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PACIFIC REPORTER

251 P.—254 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

Thus:
251 P. 87

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

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Pacific Reporter, Vol. 251, Nos. 1-5; Vol. 252, Nos. 1-4· Vol. 253, Nos. 1-5; Vol. 254, Nos. 1-4.

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Cal.Rep. 251-254 P.
2-1967

CASES REPORTED

Vols. 251–254 P.

P.

	Vol.	Page
Abbott; Stearns v., Sup.	251	907
Abbott v. Superior Court in and for Los Angeles County, App.	251	221
Alaska Packers' Ass'n v. Industrial Accident Commission of California, Sup.	253	926
Allan; People v., App.	252	779
Allen; Cornbleth v., App.	251	87
Alliance Ins. Co. of Philadelphia; Siskin v., Sup.	251	922
Alliance Land Co.; McKean v., Sup.	253	134
Allison; People v., Sup.	253	318
All Persons, etc.; Islais Creek Reclamation Dist. v., Sup.	252	1043
All Persons, etc.; Sheehan v., App.	252	337
Allyne v. Murasky, Sup.	254	564
Alpine; People v., App.	254	281
Ambassador Hotel Corporation v. Lee, App.	254	1116
Anderson; Waybright v., Sup.	253	148
Archer v. Superior Court of California in and for City and County of San Francisco, App.	254	939
Arena v. Bank of Italy, App.	251	338
Arnold; People v., App.	252	635
Arnold v. Sullenger, Sup.	254	267
Babb; Williams v., Sup.	252	1039
Babb's Estate, In re, Sup.	252	1039
Bacciocco; People v., App.	251	817
Baida; Noll v., App.	254	623
Bailes v. Keck, Sup.	254	573
Bailes v. Keck, Sup.	254	577
Ball; Fawcett v., App.	251	679
Ball v. Warner, App.	251	929
Baltimore Hotel Co.; Fry v., App.	252	752
Bandy v. Westover, Sup.	252	593
Bank of Italy; Arena v., App.	251	338
Bank of Italy v. Johnson, Sup.	251	784
Banks v. Pann, App.	254	937
Bargala; People v., App.	253	938
Basalt Rock Co. v. MacMillan, App.	251	322
Bastiani, Ex parte, App.	253	951
Bateman; People v., App.	251	335
Bates v. United Const. Co., App.	253	328
Bauer v. Bauer, App.	253	969
Bava; Citti v., App.	254	299
Bava; Dei v., App.	254	306
Baxter v. Boston-Pacific Oil Co., App.	253	185
Baxter v. King, App.	253	172
Bealey; People v., App.	254	628
Beck; Scott v., App.	254	637

P.

	Vol.	Page
Bedoy; People v., App.	252	1061
Bennett v. Logan & Bryan, App.	252	662
Binney v. San Dimas Lemon Ass'n, App.	253	346
Black; People v., App.	251	321
Blackwell; People v., App.	253	964
Blanc, Ex parte, App.	252	1053
Bleakmore; Pacific Bone, Coal & Fertilizer Co. v., App.	254	618
Blodgett v. Superior Court of Santa Barbara County, App.	254	913
Blumenthal v. Larson, App.	251	241
Board of Dental Examiners of California; Homan v., App.	254	907
Bocchio; People v., App.	251	672
Bond; Dam v., App.	251	818
Bonestell; Graham v., Sup.	253	1115
Booth v. Superior Court of City and County of San Francisco, App.	254	617
Boston-Pacific Oil Co.; Baxter v., App.	253	185
Boyer; Hillwig v., App.	254	662
Brashear; First Nat. Bank v., Sup.	253	143
Brenot v. Southern Pac. R. Co., App.	254	917
Brocco; People v., App.	253	1115
Brown; People v., App.	253	735
Browning v. Reclamation Dist. No. 108, two cases, Sup.	254	551
Brun v. Evans, App.	251	330
Bullwinkel; Fifield v., App.	253	962
Burckard v. Smith, App.	251	663
Burdick v. Kerkovecz, App.	254	684
Burt v. Forrest, App.	254	296
Byrne v. Western Pipe & Steel Co. of California, App.	253	776
Caldwell; Vaughan v., Sup.	253	929
California Highway Commission, Department of Engineering, v. Industrial Accident Commission, Sup.	251	808
California Nat. Bank v. El Dorado Lime & Minerals Co., Sup.	253	704
Callan; Stransky v., App.	253	960
Calvert; People v., App.	251	244
Carl v. Eade, App.	253	750
Carmona; People v., App.	251	315
Central-Gaither Union School Dist.; Hartwig v., Sup.	253	733
Chaffin; People v., App.	254	291
Chaplin v. Superior Court in and for Los Angeles County, App.	253	954
Chapman; Hutton v., App.	253	942
Charles L. Donohoe Co. v. Superior Court of Glenn County, App.	252	659
Chester R. Pyle Co. v. Fossler, Sup.	252	599
Chiappari; People v., App.	253	338
Chin Chew; Smith v., App.	254	599
Christianson; Kenny v., Sup.	253	715
Citti v. Bava, App.	254	299
City Council of Berkeley; Dwyer v., Sup.	253	932
City of Los Angeles v. Hannon, App.	251	247
City of Los Angeles v. Vickers, App.	254	687
City of Sacramento v. Goddard, Sup.	252	329
City of San Diego v. Cuyamaca Water Co., App.	251	341
City of Venice; Schultz v., Sup.	251	913
Clark; Mutual Ben. Life Ins. Co. v., App.	254	306
Clark; Walker v., App.	252	334
Clary's Estate, In re, App.	253	778
Clavey v. Loney, App.	251	232
Cline; Mott v., Sup.	253	718
Clover v. Jackson, App.	253	187

	Vol.	Page
Cole v. Low, App.	254	676
Cole; Wilson v., App.	252	757
Commercial Mortg. Co.; Haines v., Sup.	254	956
Compson; MacFadden v., App.	254	622
Cooley; Western Electric Co. v., App.	251	331
Coombs v. Industrial Accident Commission, App.	253	976
Coombs v. Industrial Accident Commission of California, App.	252	1069
Cornbleth v. Allen, App.	251	87
Costa; People v., App.	253	940
Cosulich v. Stempel, App.	253	344
Coyle; People v., App.	254	597
Crawford v. Imperial Irr. Dist., Sup.	253	726
Cullinan v. Mercantile Trust Co. of California, App.	252	647
Cullinan v. Mercantile Trust Co. of California, App.	252	652
Curtin v. Salomon, App.	251	237
Cuyamaca Water Co.; City of San Diego v., App.	251	341
Daly; Sexton v., Sup.	251	778
Dam v. Bond, App.	251	818
Davis; Hulse v., Sup.	253	136
Davis v. Monte, App.	253	352
De Fehr; People v., App.	254	588
Dei v. Bava, App.	254	306
De La Torre v. Johnson, Sup.	254	1105
Denault; People v., App.	253	151
DeWitt v. Sides, App.	254	668
Dickey v. Dunn, App.	252	770
Dickey v. Walrond, Sup.	253	706
Dickson v. Keeler, App.	254	919
Diederichsen; Hinde v., Sup.	254	561
Dillingham; Horney v., App.	253	970
District Court of Appeal, Second Appellate Dist., Division 2; Fay v., Sup.	254	896
District Court of Appeal, Second Appellate Dist., Division 2; Landon v., Sup.	254	907
Doe; Search v., Sup.	253	1115
Domenighini; People v., App.	254	292
Donohoe Co. v. Superior Court of Glenn County, App.	252	659
Dover; Fleming v., Sup.	251	637
Downs v. Kroeger, Sup.	254	1101
Doyle v. Jordan, Sup.	252	577
Duffey v. Duffey, App.	251	218
Dunn; Dickey v., App.	252	770
Dunn; Trull v., App.	251	226
Dwyer v. City Council of Berkeley, Sup.	253	932
Eade; Carl v., App.	253	750
E. A. Portal Co.; Mahl v., App.	254	278
Edwards; Palo Verde Land & Water Co. v., App.	254	922
El Dorado Lime & Minerals Co.; California Nat. Bank v., Sup.	253	704
Emigh v. Wood, App.	253	947
Emmons; People v., App.	252	666
Engelberg v. Sebastiani, App.	253	340
England; Skellenger v., App.	253	191
Enlow v. Irwin, App.	251	658
Enterprise Dairy Co. v. Industrial Accident Commission of California, App.	254	274
Equitable Life Assur. Soc. of United States; Minnis v., App.	253	341
Evans; Brun v., App.	251	330
Ewald; Waller v., Sup.	252	1052
Fanta v. Maddex, App.	252	630

	Vol.	Page
Farren v. Hobbs, Sup.	253	320
Fashion Hat Frame Co. v. Ringel, App.	254	275
Fawcett v. Ball, App.	251	679
Fay v. District Court of Appeal, Second Appellate Dist., Division 2, Sup.	254	896
Feather River Lumber Co.; Lane v., App.	251	838
Felton Water Co. v. Superior Court in and for Santa Cruz County, App.	254	915
Fernandes; Foster v., Sup.	252	726
Ferrari; People v., App.	251	692
Field; Johnston v., Sup.	254	269
Fifield v. Bullwinkel, App.	253	962
Fink; Morlock v., App.	254	578
Finn v. Goldstein, App.	251	964
Finn; National Bank of New Zealand v., App.	253	757
Firpo v. Pacific Mut. Life Ins. Co., App.	251	657
First Nat. Bank v. Brashear, Sup.	253	143
First Nat. Bank; Jackson v., App.	252	743
First Nat. Bank; Luckehe v., App.	253	337
First Nat. Bank; Redo y Cia v., Sup.	252	587
First Nat. Bank v. Silva, Sup.	254	262
Fisher Finance Corporation; Murdock v., App.	251	319
Fleming v. Dover, Sup.	251	637
Fleming's Estate, In re, Sup.	251	637
Flesher, Ex parte, App.	252	1057
Foote; Marshall v., App.	252	1075
Forbell v. Pacific Electric Ry. Co., Sup.	254	890
Ford; People v., App.	253	966
Forrest; Burt v., App.	254	296
Foskett; Havens v., App.	254	642
Fossler; Chester R. Pyle Co. v., Sup.	252	599
Foster v. Fernandes, Sup.	252	726
Foster; Sheean v., App.	251	235
Fowler; Lewis v., App.	252	786
Francisco & Ellington v. Pasadena Tournament of Roses Ass'n, App.	252	652
Fraser; People v., App.	253	340
Fraters Glass & Paint Co. v. Southwestern Const. Co., Sup.	254	1097
Frazer; People v., App.	252	633
Fred W. Hauger Motors Co. v. Reidy, Sup.	253	1114
Fry v. Baltimore Hotel Co., App.	252	752
Gadd, Inc., v. Workman, Sup.	253	700
Gandy; General Motors Acceptance Corporation v., Sup.	253	137
Garabedian; Hodoian v., App.	251	227
Garey; Mousseau v., Sup.	252	324
Gavin, Ex parte, App.	251	231
General Motors Acceptance Corporation v. Gandy, Sup.	253	137
Ghysels; People v., App.	252	1067
Gibbon v. Justices' Court of City and County of San Francisco, App.	253	961
Gibson v. Hercules Mfg. & Sales Co., App.	252	780
Gilbert; Rauschan v., App.	253	173
Glaze; Helfer v., App.	252	1078
Globe Cotton Oil Mills v. Zellerbach, Sup.	252	1038
Goddard; City of Sacramento v., Sup.	252	329
Goeppner, Ex parte, App.	251	939
Goetting v. Goetting, App.	252	656
Goldberg; Iwata v., App.	253	331
Goldstein; Finn v., App.	251	964
Gould; Norland v., Sup.	254	560
Gould v. Otto, App.	254	272

	P.	
	Vol.	Page
Gracey v. Gracey, Sup.	253	921
Gracey's Estate, In re, Sup.	253	921
Graham v. Bonestell, Sup.	253	1115
Gray v. Hall, App.	254	911
Haines v. Commercial Mortg. Co., Sup.	254	956
Hale; People v., App.	254	639
Hall; Gray v., App.	254	911
Hall v. Imperial Water Co. No. 3, Sup.	251	912
Hall v. Imperial Water Co. No. 5, Sup.	251	912
Hamberger-Polhemus Co. v. Hind, Rolph & Co., App.	254	615
Hamer; Honn v., App.	253	336
Hammond; Sloane v., App.	254	648
Hannon; City of Los Angeles v., App.	251	247
Harris, Ex parte, App.	253	953
Harris; People v., App.	251	823
Hartwig v. Central-Gaither Union School Dist., Sup.	253	733
Hartwig v. Proper, Sup.	253	734
Hatch; Wagg v., App.	253	1116
Haub v. Tuttle, App.	251	925
Hauger Motors Co. v. Reidy, Sup.	253	1114
Haupt v. Lindahl, Sup.	252	597
Haupt's Estate, In re, Sup.	252	597
Havens v. Foskett, App.	254	642
Hawk; Robinet v., Sup.	252	1045
Hayes v. O'Marr, App.	253	749
Haynes v. Los Angeles Ry. Corporation, App.	252	1072
Helfer v. Glaze, App.	252	1078
Heney v. Heney, App.	251	841
Henry v. Lingsweiler, App.	253	357
Hercules Gasoline Co.; Robbins v., App.	251	697
Hercules Mfg. & Sales Co.; Gibson v., App.	252	780
Herminghaus v. Southern California Edison Co., Sup.	252	607
Hershey v. Reclamation Dist. No. 108, Sup.	254	542
Hillwig v. Boyer, App.	254	662
Hinde v. Diederichsen, Sup.	254	561
Hinde's Estate, In re, Sup.	254	561
Hind, Rolph & Co.; Hamberger-Polhemus Co. v., App.	254	615
Hobbs; Farren v., Sup.	253	320
Hodoian v. Garabedian, App.	251	227
Homan v. Board of Dental Examiners of California, App.	254	907
Honn v. Hamer, App.	253	336
Hooper; Mella v., Sup.	254	256
Hornbeck; Mathews v., App.	252	667
Horney v. Dillingham, App.	253	970
Houle; Neilson v., Sup.	254	891
Hughes; Lower v., App.	251	952
Hughes v. Municipal Court of City of Los Angeles, Sup.	252	575
Hull v. Ray, App.	251	810
Hulse v. Davis, Sup.	253	136
Hunt v. L. M. Field, Inc., App.	254	594
Hunt, Mirk & Co. v. Patterson, Sup.	253	317
Hutchison v. Reclamation Dist. No. 1619, App.	254	606
Hutton v. Chapman, App.	253	942
Illbeg; Naffziger v., App.	254	276
Imperial Irr. Dist.; Crawford v., Sup.	253	726
Imperial Water Co. No. 3; Hall v., Sup.	251	912
Imperial Water Co. No. 5; Hall v., Sup.	251	912

	Vol.	Page
Industrial Accident Commission; California Highway Commission, Department of Engineering, v., Sup.	251	808
Industrial Accident Commission; Coombs v., App.	253	976
Industrial Accident Commission; San Francisco & S. R. Co. v., App.	251	931
Industrial Accident Commission of California; Alaska Packers' Ass'n v., Sup.	253	926
Industrial Accident Commission of California; Coombs v., App.	252	1069
Industrial Accident Commission of California; Enterprise Dairy Co. v., App.	254	274
Industrial Accident Commission of California; Knock v., Sup.	253	712
Industrial Accident Commission of California; Liptak v., Sup.	251	635
Industrial Accident Commission of California; London Guarantee & Accident Co. v., App.	253	323
Industrial Accident Commission of California; Montezuma Mountain Ranch School v., App.	251	948
Industrial Accident Commission of California; New York Indemnity Co. v., App.	252	775
Industrial Accident Commission of California; North Elk Oil Co. v., App.	254	582
Industrial Accident Commission of California; York Junction Transfer & Storage Co. v., App.	254	279
Irwin; Enlow v., App.	251	658
Islais Creek Reclamation Dist. v. All Persons, etc., Sup.	252	1043
Iwata v. Goldberg, App.	253	331
Jackson; Clover v., App.	253	187
Jackson v. First Nat. Bank, App.	252	743
Jahnke v. Jahnke, App.	253	752
James v. James, App.	251	666
John L. Benwell, Inc.; Lancel v., App.	253	963
Johnson; Bank of Italy v., Sup.	251	784
Johnson; De La Torre v., Sup.	254	1105
Johnson; People v., App.	254	1118
Johnson v. Seelye, App.	251	646
Johnson v. Studley, App.	252	638
Johnson's Estate, In re, Sup.	252	1049
Johnson's Estate, In re, Sup.	252	1052
Johnston v. Field, Sup.	254	269
Jordan; Doyle v., Sup.	252	577
Jordan; Perkins Mfg. Co. v., Sup.	254	551
Joyce; McDonough v., Sup.	251	916
Justices' Court of City and County of San Francisco; Gibbon v., App.	253	961
Justice's Court of Township No. 1 in Shasta County; Turner Hardware & Implement Co. v., App.	254	601
Kahn Bros.; Oles v., App.	253	158
Katz v. T. I. Butler Co., App.	254	679
Keck; Bailes v., Sup.	254	573
Keck; Bailes v., Sup.	254	577
Keeler; Dickson v., App.	254	919
Keller; People v., App.	254	580
Kelley; People v., App.	253	773
Kenny v. Christianson, Sup.	253	715
Kerkovecz; Burdick v., App.	254	684
Kimball v. Tully, Sup.	252	591
Kimball's Estate, In re, Sup.	252	591
King; Baxter v., App.	253	172
Knock v. Industrial Accident Commission of California, Sup.	253	712
Kochritz; W. H. Marston Co. v., App.	251	959
Kopp; People v., App.	253	1115

	Vol.	Page
Kroeger; Downs v., Sup.	254	1101
Kruger; Longmire v., App.	251	692
Kruse v. White Bros., App.	253	178
Lackey v. Olds & Stoller Interexchange, App.	252	672
Laioghis Hospital and Homes Committee of Portlaioghis; Maher v., Sup.	251	311
Lamborn v. Lamborn, App.	251	943
Lancel v. John L. Benwell, Inc., App.	253	963
Landon v. District Court of Appeal, Second Appellate Dist., Division 2, Sup.	254	907
Lane v. Feather River Lumber Co., App.	251	838
Langford v. Thomas, Sup.	252	602
Larson; Blumenthal v., App.	251	241
Lasley, In re, App.	254	913
Lauffer; Linser v., App.	253	1110
Lee; Ambassador Hotel Corporation v., App.	254	1116
Lee; People v., App.	252	763
Lee's Estate, In re, Sup.	253	145
Lewis v. Fowler, App.	252	786
Lierly v. McEwen, App.	254	587
Lillywhite v. Superior Court within and for Los Angeles County, App.	251	945
Lindahl; Haupt v., Sup.	252	597
Lindgren v. Weaver, App.	252	669
Lingsweiler; Henry v., App.	253	357
Linkous v. Sunderland, App.	254	919
Linser v. Lauffer, App.	253	1110
Liptak v. Industrial Accident Commission of California, Sup.	251	635
L. M. Field, Inc.; Hunt v., App.	254	594
Logan & Bryan; Bennett v., App.	252	662
London Guarantee & Accident Co. v. Industrial Accident Commission of California, App.	253	323
Loney; Clavey v., App.	251	232
Longmire v. Kruger, App.	251	692
Lopez; People v., App.	253	169
Los Angeles City School Dist. of Los Angeles County v. Odell, Sup.	254	570
Los Angeles Creamery Co.; Schurman v., App.	254	681
Los Angeles Ry. Corporation; Haynes v., App.	252	1072
Low; Cole v., App.	254	676
Lower v. Hughes, App.	251	952
Luckehe v. First Nat. Bank, App.	253	337
Luna, Ex parte, App.	253	151
Lyons; People v., App.	251	648
Lyons; Miller v., Sup.	252	330
McConnell; People v., App.	252	1068
McDonough v. Joyce, Sup.	251	916
McDonough's Estate, In re, Sup.	251	916
McEwen; Lierly v., App.	254	587
MacFadden v. Compson, App.	254	622
McGowan; People v., App.	251	643
McKean v. Alliance Land Co., Sup.	253	134
McKee; People v., App.	251	675
McKenry v. Western Union Tel. Co., App.	253	333
McKeon v. Superior Court, City and County of San Francisco, App.	254	944
Mackie; Nuetzel v., App.	253	166
Maclay Rancho Realty Co. v. Superior Court of California in and for Los Angeles County, App.	254	287
MacMillan; Basalt Rock Co. v., App.	251	322
McNett; People v., App.	251	688
Maddex; Fanta v., App.	252	630

	Vol.	Page
Maher v. Laioghis Hospital and Homes Committee of Portlaioghis, Sup.	251	311
Mahl v. E. A. Portal Co., App.	254	278
Mahoney; People v., App.	254	932
Makings, Ex parte, Sup.	253	918
Manriquez v. Superior Court of California in and for Los Angeles County, Sup.	251	1118
Manuel; Price v., App.	253	746
Marsh v. Marsh, App.	252	1071
Marshall v. Foote, App.	252	1075
Marston Co. v. Kochritz, App.	251	959
Martello v. Superior Court in and for Los Angeles County, App.	254	658
Mathews v. Hornbeck, App.	252	667
May; People v., App.	253	961
Mazuran v. Superior Court in and for Los Angeles County, App.	253	951
Mazzola; People v., App.	251	222
Mella v. Hooper, Sup.	254	256
Mercantile Trust Co. of California; Cullinan v., App.	252	647
Mercantile Trust Co. of California; Cullinan v., App.	252	652
Merz v. Poole, App.	254	914
Metcalfe's Estate, In re, Sup.	251	202
Meyer v. Superior Court in and for City and County of San Francisco, Sup.	254	1108
Miller v. Lyons, Sup.	252	330
Miller; Yule v., App.	252	733
Miller v. Yule, App.	252	737
Minnis v. Equitable Life Assur. Soc. of United States, App.	253	341
Mitchell; People v., App.	251	682
Mix v. Yoakum, Sup.	254	557
Moeller's Estate, In re, Sup.	251	311
Monte; Davis v., App.	253	352
Montezuma Mountain Ranch School v. Industrial Accident Commission of California, App.	251	948
Morgan's Estate, In re, Sup.	253	702
Morlock v. Fink, App.	254	578
Morris v. Standard Oil Co., Sup.	252	605
Motor Transit Co.; Offerdahl v., App.	252	773
Mott v. Cline, Sup.	253	718
Mousseau v. Garey, Sup.	252	324
Muchenberger v. Santa Monica, Sup.	252	727
Municipal Court of City of Los Angeles; Hughes v., Sup.	252	575
Murasky; Allyne v., Sup.	254	564
Murdock v. Fisher Finance Corporation, App.	251	319
Mutual Ben. Life Ins. Co. v. Clark, App.	254	306
Naffziger v. Illbeg, App.	254	276
Napolitano v. Superior Court within and for Los Angeles County, App.	254	647
National Bank of New Zealand v. Finn, App.	253	757
Neilson v. Houle, Sup.	254	891
Nelson; Nichols v., App.	252	739
Netherlands Fire & Life Ins. Co. of The Hague, Holland; Siskin v., Sup.	251	922
New York Indemnity Co. v. Industrial Accident Commission of California, App.	252	775
Niagara Fire Ins. Co. of New York; Siskin v., Sup.	251	922
Nichols v. Nelson, App.	252	739
Noll v. Baida, App.	254	623
Norland v. Gould, Sup.	254	560
North; People v., App.	252	1063
North Elk Oil Co. v. Industrial Accident Commission of California, App.	254	582

P.

	Vol.	Page
Nuetzel v. Mackie, App.	253	166
Ocean Industries v. Superior Court of California, in and for Santa Cruz County, Sup.	252	722
O'Connell, Ex parte, App.	251	661
O'Connor, Ex parte, App.	252	730
O'Connor; People v., App.	254	630
O'Connor's Estate, In re, Sup.	254	269
Odell; Los Angeles City School Dist. of Los Angeles County v., Sup.	254	570
Offeman v. Robertson-Cole Studios, App.	251	830
Offerdahl v. Motor Transit Co., App.	252	773
O'Kuna v. Small Claims Court of Palo Alto Tp., Santa Clara County, App.	254	291
Olds & Stoller v. Seifert, App.	254	289
Olds & Stoller Interexchange; Lackey v., App.	252	672
Oles v. Kahn Bros., App.	253	158
Olympic Auditorium v. Superior Court in and for Los Angeles County, App.	253	944
O'Marr; Hayes v., App.	253	749
Otten v. Riesener Chocolate Co., App.	254	942
Otto; Gould v., App.	254	272
Owen; People v., App.	251	686
Pacific Bone, Coal & Fertilizer Co. v. Bleakmore, App.	254	618
Pacific Electric Ry. Co.; Forbell v., Sup.	254	890
Pacific Electric Ry. Co.; Phillips v., App.	252	628
Pacific Electric Ry. Co.; Zolkover v., App.	254	926
Pacific Mut. Life Ins. Co.; Firpo v., App.	251	657
Pacific-Southwest Trust & Savings Bank v. Ross, App.	253	351
Padilla; People v., App.	254	585
Palo Verde Land & Water Co. v. Edwards, App.	254	922
Pann; Banks v., App.	254	937
Parker's Estate, In re, Sup.	251	907
Parkinson; People v., App.	254	612
Pasadena Tournament of Roses Ass'n; Francisco & Ellington v., App.	252	652
Passarello; People v., App.	251	949
Patterson; Hunt, Mirk & Co. v., Sup.	253	317
Patterson v. Southern Trust Co., App.	251	938
Patton; People v., App.	254	291
Payne; Simpson v., App.	251	324
Peairs, In re, App.	252	745
Pedel; People v., App.	254	298
Pengelly v. Pengelly, Sup.	253	323
People v. Allan, App.	252	779
People v. Allison, Sup.	253	318
People v. Alpine, App.	254	281
People v. Arnold, App.	252	635
People v. Bacciocco, App.	251	817
People v. Bargala, App.	253	938
People v. Bateman, App.	251	335
People v. Bealey, App.	254	628
People v. Bedoy, App.	252	1061
People v. Black, App.	251	321
People v. Blackwell, App.	253	964
People v. Bocchio, App.	251	672
People v. Brocco, App.	253	1115
People v. Brown, App.	253	735
People v. Calvert, App.	251	244
People v. Carmona, App.	251	315
People v. Chaffin, App.	254	291
People v. Chiappari, App.	253	338

	Vol.	Page
People v. Costa, App.	253	940
People v. Coyle, App.	254	597
People v. De Fehr, App.	254	588
People v. Denault, App.	253	151
People v. Domenighini, App.	254	292
People v. Emmons, App.	252	666
People v. Ferrari, App.	251	692
People v. Ford, App.	253	966
People v. Fraser, App.	253	340
People v. Frazer, App.	252	633
People v. Ghysels, App.	252	1067
People v. Hale, App.	254	639
People v. Harris, App.	251	823
People v. Johnson, App.	254	1118
People v. Keller, App.	254	580
People v. Kelley, App.	253	773
People v. Kopp, App.	253	1115
People v. Lee, App.	252	763
People v. Lopez, App.	253	169
People v. Lyons, App.	251	648
People v. McConnell, App.	252	1068
People v. McGowan, App.	251	643
People v. McKee, App.	251	675
People v. McNett, App.	251	688
People v. Mahoney, **App.**	254	932
People v. May, App.	253	961
People v. Mazzola, App.	251	222
People v. Mitchell, App.	251	682
People v. North, App.	252	1063
People v. O'Connor, App.	254	630
People v. Owen, App.	251	686
People v. Padilla, App.	254	585
People v. Parkinson, App.	254	612
People v. Passarello, App.	251	949
People v. Patton, App.	254	291
People v. Pedel, App.	254	298
People v. Perry, App.	253	1115
People v. Price, App.	254	640
People v. Rabe, App.	254	602
People v. Ramos, App.	251	941
People v. Reid, App.	251	219
People v. Richards, App.	253	162
People v. Russell, App.	251	699
People v. Sandoval, Sup.	254	893
People v. Seiffert, App.	253	189
People v. Shaffer, App.	254	666
People v. Shaw, App.	253	747
People v. Simon, App.	252	758
People v. Smith, App.	251	958
People v. Smith, App.	253	1116
People v. Spaulding, App.	254	614
People v. Stafford, App.	253	183
People v. Sugarman, App.	251	949
People v. Swigart, App.	251	343
People v. Taylor, App.	252	729
People v. Turlock Home Telephone & Telegraph Co., Sup.	253	1108
People v. Warrington, App.	251	327

P.

	Vol.	Page
People v. Woollacott, App.	251	826
People v. York, App.	253	1116
People v. Young, App.	253	1116
Perkins Mfg. Co. v. Jordan, Sup.	254	551
Perry; People v., App.	253	1115
Peter R. Gadd, Inc., v. Workman, Sup.	253	700
Phillips v. Pacific Electric Ry. Co., App.	252	628
Phœnix Assur. Co., Limited, of London v. Texas Holding Co., App.	252	1082
Platt Music Co.; Rubin v., App.	251	243
Poole; Merz v., App.	254	914
Postal Telegraph-Cable Co. v. Railroad Commission of California, Sup.	254	258
Povlitzki, Ex parte, App.	251	940
Price v. Manuel, App.	253	746
Price; People v., App.	254	640
Proper; Hartwig v., Sup.	253	734
Pugliese v. Pugliese, Sup.	254	266
Pyle Co. v. Fossler, Sup.	252	599
Rabe; People v., App.	254	602
Railroad Commisssion of California; Postal Telegraph-Cable Co. v., Sup.	254	258
Ramm; Russell v., Sup.	254	532
Ramos; People v., App.	251	941
Rauschan v. Gilbert, App.	253	173
Ray; Hull v., App.	251	810
Reclamation Dist. No. 108; Browning v., Sup.	254	551
Reclamation Dist. No. 108; Hershey v., Sup.	254	542
Reclamation Dist. No. 1619; Hutchison v., App.	254	606
Redo y Cia v. First Nat. Bank, Sup.	252	587
Reid; People v., App.	251	219
Reidy; Fred W. Hauger Motors Co. v., Sup.	253	1114
Rheinschild, In re, App.	254	931
Riccardi, In re, App.	251	650
Richards; People v., App.	253	162
Rider's Estate, In re, Sup.	251	805
Rider's Estate, In re, Sup.	251	807
Rider's Estate, In re, two cases, Sup.	251	799
Riesener Chocolate Co.; Otten v., App.	254	942
Riley; Sacramento and San Joaquin Drainage Dist. v., Sup.	251	207
Ringel; Fashion Hat Frame Co. v., App.	254	275
Riverside County v. Title Insurance & Trust Co., App.	252	776
Robbins v. Hercules Gasoline Co., App.	251	697
Roberts v. Roberts, App.	253	1112
Robertson-Cole Studios; Offeman v., App.	251	830
Robinet v. Hawk, Sup.	252	1045
Rose v. Superior Court in and for Imperial County, App.	252	765
Rosenberg v. San Francisco Storage Co., App.	254	909
Ross; Pacific-Southwest Trust & Savings Bank v., App.	253	351
Ross v. Ross, App.	254	683
Rubin v. Platt Music Co., App.	251	243
Ruppe, Ex parte, App.	252	746
Russell; People v., App.	251	699
Russell v. Ramm, Sup.	254	532
Sacramento and San Joaquin Drainage Dist. v. Riley, Sup.	251	207
Salomon; Curtin v., App.	251	237
Salzberger & Sons; Wright v., App.	254	671
San Dimas Lemon Ass'n; Binney v., App.	253	346
Sandoval; People v., Sup.	254	893

	P. Vol.	Page
San Francisco Breweries v. Superior Court in and for City and County of San Francisco, App.	251	935
San Francisco Storage Co.; Rosenberg v., App.	254	909
San Francisco & S. R. Co. v. Industrial Accident Commission, App.	251	931
San Joaquin Grocery Co. v. Trewhitt, App.	252	332
Santa Monica; Muchenberger v., Sup.	252	727
Sarnow; Sutton-Watts v., App.	251	654
Schainman v. Sommer, App.	253	783
Schmeiser Mfg. Co.; Willett v., App.	251	932
Schrader; Smith v., App.	251	967
Schultz v. City of Venice, Sup.	251	913
Schurman v. Los Angeles Creamery Co., App.	254	681
Scott, Ex parte, App.	254	596
Scott v. Beck, App.	254	637
Search v. Doe, Sup.	253	1115
Sebastiani; Engelberg v., App.	253	340
Seelye; Johnson v., App.	251	646
Seifert; Olds & Stoller v., App.	254	289
Seiffert; People v., App.	253	189
Sexton v. Daly, Sup.	251	778
Sexton's Estate, In re, Sup.	251	778
Shaffer; People v., App.	254	666
Shaw; People v., App.	253	747
Sheean v. Foster, App.	251	235
Sheehan v. All Persons, etc., App.	252	337
Sherman v. Sherman, App.	253	945
Sides; DeWitt v., App.	254	668
Silva; First Nat. Bank v., Sup.	254	262
Simon; People v., App.	252	758
Simpson v. Payne, App.	251	324
Siskin v. Alliance Ins. Co. of Philadelphia, Sup.	251	922
Siskin v. Netherlands Fire & Life Ins. Co. of The Hague, Holland, Sup.	251	922
Siskin v. Niagara Fire Ins. Co. of New York, Sup.	251	922
Skellenger v. England, App.	253	191
Sloane v. Hammond, App.	254	648
Small Claims Court of Palo Alto Tp., Santa Clara County; O'Kuna v., App.	254	291
Smith; Burckard v., App.	251	663
Smith v. Chin Chew, App.	254	599
Smith; People v., App.	251	958
Smith; People v., App.	253	1116
Smith v. Schrader, App.	251	967
Smith v. Smith, Sup.	254	567
Smith v. Smith, Sup.	254	1117
Smith v. Spaulding, Sup.	252	325
Smith; Turlock Merchants & Growers v., App.	251	683
Smith's Estate, In re, Sup.	252	325
Smith's Estate, In re, Sup.	254	567
Snodgrass v. Snodgrass, two cases, App.	253	755
Sommer; Schainman v., App.	253	783
Southern California Edison Co.; Herminghaus v., Sup.	252	607
Southern Pac. R. Co.; Brenot v., App.	254	917
Southern Trust Co.; Patterson v., App.	251	938
Southwestern Const. Co.; Fraters Glass & Paint Co. v., Sup.	254	1097
Spaulding; People v., App.	254	614
Spaulding; Smith v., Sup.	252	325
Stafford; People v., App.	253	183

	P.	
	Vol.	Page
Staley, Ex parte, App.	252	752
Standard Oil Co.; Morris v., Sup.	252	605
Standard Realty Co.; Tatterson v., App.	253	770
Stanton v. Superior Court of California in and for Los Angeles County, two cases, App.	253	973
Stearns v. Abbott, Sup.	251	907
Stempel; Cosulich v., App.	253	344
Stitzinger v. Truitt, App.	253	971
Stock; Turner v., App.	251	814
Stransky v. Callan, App.	253	960
Studley; Johnson v., App.	252	638
Sugarman; People v., App.	251	949
Sullenger; Arnold v., Sup.	254	267
Sunderland; Linkous v., App.	254	919
Superior Court, City and County of San Francisco; McKeon v., App.	254	944
Superior Court in and for City and County of San Francisco; Meyer v., Sup.	254	1108
Superior Court in and for City and County of San Francisco; San Francisco Breweries v., App.	251	935
Superior Court in and for Imperial County; Rose v., App.	252	765
Superior Court in and for Los Angeles County; Abbott v., App.	251	221
Superior Court in and for Los Angeles County; Chaplin v., App.	253	954
Superior Court in and for Los Angeles County; Martello v., App.	254	658
Superior Court in and for Los Angeles County; Mazuran v., App.	253	951
Superior Court in and for Los Angeles County; Olympic Auditorium v., App.	253	944
Superior Court in and for Mendocino County; Wessels v., Sup.	253	135
Superior Court in and for Santa Cruz County; Felton Water Co. v., App.	254	915
Superior Court of California, in and for City and County of San Francisco; Archer v., App.	254	939
Superior Court of California in and for Los Angeles County; Maclay Rancho Realty Co. v., App.	254	287
Superior Court of California in and for Los Angeles County; Manriquez v., Sup.	251	1118
Superior Court of California in and for Los Angeles County; Stanton v., App.	253	973
Superior Court of California, in and for Santa Cruz County; Ocean Industries v., Sup.	252	722
Superior Court of City and County of San Francisco; Booth v., App.	254	617
Superior Court of Glenn County; Charles L. Donohoe Co. v., App.	252	659
Superior Court of Santa Barbara County; Blodgett v., App.	254	913
Superior Court within and for Los Angeles County; Lillywhite v., App.	251	945
Superior Court within and for Los Angeles County; Napolitano v., App.	254	647
Sutton-Watts v. Sarnow, App.	251	654
Swigart; People v., App.	251	343
Tassey, Ex parte, App.	253	948
Tatterson v. Standard Realty Co., App.	253	770
Taylor; People v., App.	252	729
Texas Holding Co.; Phœnix Assur. Co., Limited, of London v., App.	252	1082
Thomas; Langford v., Sup.	252	602
Thompson v. Watkins, Sup.	253	697
Thompson's Estate, In re, Sup.	253	697
Thomson v. Thomson, App.	254	644
T. I. Butler Co.; Katz v., App.	254	679
Tilden v. Tilden, App.	254	310
Title Insurance & Trust Co.; Riverside County v., App.	252	776
Toler; Wagg v., App.	251	973

P.

	Vol.	Page
Trewhitt; San Joaquin Grocery Co. v., App.	252	332
Truitt; Stitzinger v., App.	253	971
Trull v. Dunn, App.	251	226
Tully; Kimball v., Sup.	252	591
Turlock Home Telephone & Telegraph Co.; People v., Sup.	253	1108
Turlock Merchants & Growers v. Smith, App.	251	683
Turner v. Stock, App.	251	814
Turner Hardware & Implement Co. v. Justice's Court of Township No. 1 in Shasta County, App.	254	601
Tuttle; Haub v., App.	251	925
United Const. Co.; Bates v., App.	253	328
Van der Vliet v. Van der Vliet, Sup.	254	945
Vaughan v. Caldwell, Sup.	253	929
Vickers; City of Los Angeles v., App.	254	687
Vieux v. Vieux, App.	251	640
Wagg v. Hatch, App.	253	1116
Wagg v. Toler, App.	251	973
Walker v. Clark, App.	252	334
Wallace v. Zinman, Sup.	254	946
Waller v. Ewald, Sup.	252	1052
Walrond; Dickey v., Sup.	253	706
Warner; Ball v., App.	251	929
Warrington; People v., App.	251	327
Washer, Ex parte, Sup.	254	951
Watkins; Thompson v., Sup.	253	697
Waybright v. Anderson, Sup.	253	148
Weaver; Lindgren v., App.	252	669
Wessels v. Superior Court in and for Mendocino County, Sup.	253	135
Western Electric Co. v. Cooley, App.	251	331
Western Pipe & Steel Co. of California; Byrne v., App.	253	776
Western Union Tel. Co.; McKenry v., App.	253	333
Westover; Bandy v., Sup.	252	593
White Bros.; Kruse v., App.	253	178
W. H. Marston Co. v. Kochritz, App.	251	959
Willett v. Schmeiser Mfg. Co., App.	251	932
Williams v. Babb, Sup.	252	1039
Wilson v. Cole, App.	252	757
Wood; Emigh v., App.	253	947
Woollacott; People v., App.	251	826
Workman; Peter R. Gadd, Inc., v., Sup.	253	700
Wright v. Salzberger & Sons, App.	254	671
Yoakum; Mix v., Sup.	254	557
Yoder, In re, Sup.	251	205
Yoder v. Yoder, Sup.	251	205
York; People v., App.	253	1116
York Junction Transfer & Storage Co. v. Industrial Accident Commission of California, App.	254	279
Young; People v., App.	253	1116
Yule v. Miller, App.	252	733
Yule; Miller v., App.	252	737
Zellerbach; Globe Cotton Oil Mills v., Sup.	252	1038
Zinman; Wallace v., Sup.	254	946
Zolkover v. Pacific Electric Ry. Co., App.	254	926

CALIFORNIA REPORTER

251 PACIFIC REPORTER

80 Cal. App. 459

CORNBLETH et al. v. ALLEN et al. (Civ. 5507.)

(District Court of Appeal, First District, Division 1, California. Dec. 28, 1926. Hearing denied by Supreme Court February 24, 1927.)

1. Deeds 🔑181—Reformation of instruments 🔑11—Equity may supply conditions in deed, omitted through mutual mistake, and parties may effect same result by written agreement.

Where conditions have been omitted from deed through mutual mistake, court of equity may supply omission, and same result may be extrajudicially effected by written agreement of parties.

2. Deeds 🔑144(1), 155—Conditional estate is created by deed reverting title to vendor on breach of restrictions; re-entry clause being unnecessary.

Deed and agreement restraining use of land, except for certain type of residence under penalty of reversion of title to vendor, show intention to create conditional estate in which case clause of re-entry is unnecessary.

3. Deeds 🔑158—Grantor under deed reverting title for breach of restriction reserved interest against subsequent purchaser, though original deed made no reference to dominant tenement.

Though deed by adjoining owner, restricting use of property to certain type of dwelling under penalty of reversion of title to grantor, contained no reference to dominant tenement, grantor reserved interest in property conveyed against purchaser of original grantee having constructive knowledge of restriction.

4. Deeds 🔑147—Owner of property has right to annex condition to conveyance.

Right to annex condition to conveyance is necessary incident to right to own and convey property.

5. Vendor and purchaser 🔑231(16)—Purchasers of property have constructive notice of recorded agreement restraining use of property described and referring to original deed (Civ. Code, §§ 1213, 1215).

Agreement between grantor and grantee restricting use of property described and referring to deed, which it was intended to reform, was an instrument affecting title to property described, under Civ. Code, § 1215, and, under section 1213, its recordation was constructive notice to purchasers of property.

6. Deeds 🔑158—Grantee of original purchaser, having constructive or actual notice of condition subsequent in deed to grantor, acquires title subject to condition.

Condition subsequent attached to title in conveyance is binding on grantee under subsequent deed having constructive notice by record or actual notice that title would be subject to condition, though subsequent deed does not recite condition contained in deed to grantor.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Lou Cornbleth and another against E. L. Allen and others. Judgment for plaintiffs, and defendants Georgina E. Freeman and another appeal. Reversed.

Wm. A. Freeman and Altes H. Campbell, both of Los Angeles, for appellants.

E. M. Smuckler, of Los Angeles, for respondents.

CASHIN, J. An action was brought by plaintiffs to quiet title to all of lot 53 of Minelita tract except the north 20 feet thereof; the property described being situated in the county of Los Angeles.

On July 8, 1920, the property was conveyed by grant deed executed by Henry and Georgina E. Freeman, two of the defendants, who are the appellants here, to Anna S. Swenson. The deed, which was recorded on August 5, 1920, contained the following provision:

"Subject to taxes for the fiscal year 1920—21, conditions, restrictions, and reservations of record, and the following: No offices, stores, flats, lodging house, double house, bungalow court, apartment house, or business building of any kind to be erected, kept, or maintained on said property, but a private two-story residence to cost not less than $5,000, and to be placed at a uniform distance of 42½ feet from property line, no building to be erected less than 10 feet from north line of lot conveyed by this deed, these restrictions run until 1920, the penalty for violation is reversion of title to vendor."

Subsequently the grantors and grantee entered into an agreement in writing dated August 19, 1921, and recorded August 26, 1921, which, after reciting the execution of the deed mentioned and that "certain errors were made in the statement of restrictions as contained in said deed, which the parties hereto mutually desire to correct," provided as follows:

"It is agreed by and between the parties hereto that the restrictions set forth in the said deed hereinbefore referred to shall be deemed withdrawn and canceled, and that in lieu of said restrictions and in the place and stead thereof it is mutually agreed that the said real property in the said deed and herein described shall from and after the execution of this agreement be subject to the following restrictions and no others:

"(1) Any and all restrictions which were of record and of force and effect at the time of the execution of the said deed of July 8, 1920.

"(2) Also the following restrictions, which shall have the same force and effect as though they had been embodied in the said deed of July 8, 1920, in the place and stead of erroneous restrictions which were so embodied in said deed: 'No offices, stores, flats, lodging house, double house, bungalow court, apartment house or business building of any kind shall be erected, kept or maintained on the said property. The only buildings which may be erected, kept, or maintained upon the said property shall be a two-story private residence to cost not less than $5,000 and to be placed at a distance of not less than 42½ feet from the front property line and not less than 10 feet from the northerly line of said property conveyed by said deed, together with a private garage and usual and customary outbuildings, which garage and outbuildings shall be placed at a distance of not less than 140 feet from the front property line. These restrictions shall be binding upon the grantee, her heirs, or assigns, during the life of such restrictions, but the restrictions shall become null and void and of no effect after January 1, 1940. In the event of the violation of these restrictions or any part of them by the vendee, her successors or assigns, then the property described herein shall revert to the vendors and their assigns, successors, heirs or devisees."

On January 18, 1922, Anna S. Swenson by grant deed conveyed the property to plaintiffs. In the conveyance no reference was made to the conditions and restrictions contained in the original deed to said grantor or in the subsequent agreement; nor by its terms was the transfer made subject thereto. The answer alleged that appellants at the time of the execution of the deed to Swenson were and still are the owners of the adjoining property and that the provisions of the deed and the agreement were made for their and its benefit. While no findings on these allegations were made, that appellants at all the times mentioned resided on and owned the adjoining property, including the 20 feet excepted from the deed to Swenson, is not disputed. These facts with the testimony of Freeman as to the plan of construction followed, which was likewise undisputed, support no other conclusion than that the object of the provisions mentioned was to effect the benefits alleged.

[1] Where, through mutual mistake, conditions have been omitted from a deed, it is competent for equity to supply the omission (Rice v. Hall [Ky.] 42 S. W. 99, 19 Ky. Law Rep. 814; Tilton v. Tilton, 9 N. H. 385; Sims v. Camp Creek School Dist., 117 S. C. 461, 109 S. E. 148; Hamilton County v. Owens, 138 Ind. 183, 37 N. E. 602); and the same result might be extrajudicially effected by the written agreement of the parties.

[2] The provisions of the deed and agreement sufficiently show an intention to create a conditional estate (Papst v. Hamilton, 133 Cal. 631, 66 P. 10; Behlow v. Southern Pacific R. R. Co., 130 Cal. 16, 62 P. 295; Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 200 P. 1051); and where this is the case a clause of re-entry is unnecessary (Fitzgerald v. County of Modoc, 164 Cal. 493, 129 P. 794, 44 L. R. A. [N. S.] 1229; 4 Kent's Comm. [14th Ed.] p. 124).

The restrictions in question were restraints on the use of the property and not upon its alienation, were imposed by way of condition and not by covenant; the distinction, as said in Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115, being a decided one, and the principles applicable being quite different.

[3] Respondents contend that, no reference having been made in the original instruments to a dominant tenement, no interest in the property conveyed was reserved, citing Werner v. Graham, 181 Cal. 174, 183 P. 945; Berryman v. Savoy Hotel Co., 160 Cal. 559, 117 P. 677, 37 L. R. A. (N. S.) 5. Neither of the cases cited supports respondents' contention; the question there considered being whether the restrictive covenants contained in certain deeds from the original grantors created servitudes and easements as between the parcels conveyed. It was held that to have that effect the intention must be expressed in the grants, and that, in the absence of language indicating that the land conveyed was part of a larger tract, the balance of which the grantor retained, or that the restrictions were intended for the benefit of other lands, or to inure to or pass with other lands, and without any description or designation of a dominant tenement, the restrictive covenants were not enforceable as between the original covenantors or their successors in interest. McBride v. Freeman, 191 Cal. 152, 215 P. 678.

[4] The right to annex a condition to a conveyance is a necessary incident to the right to own and convey property. 18 Cor. Jur. "Deeds," p. 359, § 373. As was said in Los Angeles Investment Co. v. Gary, supra:

> "The instances in which conditions restricting the use of property conveyed have been enforced are exceedingly numerous and the conditions enforced of almost every conceivable variety."

In the instant case the conditions restricting the use of the property were not materially different from those upheld in Firth v. Marovich, 160 Cal. 259, 116 P. 729, Ann. Cas. 1912D, 1190, and Strong v. Shatto, 45 Cal. App. 29, 187 P. 159.

[5, 6] The court found that respondents had no notice, actual or constructive, of the agreement mentioned at the time they acquired title on January 18, 1922. The agreement, however, which was recorded on September 10, 1921, was signed and duly acknowledged by the parties, described the property to which it related, and referred to the deed which it was intended to reform, stating the names of the parties thereto, its date, with the date when and the book and page, according to the records of Los Angeles county, in which it had been recorded. The agreement was an instrument affecting the title to the real property described therein and in the deed to which it referred (section 1215, Civ. Code), and its recordation was constructive notice to respondents (Civ. Code, § 1213). A condition subsequent is attached to the title and runs with it as against the grantee of a subsequent deed who has constructive notice by the record or actual notice that his title would be subject to the condition, and it is immaterial that the subsequent deed does not recite the condition contained in the deed to the grantor. Quatman v. McCray, 128 Cal. 285, 60 P. 855.

It appearing that appellants have an interest in the property conveyed (Strong v. Shatto, supra; Johnston v. City of Los Angeles, 176 Cal. 479, 168 P. 1047), and that the finding that respondents acquired their title without notice thereof is without support, the judgment as to appellants is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

199 Cal. 716

In re METCALFE'S ESTATE. (L. A. 9269.)*

(Supreme Court of California. Dec. 3, 1926.)

1. Wills ⚷467—Testator's "desire" that executor pay mortgage out of specific funds on property devised to joint tenant held to require executor to pay it (Code Civ. Proc. § 1560).

Expression in will of testator's "desire" that executor pay mortgage on property devised to mother out of specific funds *held* to require executor to pay it, notwithstanding that mother was joint tenant with deceased of property in question, where will showed intent to leave mother in possession and ownership of property free from debt; in view of Code Civ. Proc. § 1560, "desire" in such case not being precatory.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Desire.]

2. Wills ⚷440, 441, 470—Intention of testator is ascertained from will, taken as whole and in view of circumstances under which it was made.

Intention of testator is to be ascertained from words of will, read as a whole and taken in view, when necessary and appropriate, of circumstances under which it was made.

3. Wills ⚷821(1)—Direction for payment of incumbrance evinces intent of testator that estate shall pass to devisee unincumbered.

Direction in will for payment of incumbrance on estate of decedent evinces intent that estate shall pass to devisee unincumbered.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Mary E. Metcalfe, deceased. From an order denying a petition for an order compelling the executor to liquidate a mortgage, Claude Jennings and another appeal. Reversed, with instructions.

E. J. Miller, of Los Angeles, for appellants.

E. C. Bowen, of Los Angeles, for respondents.

RICHARDS, J. This is an appeal from an order of the superior court in and for the county of Los Angeles, denying the petition of the appellants for an order of said court compelling the executor of said estate to pay out of the funds of said estate the balance remaining due upon a certain indebtedness of the decedent, secured by a mortgage upon certain real estate, and to thereby relieve the real estate of the incumbrance and penalties of said mortgage through the settlement and dismissal of an action to foreclose said mortgage pending at the time of filing said petition and of the denial thereof by said court. The facts are not in dispute. Mary E. Metcalfe died in Los Angeles on or about the 18th day of November, 1921, being at said time and having been for several years prior thereto a resident of the county of Los Angeles. At the time of her death she was occupying as her residence the real property involved in this controversy. In the year 1920 the deceased and her mother, Fannie Jennings, had acquired said property as joint tenants, and as a part of the purchase price thereof they had given back to the grantors a mortgage thereon for the sum of $5,600, which secured two notes executed by them, each for the sum of $2,800, one of which was to become due on or before June 20, 1922, and the other on or before June 20, 1923. Mary E. Metcalfe left her last will and testament, executed upon March 15, 1921, and which will was admitted to probate on May 26, 1922. The following are the provisions of paragraphs 1 and 2 thereof:

> "I desire that my just debts be well and truly paid as soon after my decease as conveniently may, from whatever ready cash I may have on hand at the time of my decease, and in case of insufficient cash on hand at the time of my decease, that the remainder of my said debts be paid from the rents from my flat building known as No. 282 and 284 South Rampart street, city of Los Angeles, state of California.
>
> "I hereby give, devise and bequeath unto my beloved mother Fannie Jennings of the city and county of Los Angeles, Cal., my residence known as No. 5334 Victoria avenue, city and county of Los Angeles, Cal., also three promissory notes made and executed and delivered June 1, 1920, by H. M. Kirchbaum of Sioux City, Iowa, wherein and whereby he promised and agreed to pay to me the sum of $4,400 on the 1st day of June, 1922, $4,400 on the 1st day of June, 1923, and $4,400 on the 1st day of June, 1924, the same being three of a series of five notes of the same amount and date each for $4,400, and which said series of notes were secured by a certain real estate mortgage on property in Sioux City, Iowa, which said mortgage I hereby also give, devise and bequeath unto my said mother for the use of herself in the foreclosure or collection of the said notes. I also desire that the said notes be collected, and the proceeds thereof, or so much thereof as may be necessary, be applied upon the payment of the indebtedness against the residence herein given to my said mother, and the balance of the proceeds of the collection of the said notes be paid to my mother, by my executor hereinafter named."

The foregoing will having been duly admitted to probate, V. M. Smith, who was named therein as executor of said will, having been duly appointed and having qualified as such executor, on the 24th day of June, 1922, presented an application to said court, setting forth that one of said notes secured by the aforesaid mortgage had become due and that he had collected and had on hand from the source provided for in said will for the payment of said notes, sufficient money to pay the first of said notes then due, and he therefore prayed for and in due course received an order authorizing and directing him to pay said note, and also to pay the interest then due upon said mortgage to date; and the

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 30, 1926.

said note and interest were thereupon paid in accordance with said order. Thereafter, and on August 3, 1925, a petition was presented to said court by Edd Jennings, Claude Jennings, and Martina Jennings, the latter two of whom who are the appellants herein, asking for an order to compel the executor to pay the principal and interest due upon the second of said promissory notes, amounting to the balance secured by said mortgage, and to relieve said property from the lien thereof. It was set forth in said petition that the executor had made collection of the funds provided in decedent's said will for the payment of said indebtedness, and had such funds on hand; that in the meantime an action had been commenced to foreclose said mortgage, which action was then pending, and petitioners prayed that the said executor be required to settle and cause to be dismissed said action and to relieve said property from the incumbrance of said mortgage and of the threatened foreclosure thereof.

The respondents herein presented an answer to said petition, admitting, in the main, the allegations thereof, but denying that it was the duty of said executor under the terms of the will to pay and discharge the mortgage; and further setting forth that Fannie Jennings, the mother of said deceased, had acquired the whole of said property, not under and by virtue of the last will of said deceased, but under and by virtue of her right of survivorship as a joint tenant with her said daughter in the ownership of said property, and that subsequent to the death of said deceased, and prior to her own death on November 2, 1922, Fannie Jennings conveyed said property and the whole thereof to Claude Jennings, one of said petitioners and appellants herein, who had thereby become of record the owner and holder thereof. The said petition having come on for hearing upon the issues tendered by the answer of the respondents thereto and the foregoing facts having been presented in evidence, the court made and entered its order denying said petition, from which order this appeal has been taken.

[1, 2] The main question presented is as to whether or not, under the terms of said will above quoted, the executor was thereby required to pay and satisfy said mortgage out of the specific funds provided in said will for the payment of said notes and mortgages, the contention of the executor being that the language of the will in relation thereto is merely precatory and does not amount to an express direction by the testatrix which would be binding upon the executor of her estate.

The language of said will, upon which the foregoing contention of the respondents is predicated, is as follows:

> "I also desire that the said notes be collected and the proceeds thereof, or so much thereof as may be necessary, be applied upon the payment of the indebtedness against the residence hereby given my said mother and the balance of the collection of said notes be paid to my mother by my executor hereinafter named."

It is a cardinal rule for the construction of wills that the intention of the testator is to be ascertained from the words of the will, read as a whole and taken in view, when necessary or appropriate, of the circumstances under which it was made. Estate of Heydenfeldt, 106 Cal. 434, 39 P. 788; Estate of Marti, 132 Cal. 666, 669, 61 P. 964, 64 P. 1071. Applying this principle in its fullness to the last will and testament of the decedent, Mary E. Metcalfe, for the purpose of ascertaining the scope, effect, and intent of her use of the word "desire" in the foregoing clause of her will, we discover in the first of the foregoing subdivisions thereof a definitely expressed purpose with respect to the payment out of certain specified assets of what might be termed her ordinary outstanding obligations and indebtedness, as distinguished from the particular obligation referred to and provided for in the second subdivision of her will, which is also above set forth. It is to be noted that the testatrix also uses the word "desire" in relation to the foregoing purpose as expressed in the first subdivision of her will, and the use of this term in that connection would seem to bring that clause of her will within the provisions of section 1560 of the Code of Civil Procedure, reading as follows:

> "If the testator makes provision by his will, or designates the estate to be appropriated for the payment of his debts, the expenses of administration, or family expenses, they must be paid according to such provision or designation, out of the estate thus appropriated, so far as the same is sufficient."

By the second subdivision of her will, the testatrix undertook to devise to her mother certain specific property; viz., First, the residence property involved in this controversy; second, three promissory notes executed by one H. M. Kirchbaum of Sioux City, Iowa, each for the sum of $4,400, due respectively on June 1, 1922, June 1, 1923, and June 1, 1924, secured by a real estate mortgage upon property in said city, which mortgage she also devises and bequeaths to her said mother. Then follows the clause last above quoted from her said will and upon the terms of which the respondents herein rely as being merely precatory and not compelling upon the executor of her will. While it is true that the use of the word "desire" in a will has often been held to be precatory, in the sense of merely indicating a request rather than a direction, as was held in the Estate of Marti, supra, and certain of the cases collated therein, yet that case, as well as the other cases cited and relied upon by the respondents herein, will, when examined, be found chiefly to relate to provisions in wills with respect to which it was contended that trusts were imposed thereby upon legatees or devisees who otherwise, under the express provisions of the will, would be entitled to the whole interest in the estate; as in the Estate of Marti the testator, after clearly devising to his widow his entire estate in fee and after appointing her executrix without bonds and with full power of management and of sale without order of court, proceeded to say:

> "Upon the death of my wife, I *desire* that one-half of the property bequeathed to her shall be devised by her to my relatives."

Such a provision was properly held to be merely precatory. So, also, in the case of Kauffman v. Gries, 141 Cal. 295, 74 P. 846, wherein the testatrix devised a certain piece of real estate and followed the express language of said devise with the words, "It is *my desire and I hereby request* my said husband to convey in such manner and at such times as he may deem best, * * * the said above-described 99.58 acres of land to Ventura Lodge," etc., the use of the word "*desire*" in its above connection was also held not to import a binding obligation or create a trust in favor of the lodge enforceable in a court of equity. Where, however, as in the case at bar, the testatrix had devised to her mother the entire fee in the real estate in question and in addition thereto had bequeathed to the latter the whole sum due and to become due upon the three promissory notes, which are mentioned in the provision in her will immediately following such devise, there can remain no doubt but that the testatrix intended that the entire fee in the real estate so devised should go to the devisee, coupled with the bequest of sufficient money or its equivalent to clear off the incumbrance upon it, thus leaving her mother in possession and ownership of the property which had been the family home of both, free of debt. In order to render effective this clearly defined intention, the testatrix proceeded to instruct her executor as to the course to be pursued by him in achieving the desired result.

[3] A direction in a will for the payment of incumbrances upon the estate of a decedent evinces an intent that the estate shall pass to the devisee unincumbered. Estate of De Bernal, 165 Cal. 235, 131 P. 375, Ann. Cas. 1914D, 26; Estate of Heydenfeldt, supra. When the intent of the testatrix is thus apparent to broaden, not to limit, the principal devise, the use of the word "desire" in an instruction to her executor, and for the purpose of achieving this result, has been held to have the effect of a direction, as distinguished from a mere request, and to be binding upon the executor of her estate. In Estate of Pforr, 144 Cal. 127, 77 P. 825, wherein an executor was directed to make a sale of certain real estate and distribute the proceeds among certain beneficiaries, the use of the word "desire" in giving such direction was held to be the equivalent of the words "I will," and to be binding upon the executor and the esrate. In that case, this court distinguished between the use of said term in cases like Estate of Marti and Estate of Kauffman, supra, and pointed out that in the first of said last-named cases this distinction was expressly drawn. We have no doubt as to the correctness of the rule of interpretation laid down in Estate of Pforr, supra, nor of its direct application to the facts of the case at bar. The respondents, however, urge that it is a fact, as fully shown by the record herein, that the mother of the decedent, being a joint tenant with her daughter in the ownership of the real estate in question, derived her title thereto upon her daughter's death, not from the latter's will, but from the termination of the joint estate, and was therefore not a devisee thereof under her daughter's said will, and hence that the case of Estate of Heydenfeldt, supra, and Estate of Pforr, supra, have no application to the case at bar. There is no merit in this contention, for the reason that in the interpretation of said will we are looking to the intent of the testatrix and not to the effect or even the validity of her particular devise, and since it was clearly the testatrix's intent that her mother should succeed to the entire ownership of said real estate freed of its incumbrance, regardless of the means by which that succession was in law to be accomplished, the meaning to be given to the word "desire" as expressive of her binding will in that regard would not be changed.

The order is reversed, with instruction to the trial court to make and enter its order granting the petitioners' application in conformity with the views expressed in the foregoing opinion.

We concur: WASTE, C. J.; SHENK, J.; SULLIVAN, J.; SEAWELL, J.; CURTIS, J.

199 Cal. 699

In re YODER et al.

YODER v. YODER et al.

(L. A. 8468.)

(Supreme Court of California. Nov. 30, 1926.)

1. Adoption ⚿16—Order of adoption could be set aside for fraud as to one of two children, if vacation was applied for within six months (Code Civ. Proc. § 473).

Order adopting two children could, on petition of aggrieved party, be set aside and vacated as to one child on ground of fraud, if vacation was applied for within six months, under Code Civ. Proc. § 473, an action to set aside adoption contract being unnecessary.

2. Appeal and error ⚿935(1)—Unless it appears that petition for vacating order was not called to court's attention in time, seasonable application will be presumed (Code Civ. Proc. § 473).

In absence of showing that petition for vacating court order, under Code Civ. Proc. § 473, requiring application to be made within six months, was not brought to court's attention within such time, court on appeal will presume that application was seasonably made and will refuse to dismiss appeal from order refusing vacation, notwithstanding hearing was had after time.

3. Appeal and error ⚿82(3)—Order vacating adoption order as to one child for fraud, and refusing vacation as to another, held appealable as to part refusing vacation (Code Civ. Proc. § 963, subd. 2).

Where order vacated former adoption order as to one child for fraud, but refused vacation as to another, that part of order refusing vacation was appealable as special order made after final judgment, under Code Civ. Proc. § 963, subd. 2, because appeal from first order would have been in vain for lack of a record showing rights of aggrieved party.

4. Appeal and error ⚿659(6)—Diminution of record will not lie to include order material to part of order vacating former proceeding, but immaterial to part appealed from (Civ. Code, §§ 225, 226).

Motion for diminution of record will not lie for inclusion of nunc pro tunc order showing order for vacating adoption as to one child was for nonconsent, under Civ. Code, §§ 225, 226, where appeal was taken from another portion of such order refusing to vacate adoption as to another child, such nunc pro tunc order being immaterial to part of order appealed from.

5. Appeal and error ⚿122—In proceeding to vacate adoption of two children, order vacating as to one and not as to other held severable.

In proceeding to vacate adoption of two children, part of order refusing to vacate adoption order as to one child *held* severable and distinct from part vacating adoption order as to other child.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Petition by Laura E. Yoder against Earl M. Yoder and another for vacating order of adoption of Wilma Corrine Yoder and another. From an order refusing to vacate and set aside the order of adoption as to Wilma Corrine Yoder, petitioner appeals. On motion to dismiss the appeal and for diminution of record. Denied.

Percy Hight, H. D. Lawrence, W. F. Schoch, and Edmund J. Callaway, all of Long Beach, for appellant.

Louis Luckel and J. Marion Wright, both of Los Angeles, for respondents.

PER CURIAM. This proceeding presents a motion to dismiss the appeal herein and a motion for diminution of record.

Appellant is the natural mother of Dorothy Irene Yoder and Wilma Corrine Yoder, who were of the ages of 12 and 10 years, respectively, at the time the adoption proceedings hereinafter referred to were commenced. Proceedings were instituted by the respondents in the superior court of the county of Los Angeles, looking to the adoption of said children by them. After hearing thereon, the petition of respondents was granted and an order was made and filed on October 11, 1923, wherein and whereby the children named were declared to be adopted by said respondents. The respondent Earl M. Yoder is the paternal uncle of the children.

The instant proceeding was initiated by the appellant filing a petition in the above-named superior court on April 9, 1924, wherein it was alleged that her consent to the adoption proceedings was secured by fraud and undue influence, and praying that the order of adoption be vacated and set aside as to both of said children. On September 27, 1924, an order was made granting the petition as to Dorothy Irene Yoder, and the order of adoption, in so far as it affected her, was thereupon vacated and set aside. As to Wilma Corrine Yoder, the petition was denied, however, and the order of adoption, in so far as it concerned her, remained in force. The appellant prosecutes this appeal from that part of the order refusing to vacate and set aside the order of adoption as to said Wilma Corrine Yoder.

Respondents urge two grounds in support of their motion to dismiss the appeal. First, it is asserted that there is no statutory authority for this proceeding to revoke the order of adoption and therefore no statutory authority for the appeal herein, it being urged that appellant should have brought an "equitable action to set aside the contract of adoption." As their second ground for dismissal of the appeal, the respondents contend that the order refusing to set aside and vacate the adoption proceedings as to Wilma Corrine Yoder is not an appealable order, within the provisions of section 963 of the Code of Civil Procedure.

[1] We find no merit in respondents' contention touching the remedy pursued by appellant to vacate and set aside the order of adoption. It has been held that such an order may be set aside and vacated, under the provisions of section 473 of the Code of Civil Procedure, on the grounds of fraud, mistake, inadvertence, surprise, or excusable neglect. Guardianship of Van Loan, 142 Cal. 423, 76 P. 37; Bell v. Krauss, 169 Cal. 387, 146 P. 874; In re McGrew, 183 Cal. 177, 190 P. 804. The instant proceeding was instituted within six months from the making of the order appointing respondents as guardians, and may properly be considered to have been authorized by the provisions of said Code section.

[2] In so declaring, we are not unmindful that the order of adoption was made and entered on October 11, 1923, and that the petition to vacate and set aside the same was filed on April 9, 1924—two days prior to the expiration of the six months' period prescribed by section 473, Code of Civil Procedure. Nor are we unmindful that the authorities are to the effect that an application is not made within said six months' period by the mere filing of a petition for relief within that time. It has been repeatedly held that the court must be moved for the desired relief within said period. Brownell v. Superior Court, 157 Cal. 703, 710, 109 P. 91, 94; Thomas v. Superior Court, 6 Cal. App. 629, 92 P. 739. As stated in Brownell v. Superior Court, supra:

> "It is the application which is to be made within six months. A motion is an application for an order. * * * The attention of the court must be called to it and the court moved to grant it."

Though the petition did not come on for hearing until after the expiration of the six months' period, there is nothing in the record herein to indicate that said petition was not brought to the attention of the court below prior to the expiration of said six months' limitation. The "petition and motion" having been filed within said period and no showing having been made that the matter was not called to the attention of the lower court prior to the expiration of said period, it will be presumed that the application was seasonably made.

Moreover, the respondents here, as in Re McGrew, supra, "appeared in court at the trial and contested the matter without making any objection to the form of the proceeding, or to the manner of service of process."

[3] Respondents' further contention that the order denying relief in part is not an appealable order is also without merit. Guardianship of Van Loan, supra; Bell v. Krauss, supra; In re McGrew, supra. In each of said cases an appeal was allowed from a similar order. It is stated in 2 Cal. Jur. 169, section 31, that:

> "An appeal may be taken from an order denying a motion made under section 473 of the Code of Civil Procedure to vacate a judgment."

Such an order is a "special order made after final judgment," and as such is appealable, under subdivision 2 of section 963, Code of Civil Procedure. Though the general rule is that an appeal does not lie from an order denying a motion to vacate a judgment where "the motion merely calls upon the court to repeat or overrule the former ruling on the same facts" (2 Cal. Jur. 164, § 30 et seq.), nevertheless there are certain well-defined exceptions to said rule, and such an order is appealable where the circumstances are such that "an appeal from the first order would be vain for lack of a record showing the rights of the aggrieved party" (2 Cal. Jur. 167, § 31 et seq.). As the petition herein to vacate and set aside the order of adoption was founded on alleged fraud in procuring the same, it follows that, on an appeal from said order of adoption, the record therein would not show the "rights of the aggrieved party." For the foregoing reasons, the motion to dismiss the appeal must be denied.

In support of their motion for diminution of record, the respondents assert that the written consent of Dorothy Irene Yoder was not secured to the adoption proceedings, as required under the provisions of sections 225 and 226 of the Civil Code, where children over the age of 12 years are involved; that this fact came to the attention of the lower court upon the hearing of the petition to vacate the order of adoption as to both children; that said court thereupon set aside the order of adoption as to said Dorothy Irene Yoder solely on the ground that she had not given her written consent thereto; and that a nunc pro tunc order was entered in the adoption proceedings by said lower court subsequent to the appeal herein, which tends to show that the order of adoption as to Dorothy Irene Yoder was vacated and set aside solely on said ground and not upon the ground of fraud and undue influence. It is then urged by respondents that said nunc pro tunc order be made a part of the record herein.

In opposition to this motion, the appellant contends that the "clerk's transcript," on file herein, contains the entire judgment roll of the adoption proceedings; that the nunc pro tunc order entered therein and sought to be included in the record herein was made more than a year after this appeal was perfected; that said nunc pro tunc order was therefore without and in excess of the jurisdiction of the court below.

A perusal of the "clerk's transcript" reveals that the entire judgment roll in the adoption proceedings is included therein. This is indicated by the clerk's certificate to that effect appearing on page 12 thereof.

In passing upon the instant motion, we do not find it necessary to decide whether the nunc pro tunc order above referred to is properly a part of the judgment roll in the adoption proceedings and should for that reason be included therein, nor do we feel impelled to determine the validity or effect of said nunc pro tunc order. In our opinion, the motion for diminution of record must be denied for other reasons. The nunc pro tunc order sought to be included in the record herein merely concerns the order appealed from, in so far as said order set aside the adoption proceedings as to Dorothy Irene Yoder. But as no appeal has been prosecuted from that part of the order, it would appear that a subsequent nunc pro tunc order tending to explain the reason for so vacating the order of adoption as to said Dorothy Irene Yoder would serve no purpose in determining whether relief was properly denied as to Wilma Corrine Yoder. The inclusion of such nunc pro tunc order in the record herein would not tend to enlighten this court upon the issue presented by this appeal; namely, whether the order of adoption as to Wilma Corrine Yoder should have been vacated and set aside on the ground that it was procured through fraud and undue influence. The papers now making up the record herein, together with the evidence produced at the trial, will enable this court to determine whether or not the lower court rightly disposed of said issue.

[4, 5] Assuming the respondents are correct in asserting that the adoption proceedings were vacated and set aside as to Dorothy Irene Yoder solely on the ground that she had not given her written consent thereto, and that the subsequent nunc pro tunc order would so indicate, we are still unable to perceive what purpose it would serve to include said order in the record herein, as this appeal is only from that part of the prior order which refused to set aside the adoption proceedings as to the other child. It is our view that said nunc pro tunc order has no bearing upon the issue presented by this appeal and therefore need not now be made a part of the record herein. As stated in 2 Cal. Jur. 155, § 25:

> "When an appeal from a part of a judgment or order is properly taken, obviously the appellate court will review only that part of the judgment or order from which the appeal is taken, provided that portion is severable from the remainder of the judgment or order."

There can be no question but that that part of the order appealed from, which refused to vacate the order of adoption as to Wilma Corrine Yoder, is severable and distinct from that part of the order which vacated the order of adoption as to Dorothy Irene Yoder.

For the foregoing reasons, the motion to dismiss the appeal and the motion for diminution of record are and each is hereby denied.

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199 Cal. 668

SACRAMENTO AND SAN JOAQUIN DRAINAGE DIST. et al. v. RILEY, State Controller, et al. (Sac. 3924.)

(Supreme Court of California. Sept. 15, 1926. On Rehearing Nov. 13, 1926.)

1. Levees and flood control 🔑33.

Where funds were available for installments of state's appropriation, under St. 1919, p. 1209, for drainage district, it was duty of state controller to draw warrants therefor and treasurer to pay them, and duty of reclamation board to apply them in manner provided.

2. Statutes 🔑225¼.

Where appropriation act (St. 1919, p. 1209), was adopted contemporaneously with two other acts having reference to affairs of same drainage district, the three acts should be interpreted together.

3. Levees and flood control 🔑32.

Where precise procedure was designated, under St. 1919, pp. 1092, 1122, 1209, for providing funds for work on drainage district, mode thus provided was measure of powers and duties of agencies charged with prosecution of work and disposition of funds.

4. Levees and flood control 🔑34—Offer of warrant holders to purchase bonds of drainage district held not in compliance with statute (St. 1919, p. 1092, §§ 33, 34, and page 1209, § 1).

Offer by holders of warrants drawn against assessment on account of project of drainage district to purchase bonds of the district at par to an amount which could be redeemed from moneys appropriated by St. 1919, p. 1209, § 1, provided the proceeds were deposited for liquidation of warrants, and the bonds were redeemed, *held* not in compliance with St. 1919, p. 1092, §§ 33, 34, and not to warrant writ of mandate to compel any action respecting such offer by state controller and state treasurer.

5. Mandamus 🔑100—Not granted to compel particular application of proceeds of drainage district bonds not yet sold (St. 1919, p. 1092, §§ 36, 40).

The state reclamation board and a drainage district *held* not entitled to writ of mandate to require state controller and state treasurer to place moneys from sale of bonds of the district in fund prescribed by St. 1919, p. 1092, §§ 36, 40, where it affirmatively appeared the bonds had not been sold.

6. Levees and flood control 🔑33—State treasurer held not required to pay warrants as funds became available, where bonds had been authorized, but had not been sold.

State treasurer *held* not required, by Reclamation Board Act, § 15 (as added by St. 1913, p. 272, amended by St. 1925, p. 615), and St. 1919, p. 1092, § 40, to pay warrants payable from drainage district assessment as funds became available, where bonds had been authorized to provide funds for the payment of such warrants, but had not been sold.

On Rehearing.

7. States 🔑119—Appropriation of public money to redeem bonds issued to pay warrants outstanding at date of acts held not invalid as gift of public money (Const. art. 4, §§ 31, 32; St. 1911, Ex. Sess., p. 117; St. 1913, p. 266, § 7; Stats. 1919, p. 1209).

Since, under St. 1911, Ex. Sess., p. 117, St. 1913, p. 266, § 7, and St. 1919, p. 1209, Sacramento and San Joaquin drainage district is a public project undertaken by the state, appropriation of public money under St. 1919, to redeem bonds issued to pay warrants outstanding at date of act, *held* not violative of Const. art. 4, §§ 31, 32, as gift of public money.

8. Levees and flood control 🔑5—In distributing proposed reclamation work, Legislature merely called into being state agencies to carry on work (St. 1911, Ex. Sess., p. 117).

Legislature, in distributing proposed work of reclamation in Sacramento and San Joaquin drainage district under St. 1911, Ex. Sess., p. 117, among districts organized under control of reclamation board, did not thereby create separate entities, but merely called into being state agencies in form of districts to carry on proposed work.

9. Levees and flood control 🔑5—That Legislature defined power of reclamation agencies held not to affect state's attitude toward project as a public work (St. 1911, Ex. Sess., p. 117; St. 1913, p. 266, § 7; St. 1919, p. 1209).

That Legislature defined powers of state agencies created to carry on reclamation work in drainage district under St. 1911, Ex. Sess., p. 117; St. 1913, p. 266, § 7; St. 1919, p. 1209—*held* not to affect state's attitude toward project as a public work.

10. States 🔑119—That landowners were benefited by drainage district held not to affect state's right to appropriate public money therefor.

That landowners in drainage district were benefited through restoration of lands to fertility *held* not to affect right of state to appropriate public money therefor when project in entirety was public.

11. Levees and flood control 🔑32—That chief burden of providing funds was imposed on property owners benefited held act to affect state's right to determine portion of cost it would bear.

That Legislature imposed chief burden of providing funds for public drainage district on landowners benefited thereby *held* not to affect state's right to determine what portion of cost of improvement it would bear, nor manner, extent, and time it would assume it.

12. States 🔑132—Act held not to have limited power of later Legislatures to make appropriations for drainage district (St. 1913, p. 276).

That Legislature, in appropriating public money for drainage district (St. 1913, p. 276), declared that state should not be liable in excess of amount appropriated, *held* not to limit power of state through later legislation to make further appropriations.

13. Levees and flood control 🔑33 — Money available from state's appropriation held applicable to payment of outstanding warrants of drainage district, regardless of issuance (St. 1919, p. 1209, and page 1130, § 34).

Under St. 1919, p. 1209, and page 1130, § 34, money available to reclamation board from state's appropriation, unless otherwise directed by Legislature, *held* applicable to payment of outstanding debts of drainage district in form of issued, registered, but unpaid, warrants, regardless of time when warrants were issued, but were payable in order of registration.

In Bank.

Original application for mandamus by the Sacramento and San Joaquin Drainage District and others against Ray L. Riley, as Controller of the State of California, and another. Writ granted.

Downey, Brand, Seymour & Dunn, Stephen W. Downey, and Fred H. Pierce, Jr., all of Sacramento, for petitioners.

Devlin & Devlin, of Sacramento, amici curiæ.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondents.

RICHARDS, J. The petitioners herein apply to this court for the issuance of a writ of mandate to be directed to the defendant Ray L. Riley, as controller, and to Charles G. Johnson, as treasurer, of the state of California, commanding each of these state officials to severally do and perform certain acts as set forth in said application. The official acts thus sought to be compelled are such, according to the averments of the petitioners, as have arisen in the course, and as the result, of a long and involved series of events which have attended the history and development of that vast project having for its purpose the reclamation and flood control of the region lying along the course of the Sacramento river, and which has become known as "Sutter-Butte by-pass project No. 6." The details of the legislative and judicial history of that project have been already several times set forth in recent decisions by this court, and need not be again reviewed for the purposes of the instant case. Sacramento and San Joaquin Drainage Dist. v. Johnson, 192 Cal. 211, 219 P. 442; Sacramento and San Joaquin Drainage Dist. v. Riley, 194 Cal. 624, 229 P. 957. The petitioners here are "the reclamation board of the state of California," and Sacramento and San Joaquin drainage district, a state agency under the management and control of said reclamation board. The petitioners, after setting forth the progress of the plans for reclamation and flood control within said district, and the steps taken toward the levy and collection of an assessment upon the lands within the same for the purpose of paying the cost thereof, and the validation of such assessment by judicial proceedings conducted in accordance with law, and the proceedings undertaken for a bond issue in aid of such assessment, and the validation thereof by such further judicial action as was provided by law for such purpose, proceeded to allege:

> "That for purposes of co-operation in the construction of the public works included in, and provided for by the reclamation board in, said 'Sutter-Butte by-pass project No. 6,' the state of California did, by an act approved May 27, 1919, and which became effective July 27, 1919 (Statutes 1919, c. 556), appropriate out of any moneys in the state treasury not otherwise appropriated for the benefit of the Sacramento and San Joaquin drainage district, in connection with said 'Sutter-Butte by-pass project No. 6,' the sum of $3,000,000, 'to be applied as it is now or may hereafter be provided by law by the said reclamation board, in connection with said Sutter-Butte by-pass project No. 6 of the said Sacramento and San Joaquin drainage district.'"

The appropriation of $3,000,000 provided for in the foregoing act was to be payable in certain annual installments of $300,000, extending over a period of ten years, commencing on July 1, 1921, and to be payable on the 1st day of July during said successive years, down to and including, the year 1930. The petitioners allege that there is at present in the state treasury the sum of $590,920.92 derived from such appropriation and from the last two installments, which have become available therefrom in pursuance of said act, which said sum of money, the petitioners assert, the reclamation board is presently entitled to have deposited to its credit in the state treasury and in a certain special fund therein, and to be thus made available to said board for the purposes to which the successive installments of said appropriation were to be applied under the terms of the act making such appropriation. The act of 1919, above referred to, expressly provided, both by its title and by the terms of section 1 thereof, that the purpose of the state in making said appropriation of $3,000,000 was that of "co-operation in the construction of the public works included in and provided for by that certain project, heretofore adopted by the reclamation board, known as Sutter-Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district." The act further provided, in section 4 thereof, that—

> "The controller of the state of California shall, * * * during the fiscal year commencing on the first day of July, 1921, draw his warrant in favor of the Reclamation Board for the sum of three hundred thousand dollars; and shall, * * * during the fiscal year commencing on the first day of July, 1926, draw this warrant in favor of said Reclamation Board for the sum of three hundred thousand dollars."

The act further and in the same section provides that—

> "The treasurer of the state of California is hereby directed to pay each of said warrants out of any moneys in the state treasury not otherwise appropriated. All of said sums shall be applied by the reclamation board in the manner as provided by section 1 of this act."

Recurring to section 1 of said act, we find that the closing clause thereof reads as follows:

> "There is hereby appropriated the sum hereinafter set forth out of any moneys in the state treasury, not otherwise appropriated, to be paid to the said reclamation board, for the benefit of the said Sacramento and San Joaquin drainage district, in connection with the said Sutter-Butte by-pass project No. 6, or any modifications or amendments thereof that may hereafter be made, in accordance with law, the same to be applied as it is now or may hereafter be provided by law by the said reclamation board, in connection with said Sutter-Butte by-pass project No. 6 of the said Sacramento and San Joaquin drainage district."

[1] It would appear from the foregoing provisions of said appropriation act that it is the present duty of the state controller to draw and deliver to the reclamation board his warrant in favor of said board for such sums as have been made available for the uses of said board by virtue of the fact that the installments of said total appropriation for the fiscal years 1925 and 1926 have become payable. It is not denied that the sum of $590,920.92, being approximately the aggregate of these two installments, is presently available in the state treasury. We can therefore see no reason why the state controller should not be required to draw his warrant for such aggregate sum in favor of the reclamation board, nor can we discover any valid reason why the state treasurer should not be directed to pay said warrant out of such available funds, the same to be applied by the reclamation board in the manner provided by the last above quoted provision of section 1 of said Appropriation Act.

Thus far we can see no objection to granting this writ, but, when we look to the further purposes for which the petitioners seek to have a writ of mandate issue herein, we are confronted with a more serious situation. The petitioners, in substance, aver that, as the result of operations carried on in the course of the work of reclamation and flood control by said reclamation board for the benefit of said Sacramento and San Joaquin drainage district, with special reference to Sutter-Butte by-pass project No. 6, prior to July 27, 1919, there were issued and are now outstanding and unpaid warrants drawn against Sutter-Butte by-pass assessment No. 6 in the sum of $1,390,509.59 principal, upon which the interest accrued prior to February 6, 1926, amounts to the sum of $716,747.91;

that subsequent to July 27, 1919, in pursuance of the further prosecution of said work warrants against said Sutter-Butte by-pass assessment No. 6 have been issued by said reclamation board in the further sum of $7,475,375.22 principal, upon which sum interest up to February 4, 1926, had accrued in the sum of $1,921,607.62; that the authorized bonds of the Sacramento and San Joaquin drainage district, which are based upon and are secured by Sutter-Butte by-pass assessment No. 6, amount to the sum of $7,133,000, and that said bonds to the extent of said last-named sum remain unsold; that the owners and holders of certain of the earliest registered unpaid warrants, issued prior to July 27, 1919, are desirous of purchasing the said bonds of said Sacramento and San Joaquin drainage district at par to an amount which would be redeemable through the use of the said sum of $590,920.92 available out of the installments which have become payable during the years 1925 and 1926 on account of said appropriation, provided said bonds so purchased by them to that amount are forthwith redeemed by such use of said moneys; that the petitioners herein have approved said plan and proposition on the part of said warrant holders, and have accordingly adopted a resolution so providing, in which resolution it is further provided that the controller of the state of California be, and is hereby, directed to immediately draw his warrant or warrants in favor of said reclamation board in the sum of $590,920.92, and that the treasurer of the state of California be, and he is thereby, directed to pay said warrant or warrants out of any money in the state treasury not otherwise appropriated, and that thereupon said money shall be deposited with the state treasurer as a special fund for the redemption of such bonds; and that, when said bonds have been sold as aforesaid, the state controller be, and he is thereby, directed to authorize the state treasurer, and the state treasurer be, and is thereby, directed to place the money derived from the sale of said bonds, less certain expenses of sale, to the credit of the construction fund of said assessment, as provided in section 40 of the Bonding Act (St. 1919, p. 1092), and that said state treasurer be, and he is thereby, further directed to pay warrants payable out of said fund in the order of their registration.

[2, 3] The foregoing averments of the petitioners suggest a number of interesting problems, but we seriously question whether they present an aspect of the situation with which this court is either required or permitted presently to deal. Section 4 of the Appropriation Act of 1919, after providing for the amounts and times of payment of the annual installments on account of said appropriation, proceeds to state that "all of said sums shall be applied by the reclamation board in the manner as provided by section 1 of this act." Section 1 provides that said appropriation is "to be applied as it is now or may hereafter be provided by law by the said reclamation board, in connection with said Sutter-Butte by-pass project No. 6 of the said Sacramento and San Joaquin drainage district." The Appropriation Act of 1919 was adopted by the Legislature of that year contemporaneously with two other acts having application to the affairs of the Sacramento and San Joaquin drainage district. This being so, these three acts are for purposes of interpretation to be read together. Sacramento, etc., Drainage Dist. v. Johnson, 192 Cal. 211, 218, 219 P. 442. The first of said acts to be considered is the act approved May 27, 1919 (Stats. 1919, p. 1122), purporting to amend the general Reclamation Board Act, approved December 24, 1911 (St. 1911, Ex. Sess., p. 117), and the several later amendments made thereto. By its terms a new section was added to said enactment, numbered section 34, and in which new section it was provided that "all moneys which may be hereafter paid to the said reclamation board * * * under and by virtue of the provisions of an act entitled 'an act,'" etc. (referring to the Appropriation Act contemporaneously adopted), "shall be applied on said Sutter-Butte by-pass assessment No. 6, by said reclamation board, to the pro rata payment of such portions of said assessment as are based upon flood control benefits." The said added section further provides that—

> "The moneys so received by the reclamation board from the state shall, unless bonds based upon said assessment shall have been authorized by law, be by the reclamation board paid over forthwith to the state treasurer, * * * to be used and expended in the same manner as funds collected from landowners upon said assessment. But if at the time of the receipt of any such money by the reclamation board from the state, bonds based upon said assessment shall have been authorized by law, the money so received from the state shall be deposited by the reclamation board with the state treasurer to be held as a special fund for the redemption of such bonds and shall, under the direction and as required by the reclamation board, be applied to the payment and cancellation of such bonds in the manner following, to wit."

The foregoing provision of said act, as enacted in 1919, has direct reference to the other of said three enactments contemporaneously adopted, viz. the act entitled "An act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district based upon assessments levied by the reclamation board upon lands in said district." Stats. 1919, p. 1092. The above enactment embraces the details of a procedure for the authorization, issuance, sale, and redemption of bonds of said district in aid of the endeavor of the reclamation board to finance the already accrued cost of the work of reclamation and flood control, which had been in progress during several previous years in connection with Sutter-Butte bypass project No. 6, through the issuance and sale of the bonds of said district to an amount substantially corresponding to the cost of said work, and which bonds were to be redeemed out of funds to be collected by the reclamation board by means of the assessment already levied upon the lands of the property owners in said district, but which had thus far for several reasons remained uncollected, and also out of such other moneys as might come into the hands of said board from such sources as are designated in the provisions of one or the other of said contemporaneously adopted enactments. When the bonds of said district have been duly authorized, validated and executed in accordance with the earlier provisions of said Bonding Act, section 33 thereof provides:

> "The state treasurer shall receive and place the said bonds to the credit of said Sacramento and San Joaquin drainage district, and shall when and as directed by the reclamation board sell any of said bonds for the best price obtainable therefor, but in no event for less than ninety-five per cent. of the face value of such bonds and the accrued interest thereon. Before making a sale of any of said bonds, notice shall be given by the state treasurer that he will sell a specified amount of said bonds, stating the day, hour and place of said sale. Such notice shall state that sealed proposals will be received by him for the purchase of said bonds or any part thereof at the day and hour named in the notice. Such notice shall be given by publication once a week for three successive weeks in a newspaper of general circulation published in the city of Sacramento. At the time and place appointed in said notice the state treasurer shall open the bids and shall award the purchase of the bonds or any part thereof to the highest responsible bidder, or if the highest bid is not equal to par and accrued interest he shall notify the reclamation board of the amounts of the highest bids received, and reject any or all bids if so required by said board."

It is further provided in section 34 of said Bonding Act:

> "The money derived from the sale of any of said bonds shall be received by the state treasurer and shall be by him safely kept and placed to the credit of the Sacramento and San Joaquin drainage district in a fund to be designated as the 'construction fund of (giving name and number of the assessment upon which the bonds are based),' and may be drawn and expended upon warrants drawn by the state controller at the request of the reclamation board upon and payable out of said construction fund, in the same manner as provided by section fifteen of the said reclamation board act with reference to the expenditure of moneys collected upon assessments as in said reclamation board act provided."

It would thus be seen from an examination of the foregoing and the other provisions of these three contemporaneous enactments that a complete statutory method of procedure was therein provided for the procurement of the moneys required to finance said work of reclamation and flood control within said district; that, in accordance with such method, when an assessment had been levied and duly validated, and when the issuance of bonds to the amount thereof had been duly authorized, and when the validation of such bonds had been judicially accomplished, such bonds, or such amount thereof as may by the reclamation board be deemed advisable, are to be offered for sale by the state treasurer under the direction of the reclamation board in accordance with the method provided by section 33 of the said Bonding Act. The method thus provided for the sale of such bonds is as follows: Before making such sale, notice shall be given by the state treasurer that he will sell a specified amount of said bonds, stating the day, hour, and place of such sale, and at which time and place sealed proposals will be received by him for the purchase of said bonds or any part thereof. At the time and place appointed in said notice, he shall open the bids and award the purchase of the bonds, or any part thereof, to the highest responsible bidder. If the highest bid is not equal to par and accrued interest, he shall notify the reclamation board of the amounts of the highest bids received, and reject any and all bids, if so required by the reclamation board. If the bonds are sold to the highest responsible bidder, the money received therefor from such bidder by the state treasurer shall be by him placed to the credit of the Sacramento and San Joaquin drainage district in a fund to be known as the "construction fund," and may be drawn and expended upon warrants drawn by the state controller at the request of the reclamation board in the same manner as is provided by section 15 of the Reclamation Board Act (as added by St. 1913, p. 272, amended by St. 1925, p. 615), with reference to the expenditure of moneys collected upon assessments as in said act provided. When such bonds have been thus sold and transferred to the purchaser or purchasers thereof, upon receipt by the state treasurer of the purchase price they are subject to redemption in the manner provided in the succeeding sections of said Bonding Act, and by the application thereto of the money received by the reclamation board through the collection of the assessment already levied upon the lands within said district, and from such other moneys as may have been received by the reclamation board from the state under the provisions of the contemporaneous Appropriation Act, and in accordance with the provisions of section 34 of the act amendatory of the Reclamation Board Act.

[4] It will thus be apparent, from a con-

sideration of the foregoing provisions of these several acts as they existed prior to the year 1923, that a precise statutory mode of procedure had been designated for the provision of the funds required to pay the cost of the work done in the way of reclamation and flood control within said drainage district. It requires no authority to sustain the proposition that the mode thus provided is the measure of the powers and duties of those state agencies and officials who are charged with the prosecution of said work and with the disposition of the funds derived from the foregoing several sources in payment of the cost of such work and of the outstanding warrants which evidence such cost. It is to be noted at this point in the discussion that section 34, which was added to the Reclamation Board Act in the year 1919, was amended in the year 1923 by the adoption, as an emergency measure, of an act (Stats. 1923, p. 640) which had for its purpose, as expressly set forth therein, the making available of certain moneys which had come into the state treasury since the year 1919 from the receipt of certain installments payable and paid under the provisions of the said appropriation act of that year, in order to carry forward the constructive work upon Sutter-Butte by-pass project No. 6. The provisions of said amendment to said section 34, as adopted in the year 1919, were the subject of comment and construction by this court in the two cases of Sacramento and San Joaquin Drainage Dist. v. Johnson, 192 Cal. 211, 219 P. 442, and Sacramento and San Joaquin Drainage Dist. v. Riley, 194 Cal. 624, 229 P. 957. The petitioners herein do not, however, rely upon any of the provisions of said Act of 1923 in support of their claim of right to the issuance of the writ sought herein by any averment in their petition; while in their briefs, and also in the briefs of amicus curiæ in support of their said claim, reliance upon the terms of said amendment is expressly disclaimed. In other words, the petitioners herein have based their asserted right to the remedies sought herein solely upon the provisions and procedure of the several enactments of the Legislature adopted in the year 1919, to which reference has above been made. Keeping in mind, therefore, the foregoing provisions of these several enactments, we may again recur to the averments of the petitioners' application herein for the purpose of determining whether the procedure outlined therein has been so far followed by these petitioners as to entitle them to still further invoke the processes of this court so as to compel the respondents herein, or either of them, to take any further present action in the due performance of their official duties than that which they have either taken or have been thus far directed to take. By so doing we discover that neither these petitioners, nor the warrant holders in whose interest they are assuming to act, have complied, or even attempted to comply, with the provisions and procedure outlined in said enactments of 1919, and which are essential prerequisites to the remedies they herein seek to invoke. The following are some of the most serious defects of their petition in the foregoing regard: The petitioners, after alleging the due authorization for the issuance of the bonds of said district under the aforesaid Bonding Act, and also the due execution and deposit of said bonds in the office of the state treasurer as required by said act, and the termination of judicial proceedings validating said bond issue, proceed to aver that the reclamation board thereupon proceeded to direct the state treasurer to offer for sale said bonds; that "notice of said sale of said bonds was given by the state treasurer from time to time as directed by the state reclamation board, but, notwithstanding said offers of sale, no offer has been made for the purchase of said bonds, except as hereinafter specifically set forth." In another portion of their application the petitioners aver that "the board has not been able to sell said bonds or any of them." Before proceeding to further consider what offer or offers to purchase said bonds, or any of them, have been made according to the averments of the petition herein, it is important to take note of the only mode and method by which offers to purchase said bonds could be made under the provisions of the Bonding Act above set forth. That mode or method consists in the submission of sealed proposals or bids for such portion of such bonds as the bidder or bidders wish to purchase at the time and place fixed for the sale of said bonds in the notice of such sale given by the state treasurer. "At the time and place appointed in said notice the state treasurer shall open the bids and award the purchase of the bonds or any part thereof to the highest responsible bidder." Such bid or bids for such bonds may be in a sum above par, or at par with accrued interest; but, if the highest bid is not equal to par and accrued interest, the state treasurer shall notify the reclamation board of the highest bids received, and may, if directed by it, reject all bids. Do the petitioners herein allege that any such procedure has been pursued? They do not, but, in lieu thereof, they proceed to allege—

> "that the owners and holders of certain of the said registered unpaid warrants drawn against 'Sutter-Butte by-pass assessment No. 6' prior to July 27, 1919, have offered to purchase bonds of said Sacramento and San Joaquin drainage district, based upon and secured by 'Sutter-Butte by-pass assessment No. 6' at par to an amount equal to the amount which can be redeemed out of said moneys so accrued to date as aforesaid under said state appropriation, provided that proceeds from said bond sale are

deposited for the liquidation of warrants drawn against 'Sutter-Butte by-pass assessment No. 6' in the order of their registration, and that said bonds so purchased be forthwith redeemed out of said $590,920.92 so available, as aforesaid, for bond redemption."

[5] It is plainly to be seen that the foregoing averment of a conditional offer upon the part of the "owners and holders of certain warrants" to purchase the amount of such bonds specified therein utterly fails of even a semblance of compliance with requirements of the Bonding Act regulating the mode and manner by which the said bonds of the district may be bid for and sold. The warrant holders in respect to the purchase of said bonds are in no different position as bidders therefor than any other would-be purchaser of said bonds, and it cannot surely be contended that either the state treasurer or the reclamation board would be justified in selling and issuing these bonds to any person who might happen to offer to purchase the same at par without any regard for, or attempted compliance with, the foregoing rigid requirements of these statutes regulating the mode and manner of their disposal. One of the main reasons why bonds of public bodies or agencies are required to be sold at public bidding, after notice, is that they may be sold, if possible, for a sum above par, if a responsible bidder in such sum can thus be secured. It thus becomes apparent that the proposed purchasers of these bonds have in no respect complied, in either letter or spirit, with the provisions of said statute regulating the mode and method of their sale. But, even if they had done so, or if the petitioners herein had so alleged, they would still have come far short of being shown to be entitled either to receive said bonds as the purchasers thereof, or to have any action taken in the way of the redemption of said bonds, since it nowhere appears that the would-be purchasers of said bonds have paid into the state treasury the sum of money they are alleged to have proposed to pay as the purchase price thereof. On the contrary, it appears from the express averments of the petition herein that the aforesaid proposed purchasers of said bonds do not intend to pay any sum whatever into the state treasury, since, by the very terms of their conditional bid for said bonds, the procedure that they propose is that of turning over the warrants owned and held by them to the amount in value of $590,920.92 in payment for said bonds, equaling in par value said amount, when and whenever the state controller and the state treasurer shall consent to pay over to them said sum of money in redemption of said unsold, undelivered, and as yet unpaid for bonds. The further specific relief which the petitioners herein demand in the prayer of their petition is that said respondents, and each of them, be directed "to place all moneys derived from sale of bonds based upon and secured by Sutter-Butte by-pass assessment No. 6, after retaining such sums as may be necessary in accordance with the provision of section 36 of said Bonding Act to the credit of the construction fund of said assessment as provided in section 40 of said Bonding Act." In view of the fact, as affirmatively shown by the petition herein, that thus far no moneys derived from any sale of bonds has yet been received by respondents or either of them, for the reason that no bonds have been sold, it seems plain that the petitioners are not presently entitled to the relief above demanded.

[6] The further prayer of the petitioners is that the respondent Charles G. Johnson, as state treasurer, be directed "to pay warrants payable out of such Sutter-Butte by-pass assessment No. 6 as funds become available therefor in their proper order of registration as provided in section 15 of the 'Reclamation Board Act' and of section 40 of said Bonding Act." But since, as we have hereinbefore sought to make plain, these provisions of said act are not available for such purpose when the bonds of the district have been authorized and are subject to sale for the provision of funds for the payment of such warrants, and, since such bonds have been so authorized, but still remain unsold, the petitioners herein are not, upon the facts as set forth in their said petition, entitled to any present writ embracing the direction which they last above seek.

It follows from what has heretofore been stated in this opinion that the petitioners herein are entitled to the issuance of a writ of mandate directing the respondent herein Ray L. Riley, as state controller, to forthwith draw his warrant or warrants in favor of the petitioner, reclamation board, in the sum of $590,920.92, and further directing the respondent Charles G. Johnson, as state treasurer, upon the due presentation of said warrant or warrants, to deposit said sum of $590,920.92 in the state treasury, to be held as a special fund for the redemption of bonds based upon, and secured by, Sutter-Butte by-pass assessment No. 6; but that said petitioners are entitled to no other and further relief upon the facts as set forth in their petition herein.

Let a writ of mandate accordingly issue.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

On Rehearing.

PER CURIAM. [7] A rehearing was granted herein upon the request and stipulation of the respective parties hereto in order that the court might consider and determine a further question not presented upon the former record, but which seems to be embraced in the additional considerations set forth in said stipulation. The question thus presented is this: Had the Legislature the power, by and under the several acts of 1919, to provide for an appropriation of public money to be applied to the redemption of bonds issued, or to be issued, under said acts, when the proceeds from the sale of such bonds had been, or were to be, devoted to the payment of outstanding warrants issued prior to July 27, 1919, the date of said enactments, and which warrants had been issued in the prosecution of the work of reclamation and flood control undertaken in pursuance of the Reclamation Act of 1911 and of the amendments thereto made prior to the year 1919? It is the contention of the respondents herein that any application which the reclamation board might make, or attempt to make, of the installment or installments which would come under its control by virtue of our decision herein, to the redemption of bonds the proceeds of the sale of which had been, or were to be, applied to the payment of warrants issued on account of construction work done by such drainage district prior to the year 1919, and to the date of approval of said Appropriation Act, would be void as in violation of sections 31 and 32 of article 4 of the Constitution relating to gifts of public money.

We are unable to agree with this contention. The work of reclamation and flood control in that important and extensive region which is embraced within the boundaries of the Sacramento and San Joaquin drainage district is, and from its earliest inception has been, considered to be essentially a public project undertaken by the state of California in its interest and in the interest of its people at large. It was so regarded by the state in its action approving the report of the California débris commission in the year 1911, and by the act of its Legislature of that year. Stats. 1911, Ex. Sess., p. 117. It was expressly declared to be such by the enactment of the Legislature of the following year amending said former act (Stats. 1913, § 7, pp. 252, 266), wherein it was stated that—

> "The state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the by-passes and overflow channels mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed by said streams, and confining the waters of said rivers, tributaries, by-passes and overflow channels within their respective channels, and it shall be the duty of the reclamation board at all times to enforce on behalf of the state of California and the people thereof the erection, maintenance and protection of such levees, embankments and channel rectification as will, in their judgment, best serve the interests of the state of California."

The foregoing declaration on the part of the Legislature as to the public nature of the work of reclamation and flood control which had been, and was to be, undertaken and carried forward to completion was in entire harmony with the conclusion which had been already reached and declared by this court as to the essentially public nature of such work in that region in the case of People v. Sacramento Drainage District, 155 Cal. 373, 103 P. 207, and in which case the court also concluded that, since such work was essentially of such public character and benefit, the Legislature in so determining had power to provide either for the payment of the entire expense of such public work by the state itself through direct appropriations therefor, or to provide that some portion of the expense thereof might be imposed upon the adjacent lands specially benefited thereby, be means of assessments in proportion to such benefits. It was doubtless the the foregoing declaration by this court upon both of the above questions which guided the framers of the legislation of the year 1913 (Stats. 1913, supra), and of the subsequent acts in amendation and amplification thereof down to, and including, the action of the Legislature undertaken in the year 1919 in the three contemporaneous acts of the latter year.

[8-12] It is not necessary herein to review with much of detail the course of that legislation, in view of our detailed recital and examination thereof in recent cases. Two observations may, however, at this point in the discussion be aptly made. The first of these is that the state Legislature, in distributing the proposed work of reclamation and flood control in this vast region among the various reclamation and drainage districts which were formed for its prosecution under the general control of the reclamation board, was not to be understood as creating separate and independent entities for the carrying forward of such purposes, but was calling into being certain agencies of the state in the form of such reclamation and drainage districts for the more convenient handling of the intricate and involved details of such a gigantic undertaking. This was expressly so held by the appellate tribunal in the case of Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 342, 181 P. 84, and also in the case of Reclamation Board v. Chambers, 46 Cal. App. 476, 481, 189 P. 479, both of which decisions had special reference to the Sacramento and San Joaquin drainage district, and both of which have been given the full approval of this court in its recent decisions enunciating the same principles affecting the same district. The fact that the state of California saw fit to commit the details of the prosecution of the work of reclamation and flood control to the various reclamation and drainage districts provided for in the several and successive legislative enactments creating these agencies and defining the scope of their activities, procedure, and powers within the same, is not to be taken to have in any degree affected the attitude of the state toward the project in its entirety as to its being a public work, conceived and carried forward chiefly for the benefit of the state and of its people at large. The fact that the owners of lands lying within the areas to be affected and benefited by said project and work would also be directly benefited through the restoration of their said lands to fertility and cultivation could not be held to affect the right and power of the state to provide from its public treasury all of the moneys required in the course of undertaking and carrying to completion said work. It was so expressly declared in the cases of Argyle Dredging Co. v. Chambers and Reclamation Board v. Chambers, supra, which as we have seen, have met with the approval of this court. This being so, we are led to our second observation, which is that the fact that the Legislature, in the adoption of the plan or project for the prosecution of said work and for the provision of the funds which would be required in the course thereof, which is to be found embodied in the provisions of its enactments in 1913, 1915, and 1917, saw fit to impose the chief burden of providing such funds upon the landowners within the areas which were or were to be directly and beneficially affected through the prosecution and completion of said plan or project, did not, in any manner or to any extent, affect or diminish the power of the state through the action of its Legislature to determine what portion of the burden of the cost of such improvement it would bear, nor how nor in what manner, nor to what extent, nor at what time, it would resolve by appropriate legislation to assume and bear the same, or such proportion thereof as the development of such work might disclose to be just and practical and proper in order to carry the same to a successful consummation; nor do we think that the fact that the Legislature, in connection with the appropriation of the sum of $100,000 which it made in the year 1913 for the use of the reclamation board (Stats. 1913, p. 276) undertook to declare that "the state of California shall not be liable, directly or indirectly, for any obligation, claim, or liability of any kind or character, arising under, or by reason of this act, or any of the provisions thereof, in excess of one hundred thousand dollars in and by this act appropriated," can be held to have limited the power of the state through later legislation to make such further appropriations or direct the application thereof to the payment of the cost of such work as the progress thereof might seem to require.

With the foregoing considerations in mind, we shall briefly review the salient facts in relation to the progress and cost of the work of reclamation and flood control within the Sacramento and San Joaquin drainage district between the years 1913 and 1919 inclusive. By the act of 1911 (Stats. 1911, p. 117), the reclamation board, conformably to the report of the California débris commission, approved by said act, was created, and its powers in the way of control over all plans and work for the reclamation and flood control along or near the Sacramento river and its tributaries were generally declared and defined. By the act of 1913 amending and amplifying said former act, the drainage district to be known as Sacramento and San Joaquin drainage district was created, its boundaries defined, and its powers and procedure under the direction and control of the Reclamation Board outlined. By the terms of said act the reclamation board was invested with large powers in the way of acquiring lands, levees, easements, and all such other property or material requisite or necessary for by-passes, canals, overflow channels, embankments, and such other purposes as would be needful in the execution of the general project of reclamation and flood control within said district. The board was also empowered to levy an assessment or assessments upon the lands within said district for the provision of money needed for the carrying out of the foregoing purposes; which money, when collected by the methods provided for in said act, together with all other moneys received from any source, was to be deposited with the state treasurer in a fund which was thereby created to be known as the "Sacramento and San Joaquin district fund"; and was to be paid out upon warrants to be drawn by the state controller upon said fund upon the presentation to him of drafts of the reclamation board for construction work. In case there was not sufficient funds on hand for the payment of such warrants, the state treasurer was to indorse thereon the date of presentation and register the same; and such warrants were to draw interest thereafter at the rate of 7 per cent. per annum, and were eventually to be paid in the order of their registration. The sum of $100,000 was appropriated for the use of the reclamation board, one-half of which was to be repaid the state out of the moneys received from the assessment levied and collected; and, as we have seen, the responsibility of the state for the work done or the liabilities incurred by the district in excess of the amount of said appropriation was limited thereto. The work of reclamation and flood control went forward under the provisions of said act and also of the act of 1915 amendatory thereof, wherein, in section 7 thereof (Stats. 1915, pp. 1338, 1340), it was again expressly declared that the state of California and the people thereof "have a primary and supreme interest" in the work of reclamation and flood control conceived and being carried forward along the Sacramento and San Joaquin rivers and their tributaries and the lands subject to overflow by said streams. By the terms of section 20 of said act of 1915, the sum of $50,000, which by the terms of the act of 1913 was to be repaid into the state treasury, was reappropriated for the uses of the reclamation board in the form of a continuing revolving fund, was to be used by the reclamation board from time to time for any purpose for which the funds of said board or of said district, "whether raised by assessment or otherwise provided may be lawfully used." In the meantime the preliminary details for the levy and collection of an assessment for the purpose of providing the funds required for the prosecution of the work of reclamation and flood control were being worked out by the reclamation board under many difficulties arising out of the magnitude of the undertaking and the involved and often conflicting rights of those interested in and to be primarily burdened thereby. The resultant delays and impediments in the course of determining the amount of the assessment and the proper distribution of its burdens necessarily resulted in the present depletion of the meager funds which had already been provided during the initial stages of the project to such an extent that by the beginning of the year 1919 the registered and outstanding warrants drawn against said fund amounted to the sum of $1,340,358.47, with accrued interest. In the meantime the amount of the assessment, which had, after various amendments, been fixed at the sum of approximately $10,600,000, but which was subject to still further changes, remained uncollected, except as to a small portion thereof, and was being impeded as to its levy and collection by litigation in various forms. Such was the condition of the project of reclamation and flood control within said district with which the Legislature of 1919 was confronted. It was abundantly apparent that the state of California must provide remedial legislation of some sort in aid of its imperiled project of reclamation and flood control. The Legislature of 1919 accordingly adopted the three contemporaneous acts of that year, the nature, object, and interpretation of which have been set forth in detail by this court in the case of Sacramento and San Joaquin Drainage District, etc., v. Johnson, 192 Cal. 211, 219 P. 442. The only one of these three contemporaneous acts with which we are particularly concerned in the instant proceeding is that providing for an appropriation of $3,000,000 in aid of said project. The purpose of said appropriation as expressed in section 1 of the act was that "of co-operation in the construction of the public works, included in and provided for by that certain project heretofore adopted by the reclamation board, known as Sutter-Butte by-pass project No. 6 of the Sacramento and San Joaquin drainage district." The act further contains the general provision that the money thus appropriated is to be paid to said reclamation board "for the benefit of said Sacramento and San Joaquin drainage district in connection with said Sutter-Butte by-pass project No. 6 or any modifications or amendments thereof that may be hereafter made in accordance with law, the same to be applied as it is now or may hereafter be provided by law." The foregoing provisions of said act are somewhat further clarified by a reference to the provisions of the contemporaneous act of 1919 (St. 1919, p. 1130), purporting to amend section 34 of the Reclamation Board Act of previous years, wherein direct reference is made to the appropriation provided for in its companion statute by the provision to the effect substantially that all money which may be paid to the reclamation board in aid of carrying out the project of reclamation and flood control under any statute then in existence, "or by any law of similar import which has been or may be hereafter adopted by the Legislature of the state of California, shall be applied on said Sutter-Butte by-pass assessment No. 6, by said reclamation board, to the pro rata payment of such portions of said assessment as are based upon flood control benefits"; and said amendment to said section 34 further provided that—

> "the money so received by the reclamation board from the state shall, unless bonds based upon said assessment shall have been authorized by law, be by the reclamation board paid over forthwith to the state treasurer and by him credited to the funds of said assessment, to be used and expended in the same manner as funds collected from landowners upon said assessment. But if at the time of the receipt of any such money by the reclamation board from the state, bonds based upon said assessment shall have been authorized by law, the money so received from the state shall be deposited by the reclamation board with the state treasurer to be held as a special fund for the redemption of such bonds and shall, under the direction and as required by the reclamation board, be applied to the payment and cancellation of such bonds."

[13] The clear intendment of the above interlocked provisions of these two contemporaneous acts is that whatever moneys became available to the reclamation board from the resource of said $3,000,000 appropriation was, unless otherwise directed by the Legislature, to be applied to identically the same purposes to which the moneys derived, or to be derived, from an assessment or from whatever funds were to be provided by an authorized bond issue in and of such assessment were to be applied; that is to say, to the payment of the outstanding in-

debtedness of the drainage district in the form of the issued, registered, but unpaid, warrants which had been drawn by the district against the aforesaid fund of the reclamation board, regardless of the time when such warrants had been issued, but in the order of their registration. It is thus made plain that it was the purpose of the Legislature through the passage of these three contemporaneous remedial acts to provide a speedy method for the liquidation of the outstanding obligations of the drainage district in the form of these issued and registered warrants which it had duly issued for work done upon this vast public project, and that the appropriation of $3,000,000 thus made by it was, unless otherwise directed, to be applied to the payment of such obligations, regardless of whether they had arisen before or were to arise after the adoption of said enactments. By so providing, the Legislature of 1919 recognized, and in a very definite sense reaffirmed, the express declarations of the Legislatures of 1913 and 1915 as to the essentially public nature of the project for reclamation and flood control within said drainage district and the supreme interest of the state of California and of its people therein, and in the ultimately successful consummation thereof.

This being so, and it having been already determined that, in view of the essentially public nature of said project the state of California might properly have undertaken to pay the entire cost of its prosecution at the time of its inception, we are brought face to face with the proposition as to whether the state might not also at any stage in the prosecution of said public work undertake to assume and bear such portion of the burden as it might see fit through appropriate legislative action, notwithstanding the fact that it might for the time being have laid that burden upon others; that is to say, upon the landowners of said district, by whom it was reluctantly or indifferently being borne, with the effect of delaying or endangering the successful consummation of the project itself. We entertain no doubt that the state in its sovereign capacity had power so to do, and that in so doing to the extent of its appropriation of $3,000,000 made by the enactment of 1919, or of so much as may become available to the uses of the reclamation board, as the installments thereof fall due, unless otherwise diverted under the terms of said act, the state Legislature would not be violating the constitutional inhibition against gifts of public money. In the case of City of Oakland v. Garrison, 194 Cal. 298, 228 P. 433, this court considered the scope of section 31 of article 4 of the Constitution as to its application to appropriations of public money in aid of projects which were essentially public in their character as distinguished from such appropriations for purely private purposes, and in so doing distinguished the earlier case of Conlin v. Board of Supervisors, 114 Cal. 404, 46 P. 279, 33 L. R. A. 752, from the facts of the later case; and this court, in upholding the validity of the instant appropriation, decided that the fact that incidentally a private use or benefit might thereby be subserved did not affect the validity of the appropriation; the main purpose and benefit thereof being a public one. We deem the principles declared in that case and the authorities therein relied upon in support of its ruling directly applicable to the instant situation. It is, however, argued by the respondents herein that this court, in the cases of Sacramento and San Joaquin Drainage District v. Johnson, supra, and of Sacramento and San Joaquin Drainage District v. Riley, 194 Cal. 624, 229 P. 957, has decided that the owners and holders of warrants for construction work or materials furnished said district prior to the adoption of the acts of 1919 did not have a vested right to compel the application of any portion of the $3,000,000 appropriation of that year to the preferential payment of their claims. It is true that this court so held in those cases, but it does not follow therefrom that the reclamation board may not apply some portion of the moneys derived from said appropriation to the liquidation of said claims when the vastly greater interest and object of such application is that of aiding the advancement of the public project of reclamation and flood control. The fact that the owners or holders of such warrants are to be benefited by the speedier adjustment of their claims than that already provided through the slower process of the assessment and its collection is but a minor and incidental benefit as compared with the public interest involved, a greater benefit arising from the liquidation of these warrants than that accruing to the holders thereof accrues to the district and the landowners therein through the lessening to the extent thereof of their liability on account of the assessment; but even this benefit is overshadowed by the yet vaster benefit to the state at large from the pro tanto advancement of its great project for reclamation and flood control in the extensive and valuable area within this drainage district; for the confinement of the waters of its principal rivers to their proper channels, and for the scientific devotion of such waters to the fructification of its fertile lands. To appropriations of public money for such public purposes the inhibitions of the Constitution against gifts of public money can have no application.

The former opinion of this court is hereby reaffirmed.

We do not deem it necessary to extend the compulsions of the writ of mandate, at this stage of the instant proceeding, any further than that already indicated in the main opinion.

Let a writ accordingly issue.

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79 Cal. App. 734

DUFFEY v. DUFFEY. (Civ. 5518.)

(District Court of Appeal, First District, Division 1, California. Nov. 20, 1926.)

1. Divorce 🔑231—On dissolution of marriage, court may, in addition to dividing community property, compel husband to make suitable allowance for wife's support (Civ. Code, §§ 139, 146, 147).

Court must, on dissolution of marriage, divide community property, and it may in its discretion compel husband to make suitable allowance for wife's support during her life or for shorter period under Civ. Code, §§ 139, 146, 147.

2. Divorce 🔑286—Decision as to maintenance and support will not be set aside except for abuse of discretion (Civ. Code, § 142).

Trial court has extensive discretion as to provisions for maintenance and support under Civ. Code, § 142, and its decision will not be disturbed on appeal except on showing of abuse of discretion.

3. Divorce 🔑238—Possibility that divorced wife may invest her share of community property unwisely is not ground for allowing maintenance (Civ. Code, § 142).

Where wife, having received share of community property, brings suit for divorce, fact that she may possibly make poor investments will not be considered in making provisions for maintenance, under Civ. Code, § 142, providing that, where wife has sufficient property to give her support, court may in its discretion withhold any allowance.

4. Divorce 🔑235—Where income from wife's share of community property was not proved insufficient, denial of maintenance held not abuse of discretion.

Denial of maintenance *held* not abuse of discretion, where divorced wife had received over one-half of community property and was awarded only two of six children, in the absence of any evidence as to insufficiency of income from such property for support of herself and children.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Addie S. Duffey against Homer N. Duffey. Judgment for plaintiff, and she appeals from a portion thereof. Affirmed.

Fredericks & Hanna, of Los Angeles, and Schauer & Ryon, of Santa Barbara, for appellant.

Heaney, Price & Postel, of Santa Barbara, for respondent.

TYLER, P. J. This action was one originally brought by plaintiff against defendant for separate maintenance. At the time of the trial, by leave of the court, an amended complaint was filed, praying for a divorce on the ground of willful desertion. Defendant filed an answer and cross-complaint. Under his cross-complaint he also alleged desertion. Judgment was in favor of plaintiff. There were six living children, issue of the marriage, four of whom at the time of the trial were minors. During the marriage relation, the parties had accumulated community property of the value of $127,956.25, subject to an indebtedness of $40,649, or a net value of $87,207.25.

Prior to judgment, they entered into a stipulation concerning all of their property rights. By the terms of this agreement the net value of the property was divided equally between them. In addition to the one-half of the community property received by plaintiff, defendant paid to her the sum of $5,600, which represented an agreed indebtedness between the parties. At the time the judgment was rendered, plaintiff, by reason of these arrangements, was the owner of property in excess of $49,000 in her own right. It also appeared that at this time plaintiff was the recipient of an income of $25 a month, which she received from the United States government on account of the death of a son while in the army. The property settlement of the parties became a part of the decree.

In awarding judgment for the plaintiff, the custody of two of the minor children was given to her and the others to defendant. The court found that plaintiff was not entitled to any payment from the defendant for alimony, maintenance, or support, in consequence of which no power was retained by the court to alter this finding in the future. The court further found that, at the time of the granting of the interlocutory decree, plaintiff was not entitled to and should not receive from defendant any allowance for the support or maintenance of the minor children, whose custody was awarded to her. This latter finding provided for a modification from time to time, depending upon circumstances. Plaintiff has appealed from that portion of the judgment denying her an allowance for her maintenance and support, and also from the portion thereof denying her an allowance for the support of the two minor children whose custody she was awarded. It is first claimed that the portion of the decree which denies plaintiff an allowance for her support is unjust and inequitable for the reason that she was entitled to the portion she received as of right, and, being a woman, is liable through her inexperience to seriously impair the fund set apart to her, in which event there is no safeguard provided for her future, for which reason the court abused its discretion in making the order that it did. The evidence upon this subject shows that plaintiff has received as her share of the community property a sum totaling almost $50,000, the income of which, together with her allowance from the government, ought to yield about $275 per month. The defendant's share of the community property is subject to an indebtedness of $67,500, in consequence of which his income therefrom amounts to about $100 per month, a portion of which she seeks for her protection. Under these facts it is difficult to see how the claim can be made that the trial court abused its discretion. To have given the plaintiff a greater sum to safeguard her future would have been to practically strip defendant of all interest in the income derived from the accumulations of the parties.

[1, 2] It is the duty of the court, at the time of dissolving the marriage relation, to make proper division of the community property (Civ. Code, §§ 146, 147), and it may, under section 139 of the same Code, in its discretion, compel the husband, in addition, to make what it deems suitable allowance for the future support of the wife during her life or for a shorter period, depending upon circumstances. Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am. St. Rep. 266. The amount to be given, if anything, as permanent alimony, is a matter within the reasonable discretion of the court. Farrar v. Farrar, 41 Cal. App. 452, 182 P. 989. This discretion is controlled by the circumstances, and no fixed rule is provided for. Various conditions may be considered in reaching a conclusion in the matter, but the conclusion when reached will not be disturbed on appeal except upon a showing of an abuse of the exercise of such discretion. Section 142 of the Civil Code expressly provides that, where the wife has sufficient property to give her support the court may in its discretion withhold any allowance to her.

[3, 4] Plaintiff asked for and obtained a divorce and a division of the community property. The fact that she may possibly make poor investments with the funds is not a fact to be considered. That is a peril common to all who possess property. What we have said applies with equal force to the second point raised. The court by its decree provided that plaintiff was not entitled to the payment of any money from the defendant for the maintenance or support of the minor children awarded to her, reserving the power to amend this order at any future time upon proper showing. The trial court has an extensive discretion in this respect, and its conclusion will not be set aside in the absence of clear abuse. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; 9 Cal. Jur. 790. No such showing is here made. The record is silent upon the subject as to whether or not the income enjoyed by plaintiff is sufficient to support herself or her children. Under such circumstances we cannot say that the court abused its discretion in making the order it did. Defendant is maintaining the children awarded to him in private schools, a fact the court was entitled to consider as a circumstance in connection with all the other facts in reaching the conclusion it did.

The question of the right of the trial court to modify the decree with respect to the maintenance or support of the minor children under the finding or its right to make provision for their support, independent of the decree, are questions that are not before us.

The judgment is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

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80 Cal. App. 77

PEOPLE v. REID. (Cr. 1261.)*

(District Court of Appeal, First District, Division 2, California. Nov. 30, 1926.)

1. Arson 🔑37(1)—Evidence, though circumstantial, held to support conviction for arson (Pen. Code, § 447).

Evidence, though circumstantial, *held* to support conviction for arson, under Pen. Code, § 447, though defendant made extrajudicial statement at time of arrest that she started fires to get insurance on furniture, which offense is punishable under section 548.

2. Criminal law 🔑448(2)—In arson case, fireman's testimony as to location and lack of communication between fires held admissible, not being opinion evidence.

In prosecution for arson where three fires had been started in apartment, testimony by battalion chief of fire department relative to location and lack of communication between such fires *held* admissible, not being expert or opinion evidence.

3. Criminal law 🔑406(6)—Defendant's extrajudicial statement that she set fires held admission against interest.

In prosecution for arson, defendant's extrajudicial statement when arrested that she set fires to burn insured furniture *held* admissible, not as confession of guilt, but as admission against interest.

4. Criminal law 🔑409—Testimony that defendant made extrajudicial statement freely and voluntarily held proper.

In prosecution for arson, testimony that defendant made extrajudicial statement, when arrested, that she set fires to burn insured furniture, freely and voluntarily and without promises, threats, or inducements, *held* proper.

5. Criminal law 🔑829(1)—Refusal of instruction held not error, where subject-matter was covered by instruction given.

Refusal of proposed instruction, proper subject-matter of which was covered by instructions given, *held* not error.

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*Rehearing denied December 28, 1926. Hearing denied by Supreme Court January 27, 1927.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Bertha Reid was convicted of arson, and she appeals. Affirmed.

Stanislaus A. Riley, of San Francisco, for appellant.

U. S. Webb, Atty. Gen,, and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. Defendant was tried upon an information charging the crime of arson. From the judgment following the verdict of conviction and from the denial of her motion for a new trial, she has appealed upon a typewritten record.

[1] The defendant occupied an apartment at 818 Stanyan street in the city of San Francisco. On June 21, 1924, at about 8:30 a. m. of that day, fire occurred in the apartment and members of the fire department appeared upon summons and extinguished the fire. Upon investigation it appeared that three separate fires had been set, two in a room designated as a living-room and a third in a closet of the bedroom adjoining, and an examination of the premises immediately thereafter disclosed that all the fires had been started by the use of coal oil. As a result of this investigation the defendant was taken into custody and made a full statement to the police and fire department officials to the effect that she started the fires for the purpose of burning her furniture so that she could collect insurance thereon, but that she did not intend to burn the building. Upon the trial it appeared that the defendant claimed that while filling a lamp some coal oil was spilled upon her corset, which was lying upon a bureau or table, and that when she endeavored to light the lamp the corset took fire; that she then seized the corset and ran to the closet for the purpose of procuring a bath mat to aid her to extinguish the fire, and in so doing set fire to the clothing in the closet. The evidence in the record, together with the free and voluntary admissions of the defendant at the time of her arrest, fully support the verdict of conviction.

[2] Defendant complains of the ruling of the trial court relating to the state's inquiries directed to a battalion chief of the fire department covering the location and lack of communication between the separate fires which were discovered when he answered the fire call. It is said that some of these questions called for the opinion and conclusion of the witness, but the witness was merely asked to detail the location of the separate fires and to state whether there was any communication between them, and whether the partition between the two rooms showed that the fire had been in contact with it. The witness was merely asked to state the facts as he saw them and was not asked for expert or opinion evidence of any character.

[3, 4] Error is assigned in the admission of the extrajudicial statement of the defendant and in the examination of the witnesses called by the state for the purpose of showing that this statement was freely and voluntarily given. This examination was unusually fair to the defendant, and the cross-examination of the witnesses and the evidence of the defendant herself went to the full limit of propriety in that respect. The statement was not a confession of guilt of the crime charged and was not introduced as such, but was offered as an admission against interest. The witnesses called by the state were asked the usual questions as to whether the statement was made freely and voluntarily and without promises, threats, or inducements. There was no error in the examination of the witnesses nor in the admission of the statement.

It is claimed that the evidence is insufficient to support the verdict of guilty of the crime of arson as defined in section 447, Penal Code, but that the evidence tended to prove that the defendant was guilty of the crime of destroying property for the purpose of collecting insurance thereon as denounced in section 548, Penal Code. The argument is based on the extrajudicial statement of the defendant that she denied the intention of burning the house, but admitted that she set fire to the furniture for the purpose of collecting insurance thereon, It appears that she did not own the house, but had rented an apartment therein and that at the time of the fire the personal property belonging to her which was located in the apartment was insured for the sum of $1,500. The evidence is that the defendant set fire to a bureau or table standing in one room of the apartment, and that she then set fire to clothing and material in a closet in another room, and it was within the province of the jury to infer whether these acts evidenced an intention to set fire to the building within the meaning of the Code section. The jury found against the defendant upon this issue and upon evidence which was competent and as complete as circumstantial evidence of acts of this character could reasonably be.

[5] Criticism is made of the refusal of the trial judge to give a number of instructions proposed by the defendant. All these instructions were refused for the reason assigned by the trial court that they were covered by other instructions given. No complaint is made as to any of the instructions given by the trial judge. We have examined with care all the instructions proposed and refused and all the instructions given by the trial judge, and are satisfied that in every respect the subject-matter covered by the instructions refused was carried into the instructions given wherever proper, and that in every respect the jury was fully and properly

instructed in accordance with the law applicable to the case being tried.

The judgment and order are affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

79 Cal. App. 746

ABBOTT v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 5370.)

(District Court of Appeal, Second District, Division 2, California. Nov. 22, 1926.)

1. Justices of the peace ⟹166(2)—Setting case for trial by nonappealing party after expiration of year held not written stipulation to extend time (Code Civ. Proc. § 981a).

Dismissal of case appealed from justice court and set for trial by nonappealing party after expiration of year *held* proper, under Code Civ. Proc. § 981a, providing appeal from justice court must be tried within one year unless time is extended by written stipulation; such act not amounting to a written stipulation.

2. Justices of the peace ⟹166(2)—Setting case for trial over year after appeal from justice court did not estop nonappealing party to claim time had expired (Code Civ. Proc. § 981a).

By setting case appealed from justice court for trial after expiration of year, nonappealing party was not estopped to set up Code Civ. Proc. § 981a, requiring, in the absence of written stipulation for extended time, that cases so appealed be brought on for trial within one year.

Application by H. Bernard Abbott for a writ of mandate to the Superior Court of Los Angeles County, W. C. Doran and another, Judges, requiring respondent to proceed with the trial of an appeal from a justice court. Writ denied.

William G. Randall and Mart Coles, both of Los Angeles, for petitioner.

Frank J. McDougal, of Los Angeles, for respondents.

WORKS, P. J. Petitioner was defendant in a certain action in the justice court. Judgment was there rendered against him, and he prosecuted an appeal to respondent superior court. The appeal was perfected on March 10, 1925. Thereafter upon the application of the plaintiffs in the action, after written notice of motion, respondent court set it down for trial on April 30, 1926. The plaintiffs moved the court, on March 30, 1926, after due notice of motion, to dismiss the appeal on the ground that the appealing party had not brought the action on for trial in respondent court within one year, as required by section 981a of the Code of Civil Procedure, and thereupon the appeal was ordered dismissed. On April 30, 1926, the day upon which the action had been set down for trial in respondent court, the defendant, petitioner here, appeared before the court and demanded that the trial proceed. Respondent court refused the demand and ordered the cause stricken from the calendar. Thereupon petitioner presented to this court his petition in this proceeding for the purpose of requiring respondent to proceed with the trial, and we issued an alternative writ. Respondents have made no return to the writ, although they have been permitted to brief the points involved in the proceeding.

Section 981a of the Code of Civil Procedure contains the provision that an appeal must be dismissed where the appealing party has not brought the appealed cause to trial within a year (Reynolds v. Superior Court, 69 Cal. App. 445, 231 P. 354), "unless such time be otherwise extended by a written stipulation by the parties to the action. * * *"

[1, 2] A question similar to the one here presented was recently before another division of the District Court of Appeal. It was then determined that when a cause is appealed to the superior court and is set down for trial upon the application of the nonappealing party for a date more than one year after the date upon which the appeal was perfected, such action upon the part of the nonappealing party, if it does not amount to a stipulation waiving the requirement of section 981a, estops that party to avail himself of the requirement. See California L. & A. Co. v. Superior Court, 70 Cal. App. 767, 234 P. 408. At the time when this decision was rendered the cause of Miller & Lux v. Superior Court, 192 Cal. 333, 219 P. 1006, apparently was not called to the attention of the court. The latter cause arose under section 583 of the Code of Civil Procedure, which provides for a dismissal of actions when the plaintiffs have not brought them to trial within five years after answer filed, "except where the parties have stipulated in writing that the time may be extended." The Supreme Court in the case last cited expressed views as to the effect of section 583 which we think are inconsistent with the conclusion reached in California L. & A. Co. v. Superior Court. We think the fact that in the present instance the nonappealing party caused the appealed cause to be set for trial for a date more than a year after the perfecting of the appeal neither amounted to a written stipulation nor operated as an estoppel. Before reaching this conclusion we have examined Swim v. Superior Court, 193 Cal. 539, 226 P. 2.

The alternative writ of mandate is vacated, and a peremptory writ is denied.

I concur: CRAIG, J.

THOMPSON, J., being disqualified, does not participate in the foregoing decision.

80 Cal. App. 583

PEOPLE v. MAZZOLA. (Cr. 1396.)*

(District Court of Appeal, Second District, Division 1, California. Jan. 7, 1927.)

1. Intoxicating liquors 🔑202 — Information charging maintenance of place where liquor was "kept" need not allege keeping for beverage purposes.

Information, charging that defendant "did willfully and unlawfully maintain a place where intoxicating liquor was manufactured and kept," *held* not insufficient for failure to add "for beverage purposes," or "for sale, barter, or other commercial purposes," since "kept" implies such use.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Keep.]

2. Indictment and information 🔑110(31)—Indictment, under statute for maintaining place where liquor was manufactured and kept, held sufficient (Wright Act).

Information, charging that defendant "did willfully and unlawfully maintain a place where intoxicating liquor was manufactured and kept," *held* sufficient under Wright Act (St. 1921, p. 79).

3. Indictment and information 🔑86(3)—Information for maintaining place where liquor was manufactured and kept need not state particular place in county where alleged offense was committed.

Information for maintaining place where intoxicating liquor was manufactured and kept *held* not defective for failure to state particular place in county where alleged offense was committed.

4. Intoxicating liquors 🔑223(1)—In prosecution for maintaining place where liquor was "kept," state must prove that liquor was kept for commercial purposes.

In prosecution under information for maintaining place where liquor was manufactured and "kept," refusal of instruction requiring proof, beyond reasonable doubt, that liquor was manufactured and kept for purpose of sale, barter, or other commercial purposes, *held* reversible error, since state was required to prove allegation, implied by "kept," that liquor was kept for commercial purposes.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Andy Mazzola was convicted of maintaining a place where intoxicating liquor was manufactured and kept, and he appeals. Reversed.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J. Defendant appeals from a judgment of conviction of the offense of "maintaining a place where intoxicating liquor was manufactured and kept."

The prosecution was had under the provisions of the Wright Act (Stats. 1921, p. 79), which in terms adopts the provisions of the National Prohibition Act, or the so-called Volstead Act, of date October 28, 1919, and which latter act, among other things, contains the provision that—

> "Any room, house, building, boat, vehicle, structure, or place * * * where intoxicating liquor is sold, manufactured, kept * * * or bartered in violation of" this title, "and all intoxicating liquor and * * * property kept and used in maintaining" the same, "is hereby declared to be a * * * common nuisance," etc. U. S. Comp. St. § 10138¼c.

[1] The information charged that defendant "did willfully and unlawfully maintain a place where intoxicating liquor was manufactured and kept. * * *"

Appellant contends that, because it is not alleged in the information that the intoxicating liquor was manufactured and kept "for beverage purposes" or "for sale, barter, or other commercial purposes," the information failed to state facts sufficient to constitute a public offense.

In support of such contention, appellant relies principally upon the cases of People v. Mehra (Cal. App.) 238 P. 802; United States v. Dowling (D. C.) 278 F. 630, and State v. Bulloch, 151 La. 593, 92 So. 127. In the case first cited it is held that evidence of mere possession or "keeping" of intoxicating liquor is insufficient to support a conviction of maintaining a common nuisance as defined in the statute, but that additional evidence of facts or circumstances reasonably raising the inference of a purpose to sell such liquor must be presented. The case of United States v. Dowling, in which the defendant was charged with the crime of conspiracy to violate the National Prohibition Act, holds that an indictment which charged the defendant with possession of certain intoxicating liquors without alleging any facts to show that such possession was unlawful did not charge an offense. In the third case it is held that an information which merely charged the defendant with the offense of selling intoxicating liquor was insufficient, in that it contained no allegation that such liquor was sold "for beverage purposes," as provided by statute.

It is apparent that each of the authorities to which reference has been had is pertinent and applicable to the issues herein involved, and, in the absence of countervailing authorities, if not wholly convincing, would be most persuasive. It remains, however, to consider certain other cases directly bearing upon the question of the sufficiency of the information. In each of the several authorities to which attention has been directed, the importance to be placed on a proper construction or interpretation of the word "kept" is emphasized. In the case of Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 S. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548, in speaking of the significance to be properly attached to the word "kept" in the section of the National Prohibition Act there and here under consideration, the Supreme Court said:

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*Hearing denied by Supreme Court March 3, 1927.

> "The word 'kept' in this section is the only one of possible application to the case at bar, and the words with which it is immediately associated are such that as here used it plainly means kept for sale or barter or other commercial purpose."

In Singer v. United States (C. C. A.) 288 F. 695, a conclusion identical in all respects with that reached in the case last cited is reached by the circuit court. In the Mehra Case (Cal. App.) 238 P. 802, upon which reliance is especially placed by defendant, the court quotes with approval the foregoing language used by the United States Supreme Court in the case of Street v. Lincoln Safe Deposit Co., supra.

[2] It therefore may be accepted as having been judicially determined that the word "kept," as used in the section of the National Prohibition Act here under consideration, carries with it the meaning that the intoxicating liquor was illegally held or stored for the purpose of selling the same, or of devoting it to other commercial purposes. The language used in the pleading to which objection is made may therefore be said to have legally conveyed to the defendant the information that, included within the charge against him, he was accused of the offense of unlawfully keeping intoxicating liquor for sale, barter, or other commercial use. But, aside from such judicial interpretation of the word "kept," it is settled law that, generally speaking (subject to some exceptions), an information drawn substantially in the language of the statute is sufficient. 14 Cal. Jur. §§ 27, 38, and cases there cited.

In the case of People v. Johnson, 63 Cal. App. 178, 218 P. 449, the defendant was charged with "the crime of maintaining a common nuisance, as said crime is defined by section 21 of the so-called 'Wright Act,'" as was the effect of the charge against the defendant in the instant case. There, as here, an objection was made that the information did not state facts sufficient to constitute a public offense. In discussing the question, the court said in part that—

> "The charge as laid is substantially in the language of the statute, which itself fully and clearly describes the offense, and that it is, therefore, in all respects sufficient to inform and to have informed the accused of the specific crime with which he was charged so as to enable him to prepare and interpose thereto any defense available to him. This is all that is required of any criminal pleading."

In People v. Frankovich, 64 Cal. App. 184, 221 P. 671, the defendant was likewise charged with the offense of committing a common nuisance by reason of his violation of the provision of the National Prohibition Act, as adopted by the Wright Act; and, in speaking to the question raised by the appellant on an objection similar to that here under consideration, the court said:

> "We think, however, that the information, with the requisite clearness and directness, charges the offense sought to be therein stated. It is substantially in the language of the section of the Wright Act or Volstead Act (sec. 21) upon which it is founded, * * * and involves a statement of the acts constituting the offense denounced by said section 'in such manner as to enable a person of common understanding to know what is intended.' Section 950, subd. 2, Pen. Code. No more is required of a criminal pleading than that 'it be direct and certain, and allege all the acts and facts which the Legislature has said shall constitute the offense charged.' * * * No language could be added to section 21 of [title 2 of] the Volstead Act [U. S. Comp. St. § 10138½jj] adopted by the Wright Act, which would render its definition of the crime of maintaining a common nuisance clearer or more direct, and hence the general rule that it is sufficient if a crime be stated in an information or indictment in substantial agreement with the language of the statute applies here."

As a conclusion to be deduced from the several authorities to which reference has been had, it is clear that the defendant was in no wise misled by reason of the form of the accusation, but, to the contrary, that in law he was fully cognizant of the charge that was preferred against him.

[3] It is also urged by appellant that the information is defective, in that it fails to state the particular place in the county of San Bernardino where the alleged offense was committed. But it appears that such a statement is unnecessary. People v. Geiger, 116 Cal. 441, 48 P. 389; People v. Sheldon, 68 Cal. 434, 9 P. 457; People v. Wooley, 44 Cal. 494; People v. Eveart, 1 Cal. Unrep. 217; People v. Redman, 39 Cal. App. 566, 179 P. 725; People v. Burke, 18 Cal. App. 72, 122 P. 435.

[4] Prejudicial error is also predicated upon the refusal by the trial court to give to the jury each of three several instructions, by which it was proposed to inform the jury that, before the defendant could be found guilty of the offense of which he was charged, the jury must be convinced from the evidence beyond a reasonable doubt that the intoxicating liquor alleged to have been kept at the place specified in the information was manufactured or kept by the defendant *for the purpose of sale or barter, or other commercial purposes.*

By reference to the authorities cited herein, particularly the cases of Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 S. Ct. 31, 65 L. Ed. 151, 10 A. L. R. 1548, and Singer v. United States (C. C. A.) 288 F. 695, it will be remembered that the word "kept," contained within the information herein, "means kept for sale or barter, or other commercial purpose." The information therefore must be considered as though it actually had appropriately inserted therein the language which it impliedly contains; so that it must have been legally understood by the prosecution, as well as by the defendant, that the charge against the defendant included the accusation that at a certain time and place he "did willfully and unlawfully maintain a place where intoxicating liquor was manufactured and kept for sale or barter, or other commercial purpose." With such an implied allegation in the information, it necessarily devolved upon the prosecution to prove the purpose for which the defendant kept the intoxicating liquor in question. If no evidence was offered as to such allegation, necessarily the case for the prosecution would have failed. On the other hand, if any evidence was offered with reference to such allegation, the defendant was clearly entitled to have the attention of the jury directed thereto in order that the defendant might have the judgment of the jury as to whether the facts adduced were sufficient to convince the jury beyond a reasonable doubt that the purpose of the defendant in manufacturing or keeping the intoxicating liquor was that of making an illegal sale or barter thereof or to devote it to other commercial purposes. As has been indicated herein, although not expressly so stated, the allegation (whether express or implied) of the purpose of the defendant in manufacturing or keeping the intoxicating liquor in question was an essential element or factor in the information against him. In order to support a verdict of guilty against the defendant, it was as necessary to make proof of that particular allegation as it was to prove any other allegation in the information. If the defendant was entitled to any instruction in the case, it was that the prosecution was compelled to prove beyond a reasonable doubt each and every material allegation of the information. No such instruction nor the equivalent thereof was given. To the contrary, as affecting the particular point here under consideration, in effect the jury was instructed only in the formal language of the information that, if it believed that defendant did willfully and unlawfully maintain a place where intoxicating liquor was manufactured or *kept*, its duty was to find the defendant guilty. No attempt was made to define the word "kept." Without such definition the jury may have had an entirely erroneous understanding of the meaning of the word as applied to the statute here under consideration. The requested instructions which were refused by the trial court sought to instruct the jury as to its duty with reference to an element in the case which was of vital importance to the defendant. It is manifest that, in the refusal of the trial court to so instruct the jury, the defendant was deprived of a substantial right.

The judgment and the order denying the motion for a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

79 Cal. App. 545

TRULL v. DUNN et al. (Civ. 3136.)

(District Court of Appeal, Third District, California. Nov. 24, 1926.)

1. Quieting title 🔑10(1)—Plaintiff, seeking to quiet title, must prevail on strength of own title, and weakness of defendant's asserted title is immaterial.

In action to quiet title, plaintiff must prevail on strength of own title, and part of opinion dealing with weakness of defendant's asserted title as to payment of taxes and listing of property was not material to decision of case.

2. Adverse possession 🔑95—That defendants, claiming title, did not pay taxes or list lots in controversy for assessment, as affecting adverse possession, held shown by evidence.

In action to quiet title, evidence *held* to show that defendants had not paid taxes on lots in controversy, and had not, for period longer than required by statute of limitations, listed any of lots for assessment purposes.

3. Adverse possession 🔑115(1)—Question of tax payments, in determining issue of adverse possession in action to quiet title, held for trial court.

In action to quiet title, question of payment of taxes was for trial court, in determining issue of adverse possession.

Appeal from Superior Court, Los Angeles County; E. N. Rector, Judge.

On rehearing. Denied.
For former opinion, see 250 P. 185.

Wm. T. Kendrick and Victor H. Kendrick, both of Los Angeles, for appellants.
R. D. McLaughlin and H. R. Collins, both of Los Angeles, for respondent.

PER CURIAM. Appellants, in their petition for rehearing, state that "the case stated in the opinion of the above-entitled court differs materially from the case as it appears in the record in the following particulars," and then refers to the testimony of John J. Dunn, the son of the defendant James T. Dunn, as to the lands leased to the said John J. Dunn by the defendant James T. Dunn; the opinion stating: "Nowhere does it appear from the testimony that there was any definite agreement as to the particular land to be farmed." A reference to folio 167 of the transcript, setting forth the testimony of John J. Dunn, will show that we have quoted the language of the witness word for word as to the land leased by father to son for the purpose of being farmed by the son.

[1, 2] Exception is also taken to the statement of the court as to the payment of taxes by the plaintiff, and also to the statement in the opinion that the defendant had paid no taxes on the property, and that the lots in controversy were never listed by him for assessment purposes, and the effect of such failure, as shown by the case of Janke v. McMahon, 21 Cal. App. 781, 787, 133 P. 21. This part of the opinion was not material to a decision of the cause, for the reason that it dealt with the weakness of the defendant's asserted title in an action where the plaintiff must prevail upon the strength of her own title, but was in answer to the argument made by the defendants upon this appeal. The language of this court should have been that the evidence was amply sufficient to satisfy the trial court that the defendants had

not paid taxes on any of the lots in controversy, and had not for a period much longer than that required by the statute of limitations listed any of the lots for assessment purposes. Just for the sake of accuracy in this particular, we have re-examined the testimony in this case and find the following: That the plaintiff claims under a color of title by a deed made and executed on the 19th day of April, 1900, conveying all the lots in controversy to the then husband of the plaintiff, and a subsequent decree of distribution, dated October 30, 1913, distributing all of the lots in controversy to the plaintiff.

The testimony of Ella Smith Trull was directly in point to the effect that the taxes levied upon the property were paid by her husband during his lifetime, and after his death, up to some time about the year 1922, since which date the taxes were paid on the premises in controversy by a bank, when they were turned over in trust to a bank to secure certain advances. The testimony of the witness R. D. McLaughlin shows that the taxes on several of the lots, just how many not stated, were not paid and the same became delinquent and were sold. His testimony is as follows:

> "I made a memorandum, and checked that with the receipts that she gave me from the years 1907 to 1916, inclusive. At that time we redeemed everything, up to and including 1916. The tax receipts brought down by Mrs. Trull, and which I went over, covered the years 1907 to 1916, inclusive. I checked the receipts for the redemptions for all the lots during that period."

This is very persuasive evidence that the defendants had not paid the taxes on the lots. The record does show that, for the year 1913, lot 24 in block D, lots 25 and 28 in block 80, and lots 11 and 12 in block 85 were assessed to the defendant James T. Dunn; but in 1916 lots 25 and 26, block 80, and lots 11 and 12, block 85, were assessed to Ella Smith, now Ella Smith Trull. The same is true for the year 1922 as to lot 24 and lots 25 and 26, supra. In 1917, 1918, 1919, all the property described in the complaint, with the exception of one lot, to wit, lot 24 in block V, was assessed exclusively to the plaintiff.

This record we think sufficiently showed to the trial court that the defendant was not listing said lots until the controversy herein arose, and then only listed a few of the lots described in plaintiff's complaint for a very short period of time. The testimony of the plaintiff is to the effect that, when she discovered that the defendant James T. Dunn had had his name inserted on the assessment roll as to two of the lots in 1917, she called upon him in relation thereto.

The petition for rehearing also quotes the language of the defendant James T. Dunn as a witness in his own behalf, as follows: "I paid the taxes on those lots." The context of the testimony, however, eliminates the force of this testimony. It appears in the transcript as follows:

> "There were two or three people that farmed a little piece at different places. There were no lots fenced. There were two lots set out in blue gum in the tract. I think there is one or two fenced. I think you can't get on it. There is no other fence. The lots I speak of are not any of those in question here. I paid the taxes on those lots."

The witness then testified as to how he paid his taxes by sending a signed blank check to the tax collector. The assessment roll of the county of Los Angeles for the years from 1907 to 1922, inclusive, were admitted in evidence, and it was stipulated that all the taxes levied upon the lots described in plaintiff's complaint during those years had been paid; but the record, however, does not disclose anything except as herein referred to.

We were slightly in error as to the year 1913 as to the assessment of the property; but it does not appear that the defendant listed the same, and the fact that for some years afterwards his name does not appear on the assessment roll as to any of these lots amply supported the statement of this court in its opinion deciding this cause.

[3] The question of the payment of taxes was a matter primarily for the trial court in determining the question of adverse possession, and we think the record, as herein cited, justifies the conclusion of the trial court in so far as it was necessary under the law relating to adverse possession to find as to the payment of taxes.

Rehearing denied.

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79 Cal. App. 762

HODOIAN v. GARABEDIAN. (Civ. 3168.)

(District Court of Appeal, Third District, California. Nov. 23, 1926.)

1. Gifts 🔑19(1)—Grantor, executing and delivering formal conveyances of all property to brother, together with manual custody of personalty, held to have intended absolute delivery of instruments.

Where grantor, afflicted with fatal disease, executed and delivered formal conveyances of all property to brother, together with manual custody of personalty, grantor *held* to have intended absolute delivery of instruments in spite of his subsequent requirement of written agreement to redeliver in case of recovery.

2. Deeds 🔑54, 56(3)—Delivery of deed, and grantor's intent to relinquish all rights, is necessary to effect transfer.

To effectually transfer title to land, delivery of deed, together with intent to relinquish all control by grantor, is essential.

3. Deeds 🔑56(2)—Intent behind transfer of instrument must be determined from surrounding facts and circumstances.

Intent with which instrument is transferred is question of fact to be determined by consideration of all circumstances surrounding particular transaction.

4. Evidence 🔑461(2)—Parol evidence of grantor's intent when delivering deed held admissible.

Intent with which grantor delivered deed of conveyance may be shown by oral testimony.

5. Deeds 🔑66—Question of whether grantor intended to relinquish all rights under instruments on delivery is one of fact.

Question of whether grantor intended to divest himself of title, and relinquish all control over instrument on delivery, is one of fact for jury or trial court.

6. Appeal and error 🔑1011(1)—Trial court's finding as to whether grantor intended to relinquish all control of instrument on delivery held controlling in case of conflicting evidence.

In case of conflict in evidence as to whether grantor intended to relinquish all control over instrument, findings of trial court are controlling.

7. Deeds 🔑207, 208(6)—One, denying valid transfer to holder of realty conveyance, has burden to prove no conveyance or acceptance by preponderance of evidence.

Burden is on him who denies valid transfer to one holding deed of conveyance to real property to show by preponderance of evidence that there was no conveyance or acceptance.

8. Deeds 🔑208(3, 6)—Grantee's possession of deed is prima facie evidence of both delivery and acceptance.

Possession of deed by grantee, or one holding under him, is prima facie evidence of both delivery and acceptance.

9. Deeds 🔑60—Delivery of deed with intention to convey title only in event that grantor fails to survive operation held absolute and final (Civ. Code, § 1056).

Where grantor delivers deed to grantee with intent that it shall convey title only in event that grantor shall fail to survive contemplated operation, delivery is absolute and final, as provided by Civ. Code, § 1056.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by John M. Hodoian, also known as and called Mugerditch Garabedian, a minor, by his guardian, Emostuhi Hodoian, against Avak Garabedian, to set aside conveyances of real estate and assignment of personal property. From a judgment for defendant, plaintiff appeals. Affirmed.

Peckinpah & Carter and M. G. Gallaher, all of Fresno, for appellant.

Power & McFadzean and J. Thomas Crowe, all of Visalia, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment upholding the due execution and delivery of two deeds of conveyance to real property, and an assignment of certain notes and bank accounts. The only question involved is whether the instruments were delivered by the grantor to the grantee with the intent to thereby divest himself of title, and to relinquish all dominion and control over the instruments.

The issues of unsound mind and undue influence which were presented by the pleadings were specifically waived by appellant at the trial. The plaintiff is a nephew of Iseal Garabedian, an Armenian, named in the pleadings as E. Garabedian, who was the grantor mentioned in the instruments in question. For 23 years prior to his death he had lived with his brother, Avak, who was the grantee. He had no other relatives except plaintiff, and the family of his brother, Avak. The grantor owned 20 acres of land near Merced, two lots in the town of Fowler, and several notes, together with money in bank, represented by certificates of deposit and cash on open account. The value of the personal property was about $12,000. For some time the grantor had been in ill health, and about two months prior to his death he had an attack of influenza, which led his physician to order him to be taken to the hospital. This was done 10 days before his death. He died of pneumonia May 8, 1923. Avak and his daughter, Karat, visited him daily while he remained at the hospital. On May 2d he told his brother, Avak, to get an attorney by the name of George F. Gill, with whom he had transacted business for 3 years past, and bring him to the hospital. Pursuant to this request the brother and Mr. Gill visited him during the forenoon of that day. The grantor told Gill that he wanted to dispose of his property, and was thereupon asked: "What do you want to do with your property?" Turning to his brother Avak, the grantor said: "Whatever I got, I going to give you." Then, after considerable talk about making a will, the attorney told him that if he made a will it would have to be probated. He then said that he wanted to save the expense of probating, and that he did not wish to make a will, but would deed the property directly to his brother.

Mr. Gill testified with respect to this part of the conversation:

> "I went down to the hospital, and I asked whether he wanted to make some disposition of his property. * * * I assumed he wanted to make a will. * * * He wanted to know what the expense would be. I told him it would have to be probated. * * * He didn't want that, * * * I then reported to him that he would have to put it in escrow, or make a conveyance and put it in the bank, and give it to him absolutely. * * * They decided they didn't want to put them in the bank."

The notes, certificates of deposit, and old deeds containing a description of the land and property to be conveyed were kept in a safe deposit box at the bank. Mr. Gill explained that it would be necessary for him to obtain these documents, in order to draw up the instruments of conveyance, and for that purpose he visited the bank to inquire what procedure was necessary for him to gain access to the box. Upon securing the necessary information, he returned and prepared a written authorization, the necessity of signing which Avak explained to him, and he said: "You bring anything down; I sign them." This authorization, in the following language, was then signed by the grantor:

> "Tulare, Cal., May 2, 1923.
>
> "Tulare Branch of Southwest Trust & Savings Bank—Gentlemen: This is to authorize you to permit A. Garabedian to open my safe deposit box No. 5082, and to remove any and all the contents thereof.
>
> "I do hereby assign and deliver to the said A. Garabedian all the contents of said safe deposit box.
>
> "You are released from any and all liability by reason of following these instructions.
>
> "Very sincerely yours,
> "[Signed] E. Garabedian."

When the grantor was first taken to the hospital, he handed his keys, including the safe deposit box key, to his brother, saying: "You keep that." Having procured the written authorization, the attorney and Avak went to the bank and took out all of the documents from the box. They then made an engagement to meet at the hospital in the afternoon, and the attorney went to his office and prepared the two deeds and the assignment in question. Pursuant to arrangement, they again met in the sickroom about half past 1 o'clock. These instruments were first read and explained to the grantor by both Mr. Gill and Miss Karat. The grantor was able to speak the English language, but at times expressed himself with difficulty, and for this reason a part of the conversation regarding the disposition of the property was conducted through the niece, Karat, acting as an interpreter. After reading and explaining these instruments of conveyance to the grantor, he signed them in the presence of witnesses and handed them to the grantee, without reservation.

Regarding this portion of the transaction, the attorney testified:

> "We went back to the hospital, and I explained to him, in English, the substance of the deed, and the substance of the assignment. Then I asked the young lady to read the assignment to him, and explain it as she went along. And she did this in Armenian. Then I asked him if that was the way he wanted it, and he said, 'Yes.' Then he gave them either to the girl, or to his brother; I don't know which. Anyway, as far as my part of it was concerned, it was finished. Then I went to go. Then the young lady told me he wanted to know what would happen in case he got well. So I told him nothing would happen, because I would draw an instrument for his brother to sign, that he would return the property in case he got well. * * * That was after the delivery of the deed, * * * and just before I was leaving. The deeds were (then) acknowledged and turned over to Avak. I told them there had to be a delivery—I remember that."

All conversations regarding the transfer and the execution and delivery of the instruments took place at the hospital, in the presence of the grantor, his brother, Avak, his niece, Karat, the attorney, and a nurse. The grantee, Avak, testified:

> That, when Mr. Gill asked his brother if he wanted to make a will, he said: "No, I'm going to deed to him; * * * whatever I got, I going to give to you (Avak)." That the attorney then said: "All right; if you want to I give it to your brother; I will make out a paper, and give it to him." The grantor further said to his brother: "I have got one house; one 20-acre ranch, I am going to deed to you; besides that, some money too. * * *" But, he says, "If I get well, you have to give back to me." And the grantee said, "All right; I am going to give you white and black," meaning that he would give him a written agreement to return the property, if he recovered from the disease from which he was suffering.

Respecting the delivery, the grantee testified:

> "As soon as he go down to the hospital, and he (the grantor) sign up, my brother hand to me."

He then said that he put the documents in his pocket, and, taking them down to the bank, he placed them in the safe deposit box belonging to the grantor, to remain there until the death of his brother. During all of which time the grantee retained the possession of the key and so reserved entire dominion and control over the instruments and property which had been given to him.

After the execution and delivery of the instruments, and pursuant to the request of the grantor, and the promise of the grantee, Avak went with the attorney to his office, where an agreement to reconvey the property, in the event of the grantor's recovery, was prepared, executed, and left in the custody of Mr. Gill. This document contained the following language:

> "I hereby admit that the delivery of the above-described property is on the condition that, should my brother, E. Garabedian, recover from his present illness, and demand the return of his said property to him, I will so redeliver it to him; but, in the event of his death, the transfer and delivery of said property is absolute."

Six days after this transaction the grantor died, and the grantee immediately recorded the deeds and assignment.

Upon these facts the trial court found that the grantor duly delivered to the grantee the instruments of conveyance, and the custody of the personal property without reservation or condition, and with the intent to thereby divest himself of the title thereto, but that, after the delivery and conveyance of title, the grantor requested, and the grantee promised to execute an agreement to reconvey the property in the event that the grantor should recover from his illness, but that he died on May 8, 1923, and that the defendant was the owner of the property described.

[1] Realizing that he was afflicted with a fatal disease from which he expected to soon die, the grantor apparently intended to transfer all his property to his brother, Avak, with whom he had lived on friendly terms for 23 years. With this purpose in view, he summoned his attorney and formally executed and delivered to his brother conveyances to all his property to take effect inter vivos. The transfer was accompanied with the manual custody of the personal property. The fact that he afterwards required a written agreement to reconvey the property in the event of his recovery in no way impairs the validity of the transfer.

The appellant contends that when the grantor used the following language to his brother: "I am going to deed to you, * * * but, if I get well, you have to give back to me," meant that he was insisting that, if he got well, the deeds and assignment must be given back to him. However, in view of the careful explanation on the part of the attorney that he must make an absolute delivery of the deeds, and that he said to his brother, "Whatever I've got, I'm going to give to you," and that the grantee immediately proceeded to prepare and execute an agreement to redeliver the *property*, and not the instruments, in the event of his recovery, leads us to conclude that the grantor intended to relinquish all control over the instruments when he handed them to his brother. This interpretation of the language is more persuasive, since the grantor did not request the grantee not to record the instruments; in fact, he gave no instruction which would lead to an inference that he was reserving any control over the use or disposition of the instruments after he delivered them. Moreover, it should be remembered that these Armenians expressed themselves in English with difficulty. The conduct of all the parties concerned indicates that the grantor intended to make an absolute delivery of the instruments.

[2] In order to effectually transfer the title to land, the delivery of a deed is absolutely essential. The act of delivery is analogous to what was formerly termed *livery* of *seisin*. Delivery is said to be the force that vitalizes the instrument of conveyance, without which it is entirely void. The manual transfer of the deed alone is not sufficient. It must be accompanied with an intent on the part of the grantor to relinquish all control over the instrument and to presently divest himself of the title. White v. Hendley, 185 Cal. 614, 198 P. 22; Follmer v. Rohrer, 158 Cal. 755, 112 P. 544; Hotaling v. Hotaling, 193 Cal. 368, 382, 224 P. 455; Duffy v. Duffy, 71 Cal. App. 251, 235 P. 62.

[3] The intent with which the instrument is transferred is a question of fact to be determined from all the circumstances surrounding the particular transaction. 9 Cal. Jur. 153, § 52; 1 Devlin on Real Estate, 385, § 262; Hefner v. Sealey, 175 Cal. 18, 164 P. 898; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455.

[4] It is now a settled rule of evidence in this state that the intent with which a grantor delivered a deed of conveyance may be shown by oral testimony. De Cou v. Howell, 190 Cal. 741, 214 P. 444; Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703; Cummings v. Eiszler, 70 Cal. App. 67, 232 P. 723.

[5, 6] The question of the existence of the intent on the part of the grantor to divest himself of title and relinquish all control over the instrument when he delivered it is one of fact to be determined by the trial court or jury. Where there is a conflict of evidence as to the intent, the finding of the trial court is controlling. Moore v. Trott, 162 Cal. 268, 122 P. 462; Hefner v. Sealey, 175 Cal. 18, 164 P. 898; Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Smith v. Flynn, 64 Cal. App. 218, 221 P. 384; Duffy v. Duffy, 71 Cal. App. 258, 235 P. 62.

[7, 8] The appellant contends that there is no evidence of acceptance of the deeds of conveyance by the grantee. But the burden is on him who denies a valid transfer to one who holds a deed of conveyance to real property to show by a preponderance of the evidence that there was no conveyance or acceptance. The possession of a deed by a grantee, or those holding under him, is prima facie evidence of both delivery and acceptance. 8 R. C. L. 999, § 62; 2 Tiffany on Real Property, 1750, § 461; Stewart v. Silva, 192 Cal. 405, 409, 221 P. 191; Ward v. Dougherty, 75 Cal. 240, 17 P. 193, 7 Am. St. Rep. 151.

[9] Where the grantor delivers a deed to his grantee, with the intent that it shall convey title only in the event that the grantor shall fail to survive a contemplated operation, the delivery is governed by the provisions of section 1056, Civil Code, and becomes absolute and final. 9 Cal. Jur. 166, § 61; Fisher v. Fisher, 23 Cal. App. 310, 137 P. 1094. Section 1056, Civil Code, provides:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

The facts in the case of Duffy v. Duffy, 71 Cal. App. 251, 235 P. 62, are strikingly similar to those of the instant case. In that cause the grantor was about to undergo a dangerous operation for cancer of the throat, which the doctor warned him might prove fatal. Thereupon he executed a deed of conveyance to his brother and sister, with the object, in the event of his death, of saving the expense of probating the will. Evidently he expected to procure a reconveyance of the property, in case he survived the operation. He delivered the deed to the grantees, saying: "I give you and Bill my property; if I get well, you will deed it back?"—to which the sister replied: "Oh, yes." It does not appear that the operation was performed, but within five months thereafter he died. The trial court held this to be an unconditional delivery of the deed and a present transfer of title. That judgment was affirmed by the District Court of Appeal and a rehearing denied by the Supreme Court.

For the foregoing reasons, this judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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80 Cal. App. 27

Ex parte GAVIN. (Cr. 953.)

(District Court of Appeal, Third District, California. Nov. 27, 1926.)

1. Insane persons 🔑49—Inebriate suffering from disordered mind may be committed to insane hospital (Pol. Code, §§ 2168, 2185c).

That applicant for release from hospital for insane is suffering from disordered brain and unable to control habit of drinking intoxicating liquor, placing him within Pol. Code, § 2185c, relating to inebriates, does not necessarily prevent him from coming within section 2168, relating to persons whose mentality is so far disordered as to render them proper subjects for commitment thereunder.

2. Insane persons 🔑49—Inebriate with disordered mind need not necessarily be committed to State Hospital for Insane under section relating to inebriates because alcohol renders him more dangerous (Pol. Code, §§ 2168, 2185c).

That alcoholic stimulants render one suffering from mental disorder more injurious to himself and others does not necessitate commitment of inebriate with disordered mind, under Pol. Code, § 2185c, relating to such persons, rather than under section 2168 relating to persons with disordered minds.

3. Insane persons 🔑49—Disordered mental condition, requiring commitment to insane hospital, is question of fact (Pol. Code, § 2168).

Whether subject for commitment to insane hospital is suffering from disordered mental condition requiring his commitment under Pol. Code, § 2168, is question of fact, and not necessarily determined by causes that have superinduced his condition.

4. Habeas corpus 🔑25(1)—Patient of State Hospital for Insane may not be discharged on habeas corpus because hospital officials are willing to grant leave of absence on condition that he be safeguarded.

That officials of State Hospital for Insane are willing to grant patient leave of absence under condition that would prevent him from becoming a menace is not sufficient reason for order discharging him by way of writ of habeas corpus.

Application by Michael Gavin for a writ of habeas corpus, to be directed to the Superintendent of the State Hopsital for Insane. Writ denied, and petitioner remanded.

W. F. Stafford, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

PER CURIAM. The petitioner, by a judge of the superior court of the city and county of San Francisco, was committed to the State Hospital for the Insane at Napa, state of California, by an order of commitment dated the 27th day of October, 1919, and has applied to this court by way of a petition for writ of habeas corpus to be released from restraint under said commitment and ordered discharged.

The commitment, among other things, recites: That the court, being satisfied from the testimony of the witnesses and of the proof of the matter set forth in the certificate that said Michael Gavin is insane and so disordered in mind as to endanger health, person, and property, and that it is dangerous to life, health, person, and property for such person to be at large, and that his condition is such as requires care and treatment in a hospital for the care and treatment of the insane, commitment therefore ordered.

The record presented to us upon this hearing discloses that an examination of the present mental condition of the petitioner was recently had at a conference of the physicians constituting the medical staff of the Napa State Hospital and, also, of an application made by the petitioner to the superior court of the county of Napa for release on habeas corpus, and the testimony taken in both of said hearings is presented to us by way of stipulation of counsel for our consideration. This record shows that the petitioner some years prior to his commitment to the state hospital at Napa had at different times been committed to the state hospital at Stockton, subsequently discharged therefrom, and, also, committed to the state hospital at Mendocino and subsequently discharged therefrom. The record in both of said previous commitments set forth that the applicant was suffering from mental deterioration superinduced by alcoholism, his condition being associated with what is called "arterial sclerosis."

The record shows that the medical staff of the Napa State Hospital was willing to grant the applicant a leave of absence, provided some friend or relative would obligate himself to become responsible for the applicant and to take such supervision of him as would prevent the applicant from becoming a menace either of himself, to others, or in any wise injurious to life or property; that no relative or friend has consented to become so responsible for the applicant. Upon the hearing before this court, oral testimony was taken, which testimony was to the effect that, if granted a leave of absence from said hospital, the applicant was in such a mental condition as not to be able to take care of himself, being more or less irresponsible, and should at all times be under the supervision of some one who would be able to guard him with the same degree of care that is exercised over patients at the Napa State Hospital. The testimony introduced in this case further shows that for a period of about one month during this year the applicant was absent from the Napa State Hospital, having left the same without permission, and that his return to the hospital was necessitated by a condition alleged to be that of alcoholism.

[1-3] The testimony further introduced upon the hearing of this cause, and, also, the record presented from the two proceedings herein referred to, leads to the conclusion that the applicant is not simply a person who has lost the power of self-control in relation to the use of alcoholic liquors, but that his mentality has been seriously impaired and that he is now a subject suffering from a disordered brain. This is a condition, of course, rendering the applicant less able to control his appetite for intoxicating liquor, and, in a sense, places him in the class of persons referred to in section 2185c of the Political Code relative to the commitment of persons who have lost the power of self-control in relation thereto, but we think, these facts being admitted, the conclusion that the applicant is not also within the class of persons referred to by section 2168 of the same Code, having to do with commitment of persons whose mentality is so far disordered or affected as to render them proper subjects for commitment thereunder, does not necessarily follow, nor does it follow that, because of the disordered mental condition of a person, he is more likely to indulge in alcoholic stimulants, nor does the fact that alcoholic stimulants render one suffering from mental deterioration more injurious or inimical to himself or the person or property of others necessitate commitment under section 2185c of the Political Code and not commitment under section 2168 of the same Code. It is simply a question of fact whether the subject is or is not suffering from a disordered mental condition such as requires commitment under section 2168, supra, and not what causes have primarily superinduced his condition. The line of demarcation is one of fact, and when the facts are ascertained the respective sections apply. In the case at bar it would appear from the testimony that the applicant is so far mentally affected as to require some one to look after and care for him all the time, and that he cannot be safely discharged without some one ready and willing to take the place of supervision now exercised over the patient by the Napa State Hospital.

[4] The fact that the officials of the Napa State Hospital are ready and willing to grant the applicant a leave of absence under conditions that would safeguard the applicant and prevent him from becoming a menace either to himself or to others is not a sufficient reason for an order of discharge by way of a writ of habeas corpus. We find nothing in the case of In re Harcourt, 27 Cal. App. 642, 150 P. 1001, nor in the other authorities cited, when applied to the case at bar, which would lead to the conclusion that the applicant should be released.

The application is denied and the petitioner remanded.

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80 Cal. App. 20

CLAVEY v. LONEY. (Civ. 2941.)

(District Court of Appeal, Third District, California. Nov. 26, 1926.)

1. Appeal and error ⚷931(1), 1071(1) — Findings, though liberally construed, are ground for reversing judgment where material, irreconcilable, and at variance.

Though findings should be liberally construed to support the judgment, where those complained of are material, irreconcilable, and at variance, judgment must be reversed, as it is then impossible to determine which findings controlled decision of trial court.

2. Trusts ⚷63¾—Resulting trust may be declared for one injured by judgment procured by extrinsic fraud.

Equity will, in a proper case, relieve one injured from effect of judgment or decree obtained by extrinsic fraud, not the result of negligence or laches of complainant, by declaring a resulting trust in his favor.

3. Judgment ⚷511—Equity will not interfere where judgment, collaterally attacked, was procured by intrinsic fraud only.

While equity may give relief against extrinsic fraud, it will refuse to interfere in a case where judgment or decree has been procured by intrinsic fraud only.

4. Executors and administrators ⚷315(6)—In collateral attack on decree of distribution for mistake, in absence of evidence as to nature of mistake, no injury is presumed.

In collateral attack on decree of distribution for mistake, in the absence of evidence as to nature of mistake or manner of occurrence, it is presumed that complainants had full knowledge of proposed distribution and that mistake was merely a mistake of law, not the subject of equitable interference.

5. Quieting title 🔑10(2)—Decree of distribution furnishes sufficient color of title on which to base action to quiet title (Code Civ. Proc. § 322).

Adverse possession under decree of distribution furnishes one with sufficient color of title on which to base action to quiet title, under Code Civ. Proc. § 322.

6. Executors and administrators 🔑315(6)—On collateral attack on decree of distribution, it is presumed that due notice of hearing was given and bound parties interested (Civ. Code Proc. § 1634).

In collateral attack on decree of distribution for mistake in action to quiet title, it must be presumed that notice of time and place of hearing petition for distribution was given, according to Civ. Code Proc. § 1634, and bound parties interested in estate.

7. Executors and administrators 🔑315(6)—Collateral attack on decree of distribution held barred by laches after 17 years, in absence of showing fraud or excuse for delay.

In action to quiet title, brought under decree of distribution in force for 17 years and deed thereunder on record for 14 years, defense that decree was erroneous is barred by laches, in absence of showing of disability of heirs, nature of mistake, or excuse for delay.

8. Judgment 🔑256(5)—Finding that decree of distribution, under which plaintiff claimed, was erroneous held reconcilable with judgment quieting title in plaintiff for adverse possession thereunder.

In action to quiet title under decree of distribution in force 17 years, where defense was attack on decree for mistake, finding that decree under which plaintiff claimed made improper distribution of property *held* to support judgment quieting title in plaintiff, by reason of adverse possession and defendant's laches.

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by William R. Clavey against Jesse Loney, administrator of the estate of James Loney, Sr., deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

C. H. Grayson, of Sonora, for appellant.
Rowan Hardin, of Sonora, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment in favor of plaintiff quieting title to real property situated in Tuolumne county. The complaint is in the usual form. The appellant contends that the findings are irreconcilable, and that the judgment should theerfore be reversed. The evidence adduced at the trial is not before this court.

The trial court found the following facts: That Jerome Loney was the owner of 160 acres of land, situated in Tuolumne county, at the time of his death; that he died June 4, 1897, without issue, but leaving surviving him, as his heirs at law, a mother and father, named, respectively, Catherine and James. October 30, 1897, Catherine was appointed and qualified as administratrix of the estate of her son, Jerome. May 9, 1904, James, the father, died intestate, possessed of an undistributed one-half interest in this ranch, and leaving surviving him his wife, Catherine, and several children. His estate was never administered. Subsequently, in the estate of Jerome, the son, the entire interest in the ranch was distributed April 1, 1907, *by mistake*, to Catherine, the mother. January 31, 1910, she conveyed the entire interest in this ranch to Julius, one of their sons. April 21, 1921, Julius conveyed the land to plaintiff, who has ever since occupied and claimed title to the land openly, notoriously, and adversely. All taxes which were levied against the property, for more than five years immediately preceding the commencement of the action, were paid by plaintiff and his predecessor in title, who claimed adverse title under the decree of distribution, which conferred a color of title upon them.

The suit was commenced April 21, 1924. Upon the findings, the main features of which are mentioned above, the court rendered judgment quieting title in plaintiff.

The inconsistency in the findings, which is alleged to exist, is that plaintiff's grantor took possession and claimed the land in question under the decree of distribution which vested them with a color of title, and thereafter, since April 1, 1907, they have been in open, notorious, and adverse possession, and have paid all taxes which have been assessed against the same; and that plaintiff is the owner and entitled to possession, and that the defendant has no right, title, or interest in said land or any part thereof. While, upon the contrary, the trial court found:

> "That the whole of said property was distributed to said Catherine Loney, *evidently through mistake*, while an undivided one-half interest therein * * * should have been distributed to the estate of James Loney, Sr., deceased."

Defendant contends that the decree of distribution which erroneously gave an undivided one-half interest in this 160-acre tract to Catherine, instead of distributing it to the estate of her husband to which it belonged, automatically created a resulting trust in her, for the benefit of her children, to the extent of this one-half interest.

[1] Findings should be liberally construed to support the judgment, if possible. Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; Goodwin v. Snyder, 70 Cal. App. 98, 232 P. 763. But where the findings complained of are material, irreconcilable, and

at variance, the judgment must be reversed, for the reason that it then becomes impossible to determine which findings controlled the trial court in rendering judgment. Los Angeles & Arizona Land Co. v. Marr, 187 Cal. 126, 132, 200 P. 1051; Estep v. Armstrong, 91 Cal. 659, 27 P. 1091.

[2] Equity will relieve an injured party from the effect of a judgment or decree procured by extrinsic fraud, which was not the result of negligence or laches on the part of the complainant (Sohler v. Sohler, 135 Cal. 323, 67 P. 282, 87 Am. St. Rep. 98; Bacon v. Bacon, 150 Cal. 477, 89 P. 317; Simonton v. Los Angeles T. & S. Bank, 192 Cal. 651, 656, 221 P. 368; Estate of Ross, 180 Cal. 651, 658, 182 P. 752) and in a proper case, will declare a resulting trust in favor of the injured party (Sohler v. Sohler, Id.), unless the property has reached the hands of an innocent purchaser, who claims it in good faith, and without knowledge or notice of the fraud (3 Pom. Eq. Jur. [4th Ed.] 2405, No. 1053).

In the leading case of Sohler v. Sohler, Id., Xavier Sohler died testate, leaving a wife and two posthumous children and pretermitted heirs. The wife was appointed executor of his will. She had another child, by a former husband, who was named Paul Reuss. Upon distribution of the estate the widow conspired with her son, Paul, who was in no way interested in the estate, and deceived and misled the court and the parties interested into believing that he was also a son of the deceased, and thereby procured distribution of one-eighth share of the estate. While this estate was still in control of the guilty party, the court held that the facts alleged in that case, coupled with the fact that the widow was not only the executrix, but mother and guardian of the injured, dependent, infant offspring whom it was her duty to protect, that the evidence conclusively showed extrinsic fraud, and declared a trust for the benefit of the defrauded infants.

While, in a proper case, equity will relieve against extrinsic fraud, it is equally true that equity will refuse to interfere in a case where a judgment or decree has been procured by intrinsic fraud only. Wollenshlager v. Riegel, 186 Cal. 622, 628, 200 P. 726; Pico v. Cohn, 91 Cal. 133, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Hanley v. Hanley, 114 Cal. 690, 46 P. 736; Mulcahey v. Dow, 131 Cal. 73, 63 P. 158; Estate of James, 99 Cal. 374, 33 P. 1122, 37 Am. St. Rep. 60; Lynch v. Rooney, 112 Cal. 282, 44 P. 565; Estate of Cahalan, 70 Cal. 604, 12 P. 427; Dean v. Superior Court, 63 Cal. 473.

[3] A judgment procured by forged documents or perjured testimony is the result of intrinsic fraud and cannot be vacated in a collateral attack. The extrinsic fraud, which alone will warrant a court of equity in setting aside a judgment or decree, consists of such fraud as prevents a real trial upon the issues involved in the case, like conduct which prevents the injured party from receiving notice of the action, or which causes the absence of necessary witnesses. Sohler v. Sohler, Id.; Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579.

[4] But in the instant case, there is no finding of the trial court that plaintiff or his predecessors in title were guilty of extrinsic fraud or any fraud at all. The only finding complained of, is that the decree of distribution was "evidently made through mistake." Since the evidence adduced at the trial is not before this court, it is impossible for this court to determine what the nature of the mistake was, or how it occurred. For aught that appears in the record before us, this mistake may have been due to the negligence or conduct of the parties represented by the defendant. Every intendment is in favor of the judgment, and, in the absence of any showing to the contrary, we must presume that the complainants were suffering from no disability, that they had full knowledge of the proposed distribution, and that the mistake was a mere mistake as to the law, concerning which equity will not interfere.

[5] It is specifically found by the court that the plaintiff and his predecessor in title took possession under the decree of distribution, which furnished them with color of title. A decree of distribution furnishes sufficient color of title upon which to base an action to quiet title. Owsley v. Matson, 156 Cal. 401, 104 P. 983; Wilson v. Atkinson, 77 Cal. 485, 20 P. 66, 11 Am. St. Rep. 299; Gavin v. Phillips, 12 Cal. App. 34, 106 P. 424; Akley v. Bassett, 189 Cal. 625, 640, 209 P. 576; Grossman v. Yip Wing, 62 Cal. App. 121, 128, 216 P. 634; Pereira Farms Corp. v. Simas, 69 Cal. App. 159, 163, 230 P. 976. Section 322, Code of Civil Procedure, provides:

> "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment, or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely."

[6] In support of the judgment, also, it must be presumed that notice of the time and place of hearing the petition for distribution complained of was duly given, according to the provisions of section 1634, Code of Civil Procedure. It has been repeatedly said by our courts that the giving of this notice summons the world before the court (William Hill Co. v. Lawler, 116 Cal. 359, 48 P. 323; Warren v. Ellis, 39 Cal. App. 542, 547, 179 P. 544), and binds those, at least, who are interested in the estate. In the Estate

of Ross, 187 Cal. 454, 465, 202 P. 641, 646, it is said:

> "The 'distribution' of an estate includes the determination of the persons who by law are entitled thereto, and also the 'proportions or parts' to which each of these persons is entitled."

[7] The decree of distribution complained of was made in 1907, and this action was not commenced until April, 1924. With the presumption that the heirs were then under no disability as to their age or competency and had full knowledge of this decree, they would be guilty of laches which would bar their defense to this action, after a lapse of 17 years with no excuse offered for such delay. Moreover, the deed from Mrs. Loney to her son, Julius, was executed and recorded in 1910. Certainly this would set the statute of limitations in motion, and the defense to this action would have been barred within four years therefrom. Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; Bath v. Valdez, 70 Cal. 350, 11 P. 724; Feliz v. Feliz, 105 Cal. 1, 38 P. 521; Packard v. Moss, 68 Cal. 123, 8 P. 818; Alvarado v. Nordholt, 95 Cal. 116, 30 P. 211; Winterburn v. Chambers, 91 Cal. 170, 27 P. 658; Akley v. Bassett, 189 Cal. 625, 640, 209 P. 576.

Then, in April, 1921, the deed to plaintiff was executed and recorded, and he took possession with continuous claim of title, openly, notoriously, and adversely exercised. During these 17 years, with all these hostile acts of ownership, no complaint was ever made. We are therefore of the opinion that the defendant has waived whatever rights he may have enjoyed.

[8] For the reason that the defense set up in this action constitutes a collateral attack upon the decree of distribution and that it furnished color of title under which adverse title was acquired, we are of the opinion that the findings of the court are not at variance, but can be reconciled to support the judgment.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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80 Cal. App. 56

SHEEAN v. FOSTER. (Civ. 3169.)

(District Court of Appeal, Third District, California. Nov. 29, 1926.)

1. Automobiles 🔑181(1)—Only ordinary care required of automobile driver as to one not passenger for hire (Civ. Code, §§ 1714, 2096).

Plaintiff, riding in car driven by defendant, who was not a passenger for hire, was entitled only to exercise of ordinary care and diligence by defendant for her safe carriage, in view of Civ. Code, §§ 1714, 2096.

2. Automobiles 🔑244(20)—Evidence held to show driver of automobile striking tree did not exercise ordinary care for safety of occupant.

Evidence, in suit for injuries received when defendant's car ran into tree while he was looking for switch key, *held* to show that defendant did not exercise ordinary care for safety of occupant.

3. Automobiles 🔑245(87)—Contributory negligence of occupant of automobile striking tree held for jury.

Contributory negligence of occupant of automobile striking tree while driver looked for switch key *held* for jury.

4. Trial 🔑253(4)—Instruction omitting element that plaintiff's negligence must have been proximate cause of automobile accident to bar recovery held erroneous.

In suit by automobile passenger for injuries, instruction omitting element that plaintiff's negligence must have been proximate cause of accident to bar recovery *held* erroneous.

5. Damages 🔑216(8)—Instruction limiting damages for loss of time to time of filing complaint held erroneous.

Instruction that one suing for damages for injuries received in automobile accident was limited to damages for loss of time occurring before date of filing complaint *held* erroneous.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Margaret Sheean against W. B. Foster. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Theo. L. Breslauer, of San Francisco, and J. O. Goldstein, of Chico, for appellant.

Clinton W. Johnson, of Oroville, for respondent.

PULLEN, Justice pro tem. This is an action for personal injuries sustained by the plaintiff while riding in the automobile of defendant, which left the road and collided with a tree standing near the highway. The cause was tried by a jury and verdict for the defendant returned. Following the entry of judgment thereon plaintiff appeals, urging as a ground for reversal the insufficiency of the evidence to show contributory negligence and the giving by the court of certain instructions.

Defendant, Foster, was at the time referred to herein the proprietor of a mountain resort at Berry creek, about 18 miles from the city of Oroville. Upon the day in question Foster had arranged to go to Oroville, and, according to the testimony of defendant, plaintiff said to him, "I would like to go to Oroville with you," to which defendant replied, "there will be an awful crowd—it is crowded; and I said, 'There is four men going and you make the fifth, and there would be six in the car, and it would make it awful crowded'; * * * and when I came out (of ice cream parlor) and she was in the car."

The circumstances surrounding the injury to plaintiff are depicted in the testimony of defendant, called by plaintiff as a witness under the provisions of section 2055 of the Code of Civil Procedure:

> "Q. How did that accident occur? A. It occurred just like this: This key had fallen out and every time when it fell it always fell to the right because the key is on that side of the post and she would be—being crowded I couldn't reach down. It was impossible for me to reach it because she was a good-sized woman, and I was crowded, and it fell down on her side, and I was driving along slowly, and I took my foot this way and kicked it over, and I guess every one was looking out the window, I don't know, no one said anything, and the first thing I knew some one said 'look out,' and just about that time I hit the tree with the top and windshield, and she was then down after this key, and it was about 20 feet to the next tree. And I think about that—it might have been less—and I just stepped on the brake, and I hit the other tree, and that jarred the windshield loose just as she rose up. I was sitting in there, and the other man was sitting in there, and we never got a scratch, and it never hurt my motor, and she got out, and the motor run right along, and there was a car come along, and the man driving it he took her to the hospital right away as soon as he could, and I never killed my motor.
>
> "Q. When you run off of the road you were looking at the bottom of the car? A. I was looking somewhere—I wasn't looking at the road. I was trying to get the key.
>
> "Q. How far did you go before you hit that tree when you left the road? A. Oh, probably 60 or 70 feet maybe.
>
> "Q. Then, if you say were going 12 or 15 miles an hour, do you mean that you could not stop your car before hitting that tree 60 or 70 feet away? A. If I was looking and saw it, I suppose I could have stopped; sure I could. I could stop the car within a few feet. * * *
>
> "Q. How long a space would it take you to stop a car going 12 to 15 miles an hour? A. 10 or 12 feet.
>
> "Q. On this occasion even though you were going 12 to 15 miles an hour and you left the road you traveled about 60 to 70 feet before you hit the tree? A. Possibly so.
>
> "Q. Please tell the jury what happened to the car when you hit the tree. A. When I grazed the first tree that caught the side of the windshield and the top, and that is what broke everything loose, this is what broke the glass in the windshield and it was just—that is why my attention was called to it—just as I got to the first tree, and I shoved on the brakes and went into the other tree in about 20 feet, not that far, I don't know. I don't think it was over 10 feet. You can get the measurement where they are; they are there.
>
> "Q. You side-swiped one tree first and that tree was about 40 feet from the road where you left the road? A. No, sir.
>
> "Q. How many feet was it from the road when you side-swiped the first tree? A. It was right by the road.
>
> "Q. How many feet from the point where you hit? A. I don't know exactly; 35 or 40 or 50 feet. I never measured it.
>
> "Q. After you side-swiped that tree your car still went forward and you crashed headon into another tree? A. The man called my attention that I was off of the road, and I stepped on the brake and stopped it when I hit the other trees.
>
> "Q. During the time your car was traveling off of the road side-swiping the tree you were still looking for the key? A. When it struck the first tree they called, and I looked, and I felt the jar, and I stepped on the brake."

By the key referred to above was meant the ignition key that fits into a lock on the steering post of the particular type of automobile driven by the defendant. It appeared that the key or keyhole was worn and occasionally it would fall out of the switch and thereby cut off the spark, causing the engine to miss fire and stop, which condition defendant further testified had continued for some time and was known to him to exist prior to the beginning of the trip on the day of the accident.

> "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself." Section 1714, Civ. Code.

Defendant in his answer set up the plea of contributory negligence, claiming that the act of plaintiff in becoming a passenger and riding in the front seat of the automobile between the driver, defendant herein, and another man, was upon her part such an act of negligence as to preclude her from recovering for any injuries proximately caused by the negligence of defendant.

[1-3] Plaintiff attempted to prove that she was a passenger for hire, which would by operation of law impose upon defendant a certain degree of care. We are of the opinion that there was no proof that she was such passenger for hire and that defendant owed her merely ordinary care and diligence for her safe carriage. Under the provisions of section 2096 of the Civil Code "a carrier of persons without reward must use ordinary care and diligence for their safe carriage." And we are of the opinion that defendant did not, in view of the facts adduced at the trial, exercise such degree of care and diligence for the safety of plaintiff, and that, as a matter of law, the defense of contributory negligence was not established.

[4, 5] Appellant also criticizes two instructions given by the court as follows:

> "Before you can find a verdict for the plaintiff in this case you must believe from the evidence that plaintiff's injuries, if you believe she suffered any injuries from that accident, were caused solely from the negligence of the defendant, and also you must believe that the

plaintiff was without negligence on her part, and in determining this question as to whether the defendant exercised ordinary care in driving the machine, and whether the plaintiff exercised care for her own safety on that trip, you will consider all the testimony bearing upon the question describing the manner in which the defendant was driving the car and the manner in which the plaintiff acquired her seat in the said car and her actions during the trip while she was seated in said car, and especially at the time of the accident,"

—which instruction omitted the necessary element that the negligence must have been the proximate cause of the accident, and the instruction:

"You will further find for her the value of her lost time if you believe she has lost time, not, however, beyond the period of the filing of this suit, September 20, 1923, and not to exceed the sum of $20 per week,"

—which erroneously limits the value of the lost time of appellant to a period not beyond the date of the filing of the suit, which is not the limit of time imposed by law, but the jury may consider any period of time if it is made to appear to them that the injury will extend beyond the filing of the complaint. Defendant urges that this court cannot review these instructions, inasmuch as the record does not disclose at whose request they were given. But, without passing upon that question, we merely point out the error, so that upon a new trial of this action it may not be repeated.

For the foregoing reasons, we are of the opinion that the judgment should be reversed, and the cause remanded for a new trial, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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80 Cal. App. 470

CURTIN v. SALOMON. (Civ. 3195.)

(District Court of Appeal, Third District, California. Dec. 28, 1926.)

1. Pleading 🔑121(2)—Denial that plaintiff has complied with statute relating to doing business under fictitious name cannot be based on want of information (Code Civ. Proc. § 437; Civ. Code, § 2466).

Under Code Civ. Proc. § 437, a denial that plaintiff or his assignors have complied with Civ. Code, § 2466, relating to doing business under a fictitious name, cannot be made on information and belief, and hence denial based on ground that pleader has not sufficient information on the subject to enable him to answer is insufficient.

2. Pleading 🔑121(2)—Denial of corporate capacity of plaintiff's assignor cannot be based on want of sufficient information (Code Civ. Proc. § 437).

Denial of the corporate capacity of plaintiff's assignor in action for goods, wares, and merchandise cannot be based on want of sufficient information, in view of Code Civ. Proc. § 437.

3. Pleading 🔑121(4)—Existence of fact which can be ascertained by inspection of public record cannot be put in issue by denial on information and belief.

When the existence of a fact may be ascertained by an inspection of a public record, its existence cannot be put in issue by a denial solely on information and belief.

4. Pleading 🔑121(1)—Under statute denial of allegations can be based only on lack of both information and belief (Code Civ. Proc. § 437).

Under Code Civ. Proc. § 437, denial of allegations of complaint can only be made for lack of both information and belief.

5. Pleading 🔑343—In action for goods, wares, and merchandise, defendant's refusal to go forward with proof of affirmative allegations held to entitle plaintiff to judgment on pleadings.

In action for goods, wares, and merchandise where defendant affirmatively pleaded delay in delivery and defects reducing value of goods delivered, his refusal to go forward with proof of his affirmative allegations on motion of plaintiff entitled plaintiff to judgment on pleadings.

6. Depositions 🔑92—Alleged irregularities in taking deposition, which was never completed and admitted only as statement, held immaterial.

Alleged irregularities in taking deposition of defendant *held* immaterial, where deposition was never completed and admitted only as statement and not deposition of defendant.

7. Parties 🔑59(2)—Substitution as party plaintiff of one succeeding to all plaintiff's rights held proper under statute (Code Civ. Proc. § 385).

In action for goods, wares, and merchandise, substitution as party plaintiff of one shown to have succeeded to all rights of plaintiff in the action *held* properly allowed under Code Civ. Proc. § 385.

8. Depositions 🔑53—Assignment that so-called deposition was taken before notary later substituted as plaintiff held not to disclose error in view of facts.

Assignment that so-called deposition was taken before a notary public who was later substituted as plaintiff *held* not to disclose error, where so-called deposition was taken by stipulation before a stenographer and was in fact never completed but used only as a statement of defendant not as a deposition.

9. Parties 🔑63—Assignment that substituted plaintiff had not complied with statute relating to use of fictitious name held not to disclose error, in view of statute (Civ. Code § 2466; Code Civ. Proc. § 385).

In action for goods, wares, and merchandise where successor in interest of plaintiff was substituted as plaintiff, assignment that such substituted plaintiff had not complied with

Civ. Code, § 2466, relating to doing business under a fictitious name, *held* not to disclose error, in view of Code Civ. Proc. § 385, permitting action to be continued in name of original plaintiff.

10. Corporations ⊂⊃659—Defendant in action for goods, wares, and merchandise held estopped to assert that plaintiff's assignor, foreign corporation, was unlawfully doing business under fictitious name (Civ. Code, §§ 354, 355, 2466).

Defendant in action for goods, wares, and merchandise *held* estopped to assert defense plaintiff's assignor was a foreign corporation doing business under a fictitious name, in violation of Civ. Code, §§ 354, 355 notwithstanding compliance with section 2466.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by E. E. Curtin, doing business under the name and style of D. A. Curtin, against M. I. Salomon, in which E. M. Casey was substituted as plaintiff. From judgment for plaintiff, and from order for substitution of parties plaintiff, defendant appeals. Judgment and order affirmed.

Milton A. Nathan, of San Francisco, for appellant.

Walter Christie and Paul A. McCarthy, both of San Francisco, for respondent.

PLUMMER, J. Action by plaintiff for goods, wares, and merchandise upon assigned claims. Plaintiff had judgment and defendant appeals. Two appeals are presented upon one transcript, one from the judgment and one from the order of substitution of E. M. Casey as party plaintiff.

The transcript shows substantially the following facts: The American Type Founders' Company, a New Jersey corporation, authorized to transact business in the state of California, maintains a branch in San Francisco and also owns and does business in an allied industry under the designation of Printers' Machinery Supply Company. Section 2466, Civil Code, relating to doing business under a fictitious name, appears to have been complied with. The appellant owned and operated two printing establishments, one in San Francisco and one in Los Angeles. Appellant purchased certain wood type at the agreed price of $1,631.82 from the American Type Founders' Company, which was delivered to him in Los Angeles; appellant also purchased from Printers' Machinery Supply Company a printing press and certain supplies at the agreed price of $3,624.40. This press and supplies were also delivered in Los Angeles. Appellant has paid nothing to the American Type Founders' Company on the purchase price of the wood type; on the purchase price due to Printers' Machinery Supply Company, appellant has paid the sum of $1,000. The claim of the American Type Founders' Company was assigned to D. A. Curtin, as likewise was the claim of Printers' Machinery Supply Company. D. A. Curtin is a fictitious person, under which E. E. Curtin, the original plaintiff, did business. This plaintiff had also complied with the requirements of section 2466, Civil Code.

The answer of the appellant admitted the purchase of the merchandise referred to and then sets forth certain affirmative matters, to wit: That the merchandise ordered from the American Type Founders' Company at the agreed price of $1,631.82 was to be delivered to him in Los Angeles, free and clear of freight and cartage charges, but was delivered subject to such charges and the appellant had to pay therefor the sum of $200; that there was delay in the delivery of said merchandise, which reduced the value of said merchandise to $500 less the sum of $200 paid out by him and that there was not due to plaintiff upon account of the purchase of said merchandise any other than the sum of money so admitted; that the press purchased by the appellant was for the sum stated in plaintiff's complaint; that said press was to be in good working condition, with no broken parts; that the press had never been in good working condition and certain parts were broken; that by reason of which the press was worth only $1,500, on which he had paid the sum of $1,000, leaving a balance due of $500. The defendant then alleged his willingness to pay this sum and allow judgment to be entered therefor.

The answer of the appellant purported to deny the assignment of the claims to the plaintiff; also purported to deny the incorporation of American Type Founders' Company; also purported to deny compliance with section 2466, Civil Code. These denials are in the following form:

> "Said defendant avers that he has not sufficient information on the subject sufficient to enable him to answer paragraph 1 of said second amended complaint and basing his denial upon said ground, the said defendant denies," etc.

This denial refers to the doing of business under the fictitious name of D. A. Curtin by the plaintiff and also the filing of the necessary certificate by the plaintiff. On the same ground the defendant denies that the American Type Founders' Company is a corporation, etc.; on the same ground denies that said American Type Founders' Company had filed the necessary certificate. Changing the wording slightly, the answer reads:

> "Defendant avers that he has not sufficient information on the subject sufficient to enable him to answer the allegations contained in paragraph 4 of said second amended complaint, and basing his denial upon said ground, said defendant denies that heretofore or prior to

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⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

> the commencement of this action said American Type Founders' Company transferred its indebtedness to the plaintiff."

After denying the indebtedness of the Printers' Machinery Supply Company and alleging the matters which we have hereinbefore stated, the defendant follows the form of denial herein last set forth in denying the assignment of said claim to the plaintiff. The allegation in the complaint of business being done under the firm name and style of Printers' Machinery Supply Company, a fictitious name, is undenied.

[1-3] All the grounds urged upon this appeal for reversal are strictly technical. There does not seem to be a single assignment of error which has anything of merit, or tending in the least to show that the defendant had any reasonable cause whatever to contest the entry of judgment in the lower court for the value of the merchandise sold and delivered to the defendant, as alleged by the plaintiff's assignors. For this reason we do not deem it necessary to set out the proof in the transcript establishing the facts alleged in plaintiff's complaint, but will content ourselves with saying that the transcript contains sufficient testimony to support the findings of the trial court. We do this, because there is a sufficient technical answer to every technical objection made by the appellant. The denials in the answer that the plaintiff and the plaintiff's assignors had not complied with section 2466, Civil Code, could not be made upon information and belief. In this case the denial is not even upon information and belief, but simply setting forth that the defendant has not sufficient information upon which to deny the allegations in the complaint, and basing his denial upon the lack thereof, denies, etc. The law is well settled, as stated in Art Metal Const. Co. v. A. F. Anderson Co., 182 Cal. 29, 186 P. 776, that:

> "When the existence of an alleged fact may be ascertained from an inspection of a public record its existence cannot be put in issue by a denial based solely upon information and belief."

See, also, Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 P. 811; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Montgomery v. Fidelity & Deposit Co., 69 Cal. App. 251, 230 P. 993; Yokohama Specie Bank v. Trans. Oceanic Co., 54 Cal. App. 533, 202 P. 346.

[4] The denials as to the corporate capacity of plaintiff's assignor is likewise insufficient to raise an issue. Section 437 of the Code of Civil Procedure permits a defendant who has no information or belief upon the subject sufficient to enable him to answer the allegations of a complaint to base his denial thereon, but he cannot base his denial simply upon lack of information. He can only do so upon a want of both information and belief. The answer in the form filed in this case tenders no issue. Naftzger v. Gregg, 99 Cal. 83, 33 P. 757, 37 Am. St. Rep. 23; Turner v. Watkins, 36 Cal. App. 503, 172 P. 620; Nave v. Graham, 37 Cal. App. 332, 174 P. 76. Thus it appears that in compliance with section 2466 of the Civil Code the corporate existence of the American Type Founders' Company stands admitted in this cause and, also the doing of business by the Printers' Machinery Supply Company is admitted and required no proof, even though the trial court did require proof to be made.

[5] At the beginning of the trial the plaintiff moved that the defendant be required to submit proof as to the affirmative allegations contained in his complaint. The defendant declining to go forward, the plaintiff moved for judgment upon the pleadings. This was in accordance with the procedure laid down in the cases cited in Cooney v. Gray, 49 Cal. App. 664, 194 P. 61. The court denied the motion for judgment on the pleadings. It is evident the plaintiff's motion should have been granted. The plaintiff then made proof of the sale and delivery of merchandise as alleged in the pleadings and also made proof of all other matters therein contained. The defendant offered no proof.

[6, 7] Objection is made that there was irregularity in the taking of the deposition of the defendant. The record shows, however, that this deposition was never completed, was never signed by the defendant, and was introduced only as his statement and not as his deposition. After the trial had been concluded, judgment entered and motion for a new trial denied, upon the application of E. M. Casey, showing that he had succeeded to all the rights in this action theretofore owned and possessed by E. E. Curtin, substitution of plaintiff was ordered. It is from this order that the appellant also appeals. The record shows that at the time of the institution of the action the cause of action was owned and possessed by E. E. Curtin; that during the continuance of the action all the rights of the plaintiff were assigned and set over to E. M. Casey. Section 385 of the Code of Civil Procedure expressly provides that in such cases the assignee may be substituted as the party to whose interest he has succeeded, or that the action may be continued in the name of the original party. See, also, Northern Railway v. Jordan, 87 Cal. 23, 25 P. 273; Hohn v. Pauly, 11 Cal. App. 724, 106 P. 266; Walsh v. Soule, 66 Cal. 443, 6 P. 82.

[8, 9] The objection is further assigned that the so-called deposition of the defendant to which we have referred was taken before E. M. Casey, as a notary public. The record shows, however, that the so-called deposition of the defendant was taken by stipulation before a stenographer, and that E. M. Casey, the notary public before whom it purported to be taken, need not be present. The deposition, however, was not certified to, never completed, never signed, and therefore the

objection of the defendant is without merit. As a statement of the defendant no objection appears to have been made to its admission, and therefore it does not require any further consideration on our part. The assignment of the plaintiff E. E. Curtin was first made to E. J. Casey and E. M. Casey and then fully taken over by E. M. Casey. Objection is now made that there is no showing that E. M. Casey has complied with section 2466, Civil Code. As stated in Amundson v. Shafer, 36 Cal. App. 398, 172 P. 173, noncompliance with the Code in this respect to such filing and publication constitutes matter of special defense to be raised by answer and need not be alleged affirmatively. Furthermore, as the law permits an action of this kind to go to final determination under the name of the original plaintiff, who has complied with the section, we do not very well see how this objection is tenable when E. M. Casey does not come into the cause until after entry of judgment.

[10] It is further insisted that the doing of business under the designation of "Printers' Machinery Supply Company" is beyond the power of the American Type Founders' Company, a corporation, and therefore that recovery cannot be had for the value of the press sold and delivered to the defendant. In this particular, the appellant admits that he has found no authority on the subject and simply presents for our consideration sections 354 and 355 of the Civil Code, in connection with section 2466 of the same Code, and insists that compliance with the latter section is not sufficient. It is not necessary for us to determine whether a foreign corporation can, or cannot, or whether a domestic corporation can or cannot, do business in this state under a fictitious name, for the simple reason that there is another principle announced which estops a creditor from using this convenient method of discharging his obligation. In Yancy v. Morton, 94 Cal. 558, 29 P. 1111, we find the following:

> "It is alleged that the San Joaquin Lumber Company, the assignor of the plaintiff, is a copartnership formed from the Hanford Lumber Company and the Puget Sound Lumber Company (corporations). The legality of the formation of the partnership is attacked by defendant, but under the principles of Fresno Canal & Irrigation Co. v. Warner, 72 Cal. 383 [14 P. 37], and cases there cited, the defendant is estopped from making such a defense. It is there decided that 'when one has contracted with an alleged corporation, and is sued for failure to perform his contract, he cannot be heard to say that the corporation has no existence, and for that reason no contract was made."

This rule applies both ways. Thus, in Karns v. Olney, 80 Cal. 90, 22 P. 57, 13 Am. St. Rep. 101, the court says:

> "When the owners of land use a corporate name in making a contract for its sale, and instruct their agent to prepare and sign the contract in that form, they cannot impeach the contract because made in such name."

In Fresno Canal, etc., Co. v. Warner, 72 Cal. 379, et seq., 14 P. 37, supra, the following statement found in Lehman v. Warner, 61 Ala. 455, is quoted with approval:

> "It is too well settled now to be controverted that a party who contracts with a corporation, whether it be by subscription for its stock, or by promissory note, bond, mortgage, or other form of contract, is estopped from denying the existence of the corporation."

And then adds:

> "It has often been said that when a corporation sues, its corporate existence must be shown if it is controverted. When the action is against one contracting with it in its corporate capacity, the contract furnishes the evidence."

Quoting also from Close v. Glenwood Cemetery, 107 U. S. 477, 2 S. Ct. 275 (27 L. Ed. 408):

> "One who deals with a corporation as existing in fact is estopped to deny as against the corporation that it has been legally organized."

Other cases are also there cited, but the foregoing are sufficient to show that appellant is not in a position to raise that technical defense as a bar to the collection of the money due for the merchandise purchased by him.

It may be further stated that the substitution of E. M. Casey as plaintiff in this action was caused by the fact that some time after judgment was entered herein E. E. Curtin died.

The appellant in this case having chosen to introduce no evidence whatever to establish the affirmative allegations of his answer and the other matters appearing, which we have stated, there appears no valid reason why we should lengthen this opinion by setting forth testimony showing that the findings of the trial court, upon which the judgment is based, are supported.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PRESTON, Justice pro tem.

79 Cal. App. 726

BLUMENTHAL v. LARSON et al. *
(Civ. 5661.)

(District Court of Appeal, First District, Division 1, California. Nov. 19, 1926.)

1. Statutes 🔑181(1)—Statutes should be construed to effectuate legislative intent.

Primary rule of construction of statutes is to ascertain and give effect to legislative intent.

2. Statutes 🔑190—Unambiguous statute leaves no room for construction.

Where statute is unambiguous, there is no room for construction.

3. Statutes 🔑189—Mere literal construction of statute ought not to prevail if opposed to legislative intent, apparent from act itself.

Mere literal construction of statute ought not to prevail if opposed to intention of Legislature, apparent from act itself, and, if words are sufficiently flexible to admit of some other construction, it should be adopted to effectuate the intention.

4. Statutes 🔑184, 211—Act should be construed in view of its title and purpose, and language thereof expanded or restrained to effectuate such purpose.

Statute should be construed in view of its title and purpose, and, when this is ascertained, general words or phrases may be restrained to it, and, if it is of narrower import, may be expanded to effectuate the intent.

5. Brokers 🔑4—Statute requiring broker's bond, conditioned on faithful compliance "with provisions of law," held not applicable to broker's mere breach of contract (Corporate Securities Act, § 5, subd. 3, as amended by St. 1923, p. 90, and section 14).

Provision of Corporate Securities Act (St. 1917, p. 673) § 5, subd. 3, as amended by St. 1923, p. 90, providing that broker's bonds shall be conditioned on faithful compliance "with the provisions of law" by applicant, *held* applicable to such statute only and not to all laws generally, and, being enacted to prevent fraud in sale of securities, as defined by section 14, did not apply to broker's mere breach of contract for sale of securities.

6. Brokers 🔑4—Statutory broker's bond is not credit insurance contract, and liability thereon does not extend beyond express terms of act (Corporate Securities Act, § 5, subd. 3, as amended by St. 1923, p. 90).

Broker's bond, required by Corporate Securities Act (St. 1917, p. 673) § 5, subd. 3, as amended by St. 1923, p. 90, is not contract of credit insurance, but is strictly a statutory bond, liability on which does not extend beyond terms of act, doctrine of strictissimi juris being applicable.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles J. Blumenthal, doing business under the name and style of the A. E. White Company, against J. W. Larson and others. From an order dismissing the action against the defendant United States Fidelity & Guaranty Company, plaintiff appeals. Affirmed.

Superseding former opinion, 248 P. 681.

Harry C. Bocchio and Ralph Starke, both of San Francisco, for appellant.

Horace W. B. Smith and P. R. Lund, both of San Francisco, for respondent.

Joseph G. De Forest, L. W. Irving, Redman & Alexander, Jesse H. Steinhart, John J. Goldberg, Hartley Peart, Gus L. Baraty, John Ralph Wilson, Ernest T. Hall, Cooley & Gallagher, and Guy Leroy Stevick, all of San Francisco, amici curiæ on behalf of respondent.

H. Raymond Hall, of Oakland, amicus curiæ.

TYLER, P. J. Appeal from an order dismissing an action against a surety on a bond given under the Corporate Securities Act.

There is no dispute as to the facts. The complaint contained two counts arising out of the same transaction. The first is an open book account for securities, bought and sold by plaintiff for the account of the defendant Larson, under which it is sought to recover the sum of $620. The second is for a breach of a contract for the sale and purchase of securities, sold by plaintiff and purchased by the defendant, and it alleges that by reason of such breach plaintiff was damaged in the sum of $620. The complaint further alleges, in each count thereof, that defendant Larson was an investment securities broker, duly licensed as such by the commissioner of corporations; that on the 30th day of June, 1924, the defendant United States Fidelity & Guaranty Company executed to the commissioner of corporations the bond required by the Corporate Securities Act to be filed by all applicants for certificates authorizing them to act as investment securities brokers at the time of filing their application therefor; that said bond was in the sum of $5,000 and was executed by defendant Larson, as principal, and by the defendant United States Fidelity & Guaranty Company as surety, said bond being given to guarantee the faithful compliance with the provisions of law on the part of defendant Larson, and on the part of his salesmen, agents, and employees; that said bond was renewed on the 15th day of February, 1925, by said principal and surety and during all the times mentioned in the complaint was in full force and effect. Defendant surety company interposed a general demurrer to the complaint, alleging that it did not state facts sufficient to constitute a cause of action against it. The court sustained the demurrer and upon plaintiff's failure to amend entered judgment dismissing the action as to said defendant surety company. This is an appeal from the

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*Hearing denied by Supreme Court January 17, 1927; Waste, C. J., and Curtis, J., dissenting.

ruling on demurrer and from the judgment of dismissal.

The action, in so far as it affects the surety company, is bottomed upon subsection 3 of section 5 of the Corporate Securities Act, as amended in 1923. Stats. 1923, p. 90. The subdivision reads as follows:

> "At the time of filing an application for a broker's certificate, the applicant shall deliver to the commissioner of corporations, a good and sufficient bond for $5,000 payable to the state of California, to be executed by said applicant, together with a surety company, and to be approved by the commissioner of corporations. Said bond shall be conditioned upon the faithful compliance with the provisions of law by said applicant and by all agents representing the said applicant, and shall provide that upon failure to so comply the applicant shall be liable to pay any and all persons who may suffer loss by reason thereof."

The sole question here presented is the meaning to be given to two phrases contained in the above-quoted paragraph of the act in question, reading as follows:

> "Said bond shall be conditioned upon faithful compliance *with the provisions of law* by said applicant * * * 'and' upon failure to so comply the applicant shall be liable *to any and all persons who may suffer loss* by reason thereof."

It is appellant's contention that the phrase "with the provisions of law" should be so construed as to include the transaction in question, and that this being so, the bond is liable for the loss suffered by plaintiff by reason of defendant Larson's refusal to accept and pay for the balance of the stock ordered purchased for his account.

[1-4] While the phrase "provisions of law" is a very broad and general one, we are of the opinion that it only refers to the provisions of the Corporate Securities Act. There are numerous rules of statutory construction to guide courts in ascertaining the true meaning of a statute. A statute is to be construed according to the intent of the law-making body. The intent is the vital part, and the primary rule of construction is to ascertain and give effect to that intent. If a statute is plain, certain, and unambiguous, so that no doubt arises from its own terms as to its scope and meaning, a bare reading suffices and there is no room for construction. The mere literal construction, however, ought not to prevail if it is opposed to the intention of the Legislature apparent by the act itself; and, if the words are sufficiently flexible to admit of some other construction, it should be adopted to effectuate the intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. The language of an act should be construed in view of its title and its purpose. It is indispensable to a correct understanding of the statute to inquire first what is the subject of it and what object is intended to be accomplished. When this is ascertained, the answer is found to all its intricacies. General words or phrases may be restrained to it, and those of narrower import may be expanded to effectuate the intent.

[5] Guided by these rules, it seems plain to us that the phrase in question relates solely to the provisions of the Corporate Securities Act, and not to all laws generally. The title of the act in question declares it to be one for the regulation and supervision of companies, brokers, and agents, to prevent fraud in the sales of securities, and it provides for the enforcement of the act and punishment for violation of its provisions. The manifest and declared purpose is to prevent fraud in the sale of securities, as the same are defined by section 14 of the statute. This section sets forth the prohibited acts which would constitute fraud, the prevention of which was the purpose of the statute and bond. It reads as follows:

> "Every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this act, or of the Constitution of this state, or who, in any application to the commissioner, or in any proceeding before him, or in any examination, audit, or investigation made by him or his authority, knowingly makes any false statement or representation, or who, with knowledge of its falsity, files or causes to be filed in the office of the commissioner any false statement or representation concerning such company or the property which it then holds or proposes to acquire, or concerning its officers or its financial condition or other affairs, or concerning its proposed plan of business, or who, with knowledge of the falsity of any such statement or representation, issues, executes, or sells, or causes to be issued, executed, or sold, any security, without first informing the commissioner of the falsity of such statement, in writing, or who, directly or indirectly, knowingly applies, or causes or assists in causing to be applied, the proceeds, or any part therof, from the sale of any security to any purpose contrary to the provisions of the permit authorizing the issue of such security, or to any purpose specified in such permit in excess of any amount limited in such permit to be used for such purpose, or who, with knowledge that any security has been issued or executed in violation of any of the provisions of this act, sells or offers the same for sale, or who, with knowledge that any advertisement, pamphlet, prospectus, or circular concerning any security contains any statement that is false or misleading, or otherwise likely to deceive a reader thereof issues, circulates, or publishes the same, or shall cause the same to be issued, circulated, or published, or who, in any other respect, willfully violates or fails to comply with any of the provisions of this act, or who, in any other respect, willfully violates or fails, omits, or neglects to obey, observe or comply with any

order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under the provisions of this act, is guilty of a public offense and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment." 1 Deering, Gen. Laws, 1923, p. 1414.

It is clearly apparent from a reading thereof that the section is confined solely to sales of worthless securities and that it has no application to transactions between brokers and their clients generally. The law affords an ample remedy for the breach of a contract or for any illegal act with reference to sales of legitimate securities, but it is not to be found in an action against the bond given in conformity to the provisions of the act in question.

[6] The bond required under the act was never intended to be a contract of credit insurance. It is strictly a statutory bond and liability thereon does not extend beyond the terms of the act. The doctrine of strictissimi juris applies. Here no fraud was alleged in the sale of any security, good or otherwise. The defendant Larson did not fully comply with the terms of his contract of purchase. In a broad sense, he may be said to have violated the substantive law in breaching his contract of sale, but this is not the violation of law for which the bond was given. To so construe the phrase would be to create a right of action under innumerable circumstances and conditions. The bond, in our opinion, was not given to insure, on the part of Larson, his proper adherence to all laws, substantive and otherwise, but solely for a compliance with the provisions of the statute, which, as we have seen, was enacted for the purpose of preventing the formation of corporations and the sale of stock thereof without the supervision of the corporation commissioner. This is the manifest intent and purpose of the act, and the bond beyond any question was given solely for the purpose of securing compliance with its provisions. People ex rel. New York, etc., R. Co. v. Willcox, 200 N. Y. 423, 94 N. E. 212.

We are cited to the case of Zapf v. Redenour, 198 Iowa, 1006, 200 N. W. 618, as upholding appellant in his contention. The bond upon which the action was predicated in that case was given in conformity to a statute much broader in its terms than the one with which we are here dealing. It is therefore not authority upon the question. Statutes of the character here involved are being amended so as to be more comprehensive in their scope. Our own statute has been so amended. Stats. 1925, p. 962. The present controversy, however, is in no manner affected by the change, as the cause of action here alleged arose long prior to such amendment. The extent of the liability of a bond given under the law as it now stands is a question we are not called upon to consider or discuss. From what we have said, it follows that the judgment should be affirmed. It is so ordered.

We concur: CAMPBELL, Justice pro tem.; KNIGHT, J.

79 Cal. App. 756

RUBIN v. PLATT MUSIC CO. (Civ. 5378.)

(District Court of Appeal, Second District, Division 2, California. Nov. 23, 1926.)

1. Appeal and error 🔑939—Objections to settlement of transcript, filed within six months after default in giving notice of request therefor, are presumed overruled or waived.

Where transcript has been settled by trial judge within six months after default in giving notice of request for transcript, it is presumed that objections to its settlement were raised in trial court, and relief from default, granted, or that respondent waived default by failure to object in trial court.

2. Appeal and error 🔑939—Objections to transcript settled on stipulation as to its correctness within 6 months after default in giving notice of request are presumed waived.

Respondent, certifying to correctness of transcript filed within six months after default of appellant in giving notice of request for transcript, is presumed to have waived default by failure to object in trial court.

3. Appeal and error 🔑627(2)—Appeal will not be dismissed for want of transcript, where appellant's brief raised questions not requiring transcript, and judgment roll was on file.

Where appellant's opening brief raised points which would not necessitate transcript, and papers making up judgment roll were on file, appeal will not be dismissed on ground that reporter's transcript was not filed in time.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Henry Rubin against the Platt Music Company. Judgment for plaintiff, and defendant appeals. On motion to dismiss appeal. Motion denied.

Glen E. Huntsberger and Peyton H. Moore, both of Los Angeles, for appellant.
Harry Sherr, for respondent.

THOMPSON, J. This is a motion to dismiss the appeal on the ground that no transcript or bill of exceptions was filed within the time required. It appears that judgment was entered on February 16, 1926, and notice of entry thereof given on the same day; that notice of intention to move for a new trial was filed within the time and on February 26, 1926; that nothing further was done with respect to the motion for a new trial, and therefore it was denied by lapse of time on April 16, 1926; on March 3, 1926, the appellant gave notice that it appealed; the motion to dismiss the appeal was served on May 13, 1926, and came on for hearing on the 14th day of June, 1926. In the meantime, and on June 5, 1926, both the clerk's transcript and the reporter's transcript were filed in this court.

The two transcripts having been filed prior to the time that the motion came on for hearing, the real ground of the motion to dismiss is that the appellant did not give notice of the request for a transcript of the testimony within ten days after notice of the entry of the judgment, or within ten days after motion for a new trial was denied by lapse of time.

In the case of In re Barney, 191 Cal. 18, 214 P. 853, it is said:

> "It has been frequently held and is now thoroughly established that the failure to give the notice to prepare the typewritten record for use on appeal is not a ground for a dismissal of the appeal. If, however, it appears from the entire record that, in the absence of a properly authenticated reporter's transcript, there is no record upon which a reversal of the decision could be predicated, then the proper course is to move for an affirmance of the judgment on that ground, and upon such application the court will consider the question as to whether or not the record was properly prepared."

And in Mill Valley v. Massachusetts, etc., Co., 189 Cal. 52, 207 P. 253, it is held that diligence in the preparation of the record on appeal should ordinarily be subject to investigation and determination in the trial court rather than in the appellate court.

[1, 2] In re Barney, supra, would be decisive of the question were it not for the fact that in that case the transcript was settled more than six months after the default of the appellant in giving his notice for the preparation of the transcript, which delay was considered to rob the trial court of its jurisdiction to relieve the appellant of his default. But where, as here, the transcript has been settled by the trial judge within the six months' period, it must be presumed, either that the objections to its settlement were raised, as they should have been, in the trial court, and the settlement was the equivalent of relief from that default, or that the respondent waived the default by failure to object in the trial court. The latter would seem to be the situation here, as is evidenced by the stipulation of respondent to the correctness of the transcript.

[3] There is another feature of this case, however, which is determinative of the motion. The appellant's opening brief is on file, together with the clerk's transcript, including those papers going to make up the judgment roll, notice of appeal and the notice to the clerk to prepare transcript. From an inspection of the plaintiff's opening brief, we observe that points are raised which would not necessitate the reporter's transcript, the merits of which we cannot determine at this time, because a determination of the merits would effect an unwarranted advancement of the case. Under a similar state of facts the Supreme Court, in the case of Weaver v. Fickett, 196 Cal. 401, 238 P. 87, refused to dismiss the appeal on the ground that no bill of exceptions or reporter's transcript was required. What is said there is applicable to the situation here.

Motion denied.

We concur: WORKS, P. J.; CRAIG, J.

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80 Cal. App. 50

PEOPLE v. CALVERT. (Cr. 924.) *

(District Court of Appeal, Third District, California. Nov. 29, 1926.)

1. Intoxicating liquors ⟹236(9)—Evidence held to sustain conviction of maintaining liquor nuisance.

Evidence *held* sufficient to sustain conviction of maintaining a common nuisance by keeping and habitually selling intoxicating liquor on premises ostensibly conducted as a restaurant and soft drink parlor.

2. Intoxicating liquors ⟹143—Single sale does not establish nuisance.

A single sale of intoxicating liquor is not sufficient to establish a charge of nuisance.

3. Criminal law ⟹721(1)—Purpose of statute declaring that defendant's failure to testify shall not be used against him is to protect persons not desiring to testify for legitimate reasons (Pen. Code, § 1323).

Purpose of Pen. Code, § 1323, declaring that defendant's neglect or refusal to testify shall not prejudice him nor be used against him on trial, is to protect innocent persons not desiring to be witnesses because of excessive timidity, nervousness, possible confusion, and embarrassment by offenses charged, or compromise by association with others.

4. Criminal law ⟹1119(4)—District attorney's statement, "Why didn't you take the stand and deny it?" held not reversible error, where record did not cite as misconduct, nor appropriately describe, manner of delivery.

District attorney's statement in argument, "She admitted she had a drink of whisky; why didn't you take the stand and deny it?" *held* not ground for reversal of seller's conviction of maintaining common nuisance, where record did not cite statement and manner of delivery as misconduct nor describe manner thereof by appropriate language, but rather indicated that court and counsel regarded pronoun "you" as addressed to defendant's counsel personifying defense, not as referring to defendant.

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*Hearing denied by Supreme Court January 27, 1927; Waste, C. J., and Richards and Langdon, JJ., voting for a transfer.

5. Criminal law ⚷721(3)—It is prejudicial error for district attorney to call jury's attention to defendant's failure to testify and comment thereon as warranting inference of guilt.

It is prejudicial error for district attorney to call jury's attention, directly or indirectly, to fact that defendant has not testified in his own behalf, and to comment thereon as warranting inference that he is guilty.

6. Criminal law ⚷721(5)—District attorney may point out that certain evidence of prosecution is uncontradicted (Pen. Code, § 1323).

District attorney may point out that certain evidence of prosecution stands uncontradicted, without violating Pen. Code, § 1323, providing that defendant's failure to testify shall not prejudice nor be used against him.

7. Criminal law ⚷1171(5)—District attorney's argument concerning failure to deny certain fact and uncontradicted testimony of prosecution held not reversible error.

District attorney's statement in argument, on being interrupted by defendant's counsel, that, "She admitted she had a drink of whisky; why didn't you take the stand and deny it?" and that certain testimony of prosecution stood uncontradicted, *held* not ground for reversal of seller's conviction of maintaining common nuisance, in view of evidence clearly showing maintenance thereof.

Appeal from Superior Court, Sacramento County; George H. Thompson, Judge.

J. C. Calvert was convicted of maintaining a common nuisance, and he appeals. Affirmed.

Donald E. Wachhorst and Wallace Sheppard, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PULLEN, Justice pro tem. The defendant herein was charged and convicted of maintaining a common nuisance, and from the judgment of conviction and the order overruling defendant's motion for a new trial he prosecutes this appeal.

[1] It appears from the evidence that on and for some time prior to November 28, 1925, appellant was conducting a place of business in Sacramento county, ostensibly as a restaurant and soft drink parlor. That the appellant was so operating and conducting the place of business is sufficiently established by the evidence, it appearing therefrom that the name of appellant was on a sign outside the building, and a witness testified that frequently during the year prior to the 28th of November he had seen appellant in and about the premises serving food to the patrons in the restaurant, and particularly is this evidence sufficient in view of the fact there was no evidence offered controverting the fact of management and control other than, of course, the presumption of innocence raised by the plea of not guilty.

About two weeks prior to the day in question a deputy constable saw men and women going into the restaurant or café, and upon looking through the window saw defendant serve a man and woman with a dark liquid in what is commonly known as whisky glasses, and saw the parties drink the liquid from the glasses, and saw the appellant open and close the cash register. Upon a subsequent occasion and about a week before the arrest of appellant a witness testified she bought from appellant at the premises in question three drinks of whisky. On the night of the arrest certain witnesses testified to seeing through a window a number of persons being served by appellant with liquid of some kind in whisky glasses. The officers immediately entered, and appellant was found standing in a small room adjacent to the dining room with a bottle of liquor in his hand and a man near by holding an empty whisky glass. The liquid contents of the bottle in appellant's possession was by analysis found to contain a very large percentage of alcohol of high degree. Shortly after the arrest and while defendant in the custody of a peace officer was arranging for a bail bond, he stated to the officer that he "would never sell another drop."

The foregoing briefly is the testimony adduced at the trial, and is set forth in some detail for the reason that one of the grounds urged by the appellant is the insufficiency of the evidence to sustain the conviction, but as to that point the testimony, if believed by the jury, was amply sufficient to sustain the judgment.

[2] Appellant urges that the prosecution failed to prove the essential elements of the charge of maintaining a common nuisance—namely, that the liquor was kept on the premises and—"was sold, kept, or bartered habitually, continually, or recurrently." U. S. v. Butler (D. C.) 278 F. 677. It is true that a single sale of such, standing alone, is not sufficient upon which to predicate a charge of nuisance, but here there were other circumstances which, if believed by the jury, and taken into consideration with the statement of appellant to the arresting officer and the direct proof of sale to the witness Mrs. Wade of the three drinks of whisky, are sufficient to establish a prima facie case of nuisance.

[3] The point urged by appellant to which he devotes the most attention in his brief is the alleged misconduct of the district attorney in commenting upon the fact that the appellant did not take the witness stand during the trial. That the neglect or refusal of a defendant in a criminal action or proceeding to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding is declared by section 1323 of the Penal Code. The reason for this enactment is well expressed by Mr. Justice

Field in the case of Wilson v. United States, 149 U. S. 60, 13 S. Ct. 765, 37 L. Ed. 650, wherein he says:

> "At common law no one accused of crime could be compelled to give evidence in a prosecution against himself, nor was he permitted to testify in his own behalf. The accused might rely upon the presumption of the law that he was innocent of the charge, and leave the government to establish his guilt in the best way it could. This rule, while affording great protection to the accused against unfounded accusation, in many cases deprived him from explaining circumstances tending to create conclusions of his guilt which he could readily have removed if permitted to testify. To relieve him from this embarrassment the law was passed. * * *" (Giving him the right if he so desired of testifying on his own behalf.)
>
> "But the act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to every one, and not wish to be witnesses. It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. The statute, in tenderness to the weakness of those who from the causes mentioned might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the failure of the defendant in a criminal action to request to be a witness shall not create any presumption against him."

[4] Appellant quotes from the record a number of instances occurring in the argument of the district attorney and during the taking of the testimony. One instance is as follows:

> "But, nevertheless, her testimony is not denied; there was three people there when the drink was purchased, and nobody has denied that the drink was purchased, and I take it that you will accept that testimony, unless you say Mrs. Wade is not capable of telling the truth. Now, that issue is preliminary—
>
> "Mr. Shepard (interposing): I hate to interrupt the district attorney, but—
>
> "Mr. Henderson (interposing): She admitted she had a drink of whisky; why didn't you take the stand and deny it?
>
> "Mr. Shepard: I ask that the court instruct the jury to disregard any statement regarding any witnesses not taking the stand."

Appellant claims that the foregoing was dramatically addressed directly to the appellant, and, if so, an appellate court should not hesitate to reverse the case, but the record does not so show. If such an incident took place counsel should immediately cite the statement and its manner of delivery as misconduct and by appropriate language describe the manner of delivery so the record will show the assignment and an opportunity given the court to see that the citation in the record is a correct narration of the actual occurrence; otherwise, of course, the record of the reporter shows merely the words and not the objectionable dramatic attitude, gestures, emphasis, or other act complained of. There is no such record before us, and, in fact, the record seems to indicate that both court and counsel did not at the time construe the pronoun "you" as referring to the defendant, but rather was used as a pronoun addressed to Mr. Shepard as counsel personifying the defense.

[5] Numerous other excerpts are cited by appellant from the argument of the district attorney to the jury to the effect that certain testimony of the prosecution stood uncontradicted, and, as Justice Chipman said in the case of People v. Wademan, 38 Cal. App. 116, 133, 175 P. 791, 797:

> "The defendant is not required to testify in a criminal case and the statute is intended to prevent the prosecuting officer from taking advantage of the defendant by reason of his failure or refusal to testify. The reviewing courts have very properly held it to be prejudicial error for the district attorney to call the attention of the jury to the fact that the defendant has not testified in his own behalf and to comment on the fact as warranting the inference that his silence is evidence of guilt. The district attorney should not be permitted by indirection to accomplish what the law frowns upon when done directly. And where his address to the jury shows on its face that the district attorney intended to invite attention to the failure of the defendant to take the witness stand and deny the charge and had the apparent effect to emphasize such fact and suggest an inference of guilt, such conduct should receive quick condemnation."

In this case of People v. Wademan the district attorney in his address to the jury said:

> "If her story was contradicted, you might be in doubt, but the defense has left the story stand where it is unimpeached and undisputed, and when you go into the jury room to consider whether the girl was telling the truth, ask yourself this question: 'Is her testimony contradicted by a single witness in this case?' and I say 'No.' Under those circumstances, gentlemen of the jury, you have got to believe that girl; you cannot do anything else."

This was in our opinion a stronger statement than the remarks assigned as misconduct in the case before the court, and there the court used these words:

> "We do not think, however, it can fairly be claimed that the district attorney intended to invite attention to the fact of defendant's not having testified or to suggest any inference deducible from the fact. In speaking of the testimony of the prosecutrix in the way he did he had a right to claim that it was uncontradicted and that no witness had been called to impeach her testimony. * * * We cannot say that the

remarks of the district attorney were so far prejudicial as to justify a reversal."

[6] In view of the authorities construing section 1323 of the Penal Code, the district attorney is permitted to point out that certain evidence of the prosecution stands uncontradicted (People v. Kromphold, 172 Cal. 512, 157 P. 599; People v. Wademan, 38 Cal. App. 116, 175 P. 791; People v. McLeod, 30 Cal. App. 435, 158 P. 506), and from an examination of the foregoing we do not believe the district attorney overstepped his rights.

[7] In view of the evidence which to our minds clearly shows that the appellant was maintaining a common nuisance as charged, we do not believe that, even if the allusions of the district attorney in his argument somewhat overstepped the bounds laid down by the Penal Code and the ethics of a prosecuting attorney, there has been a miscarriage of justice.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 669

CITY OF LOS ANGELES v. HANNON et al.*
(Civ. 5365.)

(District Court of Appeal, Second District, Division 2, California. Nov. 9, 1926. Rehearing Denied and Opinion Amended Dec. 9, 1926.)

1. Judgment 🔑214.

Minute order for judgment is not a "judgment."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment (In Law).]

2. New trial 🔑61.

Delay in filing findings and judgment is not ground for new trial, under Code Civ. Proc. § 657.

3. Judgment 🔑210—Statute, requiring decision to be filed within 30 days, is directory merely (Code Civ. Proc. § 632).

Code Civ. Proc. § 632, requiring decision to be filed within 30 days after submission of cause, is merely directory, and judgment subsequently entered is not affected by failure to comply therewith.

4. Eminent domain 🔑172.

Trial court did not lose jurisdiction of action of eminent domain during period of 4½ years in which there was no objection made or action taken by either party.

5. Eminent domain 🔑246(3)—Delay in securing entry of judgment held not implied abandonment of proceedings.

Mere delay of city in securing entry of judgment in eminent domain proceeding, not constituting violation of Code Civ. Proc. § 1255a, providing for abandonment of condemnation proceedings, does not constitute an implied abandonment.

Thompson, J., dissenting.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action in eminent domain by the City of Los Angeles against Catherine Hannon and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

J. Wiseman Macdonald, of Los Angeles, for appellant.

Jess E. Stephens, City Atty., and E. H. Delorey, Deputy City Atty., both of Los Angeles, for respondent.

CRAIG, J. The plaintiff and respondent instituted this action in eminent domain on June 10, 1915, to condemn lands of the defendants for the purpose of opening and widening Long Beach avenue, in the city of Los Angeles. Referees appointed by the superior court filed their report on June 18, 1918, awarding to the appellant the sum of $6,805.20 and $15 costs. To such report appellant filed exceptions, and a hearing before the court below was had on July 20, 1919, on which date the trial court ordered judgment in favor of Catherine Hannon in the sum of $9,640.70 for the land sought to be taken, $4,295.72 as compensation for consequent damages to other property, and costs. No further steps were taken until February 27, 1924, or about 4 years and 7 months after the date on which the court had fixed the valuation. On the date last mentioned an interlocutory judgment, providing for the payment to appellant of the amounts so determined on July 20, 1919, was signed, and it was entered on March 10, 1924. In said judgment it was recited that the exceptions of the defendant Catherine Hannon to the report of the referees were well taken, and should be sustained in part; that the report should be so modified "that the total compensation proper to be paid to the defendant Catherine Hannon as the owner of said parcel of land is the sum of $13,951.42, instead of the sum of $6,820.20, the amount awarded by the referees as total compensation proper to be paid to said defendants."

Appellant moved for a new trial upon grounds 3, 4, 6, and 7 of section 657 of the Code of Civil Procedure. The notice of intention to move for a new trial was accompanied by affidavits of real estate experts which tended to show that the value of the property had greatly increased since the trial of the issues presented by the pleadings. The trial court denied the motion, stating that it so ruled "for the reason that the grounds on which the motion is really based are not, in my judgment, cognizable by the court in passing on this motion."

It is urged that by the delay in entering

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*Hearing denied by Supreme Court January 3, 1927; Preston, JJ., dissenting.

judgment the respondent must be held to have abandoned the proceedings, and forfeited its right to the property, and that the trial court lost jurisdiction of the case. The appellant invokes the provisions of section 632 of the Code of Civil Procedure, which provides that the decision of the court, when a case is tried without a jury, "must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." It is contended that the rendition and filing of the decree herein was, after such delay, not only in contravention of said section, but in violation of article 1, § 14, of the Constitution, which latter forbids the taking of property without just compensation.

[1] The law is established in this state that a minute order for judgment is not a judgment. Canadian & American Mortgage & Trust Co. v. Clarita Land & Investment Co., 140 Cal. 672, 74 P. 301; Cuneo v. Cuneo, 40 Cal. App. 564, 181 P. 229; United Taxpayers' Co. v. San Francisco, 55 Cal. App. 239, 203 P. 120; McKannay v. McKannay, 68 Cal. App. 709, 230 P. 218; Prothero v. Superior Court, 196 Cal. 439, 238 P. 357. Hence appellant was afforded no opportunity for an appeal until 4½ years after the date of trial (Code Civ. Proc. § 664), unless prompted to move the court below or to take other proper steps to procure an earlier filing and entry of the judgment.

Appellant does not complain that error was committed during the trial, nor in fixing the amount of the award. It is urged that, since the property was to all intents and purposes in custodia legis, appellant could not convey, incumber, or lease it for a term; that she was compelled to sit by and see it quadruple in value, and was burdened with a corresponding increase in taxes, though precluded from improving the premises for the purpose of increasing their revenue. It is further insisted that, although appellant was permitted to retain possession and a limited use of the property, yet the title was suspended by the delay in entering judgment, thus enabling the plaintiff to elect, at its option, to dismiss its action or to accept the property at any time without payment of interest upon the amount adjudicated.

[2] Respondent ignores this point, and confines its argument principally to the proposition that a new trial was properly denied. It has been decided that a delay in filing findings and judgment is not one of the grounds for a new trial under section 657 of the Code of Civil Procedure. Kepfler v. Kepfler, 134 Cal. 205, 66 P. 208. But this is not, nor could it be, an appeal from the order denying a new trial. It is taken from the judgment, which, if by reason of the delay the trial court lost jurisdiction to enter, would require a reversal.

[3] Prior to its amendment in 1874 section 632 of the Code of Civil Procedure required that decisions be filed within 20 days after submission of the causes, and provided that "unless the decision is filed within that time the action must again be tried." The section, as amended (Amendments to the Codes 1873–74, p. 312), extended the time to 30 days, omitting the penalty, and has ever since been held merely directory. In so holding it has repeatedly been said that the validity of a judgment subsequently entered is not affected by failure to comply with the statute. Oakland First National Bank v. Wolff, 79 Cal. 69, 21 P. 551, 748; Heinlen v. Phillips, 88 Cal. 557, 26 P. 366; Rosenthal v. McMann, 93 Cal. 505, 29 P. 121; Marshall v. Taylor, 97 Cal. 422, 32 P. 515; Edwards v. Hellings, 103 Cal. 204, 37 P. 218; Neihaus v. Morgan, 5 Cal. Unrep. 391, 45 P. 255; Churchill v. Louie, 135 Cal. 608, 67 P. 1052; Hutchinson v. Marshall, 49 Cal. App. 307, 193 P. 164; McLennan v. Bank of California, 87 Cal. 569, 25 P. 760.

[4] Nor can it be successfully contended that the trial court lost jurisdiction through procrastination during which there was no objection made nor action taken by either party. In Brady v. Burke, 90 Cal. 1, 27 P. 52, the cause was tried in 1878, and judgment was ordered; an appeal was taken, although the judgment was not entered until 1882, which latter fact was not called to the attention of the Supreme Court; when the remittitur was returned, execution issued, and the property involved was sold. Upon a second appeal it was contended that the superior court had lost jurisdiction of the case, and that the judgment entered 4 years after the date of trial, and the execution, were void. In affirming the judgment it was said:

> "Until the judgment is entered, such court retains complete jurisdiction of the case, of which it cannot be divested by any unauthorized appeal to this court. * * * It follows that the superior court had jurisdiction to enter the judgment of January 7, 1882, and that the execution sale thereunder, under which plaintiff purchased, was not void."

In other jurisdictions having similar statutes limiting the time within which decision must be filed and entered, the rulings have been the same in this respect. In Toole v. Weirick, 39 Mont. 359, 102 P. 590, 133 Am. St. Rep. 576, the following language was used:

> "If Mrs. Myers had desired action upon the matter at an earlier date, this court was open to her to apply for a writ of mandate to compel the district court to decide the case. California and Utah each has a statute similar to our section 6763 above [Rev. Codes 1907], and in each state it has been held that the statute is directory, and the failure of the court to render its decision within the time limited does

not deprive the court of jurisdiction to decide it at a later date. * * *"

In Lynch v. Coviglio, 17 Utah, 106, 53 P. 983, it was observed that the statute under consideration was a verbatim copy of section 632 of the Code of Civil Procedure of California. The court there said:

> "A court, therefore, trying a case without a jury, has jurisdiction to file its findings of fact, conclusions of law, and decision after the expiration of the time designated in the statute."

To the same effect are Rawson v. Parsons, 6 Mich. 401; McCray v. Humes, 116 Ind. 103, 18 N. E. 500; Vogle v. Grace, 5 Minn. 294 (Gil. 232); People v. Dodge, 5 How. Prac. (N. Y.) 47; McCrady v. Jones, 36 S. C. 136, 15 S. E. 430; Body v. Jewsen, 33 Wis. 402; Cramer v. Hanaford, 53 Wis. 85, 10 N. W. 15.

Appellant relies upon the reasoning employed in Bensley v. Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575, which is claimed to be particularly applicable here. We are unable to discover any principle there stated which can be said to apply to this proceeding, except in the ruling that a plaintiff in a condemnation suit must comply with the terms of the statute, and that it will not be permitted to acquire title or possession under a void judgment. In the cited case the commissioners' report was filed August 23, 1853; on December 17 of the same year the plaintiff withdrew its deposits and collateral security, and the court made a minute order *dismissing the action;* on December 25, 1856, 3 years after dismissal, the plaintiff procured an order confirming the report of the commissioners; and on June 29, 1857, a final order for judgment condemning the property and directing that the water company be let into possession was made without notice to the owner of the premises. In 1859 the latter filed a petition reciting that the company was threatening to and would, unless enjoined, take possession, excavate, build embankments, and divert valuable waters of springs and streams. A decree of injunction was granted, which was affirmed upon appeal. No municipal corporation was involved, objection was not made to the commissioners' report, the defendant was given no opportunity to be heard, nor was the appeal taken from the judgment itself. We need not pause to conjecture as to what might have been the reasoning of the Supreme Court, had there been no dismissal and withdrawal of the deposit, and had the judgment, though delayed, been regular in other respects. Since the decision itself has no bearing upon the issues here presented, we must be governed by the rule established by authorities in point, wherein courts of last resort have spoken uniformly.

This condemnation proceeding was instituted under the statutes of 1911, as amended, which contain provisions not enacted at the time of the rendition of the decisions in Bensley v. Mountain, etc., Co., supra. Section 1255a of the Code of Civil Procedure contains a definite provision concerning the method by which condemnation proceedings once instituted may be abandoned. It reads as follows:

> "*Abandonment of Condemnation Proceedings.* Plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, by serving on defendant and filing in court a written notice of such abandonment; and failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding. Upon such abandonment, express or implied, on motion of defendant, a judgment shall be entered dismissing the proceeding and awarding the defendant his costs and disbursements, which shall include all necessary expenses incurred. * * *"

[5] Apparently it was the intention of the Legislature that an abandonment might be implied from "failure to comply with section 1251 of this Code." It is not contended in the instant case that there had been an express abandonment or a failure to comply with any of the provisions of said section 1251. Since the Legislature saw fit to make express provision for the manner in which an implied abandonment might take place, under the maxim, Expressio unius est exclusio alterius, the mere delay on the part of the parties in a condemnation suit to take one of the necessary steps, which delay does not constitute a violation of the designated section, cannot be said to constitute an implied abandonment. Lewis' Suth. State Const. (2d Ed.) §§ 627–633, and cases cited.

It may also be observed that in that part of the statute above quoted under which this action is maintained provision is made for the dismissal of the proceeding where an abandonment, express or implied, has occurred, upon motion of the defendant. If in this case she had desired the return of her property, in addition to the remedies which are mentioned elsewhere in this opinion, if an abandonment had actually taken place, she had no need to wait for the court to render its decree, but might at any time have availed herself of the right to move to dismiss. At any rate, the fact that she possessed this as well as other remedies removes in a large measure the force of the claim that a hardship has been worked by reason of the fact that the price of the property condemned has greatly enhanced in value since the filing of the suit. However, if in fact it may have decreased in value, the city, in acquiring the property, would still be bound to pay the amount originally allowed.

Much stress is laid upon provisions of the Constitution relating to just compensation and upon "the Supreme Court's views on fair dealing in eminent domain cases." However, from the views expressed herein it becomes apparent that neither the question of adequacy of the award nor that of expediency in such cases can arise. This being an appeal from the judgment, to which no objection is raised, and the court below having had jurisdiction to enter it, an affirmance is the logical and legal result.

The judgment is affirmed.

I concur: WORKS, P. J.

THOMPSON, J. I dissent. The question is, Did the inaction of the plaintiff municipality for 4 years and 7 months constitute an implied abandonment of the proceedings? It must be conceded that the trial court had not lost jurisdiction by the delay, even though the delay of nearly five years may render the judgment erroneous. In determining the true effect to be given to this unconscionable, unreasonable, and wholly unjust lapse of time, consideration must be given to the fact, first, that the right of eminent domain provided for by statute is in derogation of common right, and therefore must be strictly construed. Bensley v. Mountain Lake Water Company, 13 Cal. 306, 73 Am. Dec. 575; Gilmer v. Lime Point, 19 Cal. 47; Trumpler v. Bemerly, 39 Cal. 490; Chase v. Putnam, 117 Cal. 368, 49 P. 204.

A careful study of the statutes providing for the exercise of the right of eminent domain clearly indicates an intent on the part of the Legislature to prevent any unreasonable delay. For example: In the Improvement Act of 1903 (Statutes of 1903, p. 376, § 9) it is provided:

> "The referees shall at once proceed to view the land sought to be condemned."

And, again (St. 1909, p. 1038):

> "They shall make and file with the clerk a written report of their findings, and of their necessary expenses, within thirty days after the date of their appointment: Provided, however, that the time so allowed may be extended, upon good cause shown, by the court or judge thereof, but such extension shall not exceed ninety days."

It is also well to note that section 10 provides that the compensation and damages shall be deemed to have accrued at the date of the order appointing the referees or of the order setting the cause for trial.

Further light for the proper interpretation to be placed upon the delay is found in section 1251 of the Code of Civil Procedure, providing that, upon condemnation, payment must be made by the plaintiff within 30 days after final judgment, except that, in case it appears by affidavit that bonds of the state or of public corporations must be sold in order to provide the money, the sum may be paid within one year, and excepting, further, that if the bonds cannot be sold by reason of litigation the time during which such litigation is pending shall not be considered a part of the one-year period. Section 1255a of the Code of Civil Procedure provides that the plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of 30 days after final judgment by serving on defendant and filing in court a written notice of such abandonment, and "failure to comply with section 1251 of this Code shall constitute an implied abandonment of the proceeding." It is true that, as suggested in respondent's brief, the abandonment provided for in the Improvement Act of 1903 does not mention an implied abandonment. Nevertheless, this cannot be considered as controlling in the premises, for the reason that it not only appears from a strict construction, but also it appears to have been the intent of the Legislature, that payment for property taken under the statutes providing for eminent domain and the acquisition of property without the consent of the owner and against his will should be paid for within a limited period of time. Under the general procedure, if the trial is delayed for more than one year after the commencement of the action, damages are deemed to have accrued at the date of the trial rather than at the date of the issuance of summons (section 1249, Code Civ. Proc.); another clear indication that the Legislature contemplated no unreasonable delay in proceedings having for their purpose the acquisition of another's property without his consent.

It is true that in the case of Bensley v. Mountain Lake Water Company, 13 Cal. 306, 73 Am. Dec. 575, it appeared that the court had made an order dismissing the action and that the deposits and collateral security had been withdrawn. In this case the commissioner's report was filed on August 23, 1853; the order of dismissal had been entered December 25, 1856; and on June 29, 1857, final order for judgment condemning the property was entered. It is also true that that was an action brought to enjoin the defendant from exercising any right claimed under the judgment. The court, however, gave little consideration to these facts, but says:

> "But to steer clear of any disputed facts, the broader question may be made, whether the party, after procuring an order for the condemnation of property, to public use, can lay by for 4 years without complying at all with those requirements of the proceeding which are of service to the owner, and then without notice give effect to the previous and initiatory acts, through which he deraigns his title. This statutory power of taking property from the owner, without his consent, is one of the most delicate exercises of governmental authority. It is to be watched and guarded with jealous scrutiny. Important as the power may be to the government, the inviolable sanctity, which all free Constitutions attach to the rights of property of the

citizen, constrains the strict observance of the substantial provisions of law, which are prescribed as modes of the exercise of the power, and to protect it from abuse. All statutory modes of divesting titles are strictly construed, and to be strictly followed. He who relies for a title upon an extraordinary mode of acquisition given him, not by the will of the owner, expressed or implied, but against his will and by the mandate of the law, must show for his warrant a strict compliance with those statutory rules from which his title accrues."

And, again:

"If we were to hold that by force of these proceedings, in 1853, this company had a right to wait until 1857, and then insist upon giving them effect, we must necessarily hold that the property condemned need not be paid for according to its valuation or real value in 1857, the time when really taken, but may, in effect, be paid for according to its assessed value in 1853, when proceedings were first instituted, and be paid for, not in cash, but on four years' credit, without security. Nay, more, that it might be taken at the mere option of the company, without any sort of obligation on their part to take it, if they chose to decline, as, possibly, they might, if it deteriorated in value. It would be a unilateral contract, binding one party, but not binding the other, and translated into plain English, would mean: 'If we (the company) choose, we will take your (Emerson's) land 4 years hence, by paying for it what is now assessed as its value. You are to keep it for us, and not sell it, for all that time; but if it declines in value, or we do not choose to take it, we will not do so.' No sane man, if left to his volition, would make such a trade, and we think we have shown that the law is not so unjust or arbitrary as to make such a bargain for a citizen when it subjects him to its power."

And again the court says:

"To entitle the company to take the property on those terms, they must avail themselves of the privilege within the proper time. The lapse of a reasonable time without availing themselves of the privilege was itself an abandonment of all claim to it. To say the very least, when a year had passed and no offer made, the proceedings were effectually discontinued."

We think it is well to note that on a petition for a rehearing this statement is made:

"*The main principle* upon which we went in the opinion is this: That, after proceedings for a condemnation, which proceedings result in an assessment of damages, the money must, within a reasonable time, be paid or deposited; and, if 4 years intervene before such an act is done, the proceedings must be held to be discontinued; and that a deposit does not mean merely formally putting the money into court and then withdrawing it."

To the same effect is Port Townsend Southern R. Co. v. Barbare, 46 Wash. 275, 89 P. 710; Wagner v. Bealmear & Son, 135 Md. 690, 109 A. 466; and Nichols, The Power of Eminent Domain, § 342. It might be argued that there is a difference in this case from one in which the time started to run and the delay occurred after the entry of the interlocutory judgment, but in the absence of all statutory regulations the time after the entry of the interlocutory judgment would be a reasonable time, and the same cogent reasons apply to an unreasonable delay after trial which apply to an unreasonable time after interlocutory judgment. In principle there is no distinction.

Assuming for the purpose of argument contrary to the undisputed fact that the delay was occasioned not by the plaintiff, but by the court in its failure to render its decision, it does appear that those things which would constitute an abandonment by the plaintiff, if done by the plaintiff, would, if suffered to be done by the court, constitute error, and the court should have declined to sign the findings and interlocutory judgment. The latitude permitted by the directory character of section 632 of the Code of Civil Procedure should have been limited and controlled by the nature and character of the action here involved. That section must have some effect, and where, as here, the character of the action is such and the delay so great that it is wholly inequitable to go forward, it is error for the decision to be entered. If equity would interfere to restrain the assertion of rights founded on the judgment, as was done in Bensley v. Mountain Lake Water Company, supra, the reasons impelling equity's interference should have restrained the hand of the court in the first instance and impelled it to enter a dismissal if it is found impossible under the authorities to have granted damages as of the date of resetting the cause for trial. The writer is of the opinion, however, that the motion for a new trial waived the right of dismissal if the new trial were granted.

It is plaintiff's position that the defendant acquiesced in the delay, and therefore cannot be heard to complain. This position might be tenable, had the defendant ever agreed or consented to the disposition of her property; but, if she chose to permit the abandonment by lapse of time or otherwise, it seems that the city, upon whom is cast the duty of meeting statutory requirements and equitable compensation, cannot urge her acquiescence as an excuse for its own delay. In fact, she may have been more than willing that they delay, but the record does not disclose anything actively done by her to bring about the delay, and therefore it does not seem that she should be chargeable in any way therewith.

The affidavits used on the motion for a new trial, without contradiction, show a great increase in value and it is no answer to suggest that the value might have decreased because then the injury would fall where it belonged, upon the slothful.

199 Cal. 705

In re MOELLER'S ESTATE.

MAHER et al. v. LAIOGHIS HOSPITAL AND HOMES COMMITTEE OF PORTLAIOGHIS.

(S. F. 11511.)

(Supreme Court of California. Nov. 30, 1926. Rehearing Denied Dec. 30, 1926.)

1. Wills 🔑417—Document admitted to probate held to include writing on both sides of paper.

Document admitted to probate as will of deceased *held* to be entire writing, and not that on one side of paper only, where order contained no such limitation, and court subsequently admitted evidence of handwriting expert to show that writing on back of paper was added at later date.

2. Wills 🔑421—Supreme Court is not bound by superior court's construction of order admitting will to probate.

Supreme Court is not bound by construction which superior court placed on its own order admitting will to probate.

3. Wills 🔑421—Supreme Court will presume that judge of probate court knew better than any one else what document he admitted to probate.

Supreme Court will presume that judge of probate court knew better than any one else what document he had in mind when he signed order admitting it to probate as last will of deceased.

4. Wills 🔑421—Attempt cannot be made at hearing of petition for distribution to show part of will to be invalid.

After final order admitting paper to probate as last will, attempt cannot be made at hearing of petition for distribution to show that writing on reverse side of such paper was invalid because executed at later date.

5. Charities 🔑19—Bequest to Mount Mellish Union Workhouse held valid bequest to Laioghis Hospital and Homes Committee, having control of Mountmellick Union Workhouse.

Bequest to Mount Mellish Union Workhouse *held* valid bequest to Laioghis Hospital and Homes Committee, statutory body having control of Mountmellick Union Workhouse, though at time will was made institution was managed by Mountmellick poor law guardians.

6. Charities 🔑32—Workhouse, managed by poor law guardians and hospital and homes committee, held presumed to be charitable institution.

Mountmellick Union Workhouse, which was under management of Mountmellick poor law guardians until Laioghis Hospital and Homes Committee assumed control, *held* presumed to be charitable institution, since such names indicate purpose of administering charity.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Elizabeth Brady Moeller, deceased. From a decree directing distribution to John Maher and others, Laioghis Hospital and Homes Committee of Portlaioghis appeals. Reversed, with directions.

Wallace & Ames, of San Francisco, for appellant.

David Livingston, Lawrence Livingston, and Livingston & Livingston, all of San Francisco, for respondents Maher and others.

Cullinan & Hickey, of San Francisco, for respondent Hynes.

CURTIS, J. The deceased, Elizabeth Brady Moeller, died in the city and county of San Francisco on the 6th day of November, 1921. She left what purported to be an olographic will written on both sides of a single sheet of paper. On one side thereof was written the following:

"Alameda April the 22 1907 What ever is left after My Death and Buirel goes to My Nephew Peter Brady of Dublin Ireland Son of My

Brother Peter Brady Who Belonged to the 48 Regement of the English Army enlisted at the Time of the Crimes War served 21 years and died in Dublin leaving one son every thing goes to him Elizabeth Brady Moeller."

The reverse side of said sheet of paper contained the following writing:

"if My Nephew is Not Living it goes to Mount Mellish Union Workhouse where I was take care of when i was young and helpless in the Poor House Queens county Ireland. Elizabeth Brady Moeller."

There is no question but that all of the writing upon said sheet of paper was that of deceased. This paper was filed in the office of the clerk of the superior court of said city and county of San Francisco, together with the petition of the public administrator of said city and county, "praying for admission to probate of a certain document dated the 22d day of April, 1907, * * * purporting to be the last will and testament of Elizabeth Brady Moeller, deceased." Thereafter, and on the 8th day of December, 1921, said superior court made an order by which it was "ordered, adjudged, and decreed that said document filed herein, purporting to be the last will and testament of Elizabeth Brady Moeller, alias, deceased, be admitted to probate as and for the last will and testament of said * * * deceased." No contest was ever filed to the probate of said will, either before or after the order admitting same to probate. Upon the hearing of the petition for distribution, evidence was admitted showing that Peter Brady, named in said will as a devisee thereunder, had died prior to the death of deceased. It was further proven upon said hearing that the respondents herein were her sole heirs at law, being children of her deceased brother, who died prior to her death. Evidence was also introduced at the hearing of the petition for distribution of a handwriting expert, who testified that the writing upon the reverse side of the sheet of paper upon which the will was written was later in date than the writing upon the other side, or first page, of said paper; and, basing a finding upon this evidence, the court found that the writing upon the reverse side of said paper did not constitute a legal codicil, or a legal will, or a legal documentary disposition of any kind. This finding was predicated upon the contention that the second page, having been written at a later date, and, therefore, at a different time than that on which the first page was written, and being without date, failed to meet the requirements of the statute defining an olographic will. The writing on the second page was accordingly held to be no part of the will of said deceased, and to be invalid as a testamentary disposition. The court further found that "there is not and never was any person, firm, entity, body, or corporation by the name or title of Mount Mellish Union Workhouse, or bearing any similar name or title, capable under the law of taking by will any property of the said decedent." The decree of distribution, based upon these findings, distributed all the property of said deceased to the respondents herein as the heirs at law of said deceased. From this decree the Laioghis Hospital and Homes Committee of Portlaoighis has appealed.

The first contention of appellant is that the last will and testament of said decedent was the entire document filed in said court, consisting of the writing on the front and reverse sides of said paper, and that by the order admitting the will of said deceased to probate this entire document was the instrument intended and designated in said order, and which was ordered and decreed therein to be the last will and testament of said decedent. Appellant accordingly contends that, as no contest of said will was ever filed, the order admitting it to probate became final and binding upon all parties affected by said will, and that the court was without any power thereafter to admit evidence upon the hearing of the petition for distribution or at any other time to show that the writing on the reverse side of the paper was written at a different time than that on which the first page thereof had been written, and accordingly was invalid on account of the failure of the testatrix to date the writing on the reverse side of said paper. We will assume that, if the writing on the reverse side of the paper had been written at a different date than that on the first page, and that the latter bore no date, then it was fatally defective as an attempt to make a testamentary disposition of property.

[1] The first question, therefore, to determine is what document was admitted to probate as the last will and testament of said deceased. Was it the first page of said paper or was it the whole document containing not only what was written on the first page, but also what was written on the reverse side of said paper? Neither the petition for probate of the will nor the certificate of the proof and facts, found as required by section 1317, Code of Civil Procedure, are contained in the record on appeal. The order admitting the will to probate, however, contains certain recitals and other language which we think in themselves are determinative of the question here involved. In the first place, the order admitting the will to probate recites that—

> "The petition of W. J. Hynes, etc., praying for the admission to probate of a certain document, dated the 22d day of April, 1907, and filed in this court, purporting to be the last will and testament of Elizabeth Brady Moeller, alias, deceased."

[2, 3] And again we find in said order that "the court hereby finds the fact to be that said document is entirely written, dated, and

signed by the hand of the said Elizabeth Brady Moeller herself," and finally it is decreed in said order "that said document filed herein, purporting to be the last will and testament of said Elizabeth Brady Moeller, alias, deceased, be admitted to probate as and for the last will and testament of said" deceased. The document presumably at least referred to in said order must have been the entire instrument, including the writing on the first and second pages of the paper before referred to. Had the court intended to limit said order to any particular portion of said document, or had the court intended to designate any portion of said paper as not being a part of the last will of said decedent, we would expect some reference to such intention in the order itself. Finding none, we must conclude that the court by said order admitted the entire document to probate as the last will of said deceased. We are somewhat confirmed in this interpretation of said order by the action of the court admitting at the hearing of the petition for distribution evidence of the handwriting expert to the effect that the writing upon the reverse side of said paper was written at a later date than that on the first page thereof. Had the court considered said order as only admitting to probate the writing on the first page of said paper, then it would not have been necessary to have attempted to have shown on the hearing of the petition for distribution the illegality of the writing on the reverse side of said paper. By the admission of said testimony, the probate court unquestionably considered that the whole document had been admitted to probate as the last will of said deceased. While we are not bound by the construction which the court placed upon its own order, yet, when the same judge who signed the order admitting the will to probate thereafter admitted evidence for the purpose of showing that a portion of a document on file in said court, and claimed to be the last will, was illegal on account of its defective execution, we must conclude that the trial judge of said court considered that the alleged illegal portion thereof had been in the first instance admitted to probate as a part of the last will of said deceased. We must assume that the judge of the probate court knew better than any one else what document he had in mind when he signed the order admitting it to probate as the last will of said deceased, and it is not unreasonable to conclude that, when he later permitted evidence to be introduced which tended to invalidate a portion of said document, he considered that said document as a whole had been admitted to probate as the will of said deceased by his previous order. We think it therefore sufficiently apparent from the record before us that the document admitted to probate as the last will of said deceased was the entire writing of said deceased found on either side of the paper on file in the probate court. As the order admitting the same to probate was never appealed from, and no contest was ever filed to said will, said order became final. Estate of Parsons, 196 Cal. 294, 237 P. 744.

[4] We think it follows without the necessity of any argument that the attempt to show at the hearing of the petition for distribution that the writing on the reverse side of said paper was executed at a later date than the writing on the first page thereof, and was invalid by reason of its being without date, was an attack upon a final order of the court, and was without warrant of any law whatever. The finding of the court, therefore, that the writing upon the back of said paper does not constitute a legal document, or a legal will, or a legal testamentary disposition of any kind, finds no support in the record before us.

[5] The only other question in the case is as to the validity of the bequest made in the said will in favor of the Mount Mellish Union Workhouse. We have already referred to the finding of the court that there is no such person or corporation by that or any other similar name capable under the law of taking by will any property of the decedent. Upon the hearing of the petition for distribution the appellant appeared and contested the right of the respondents to share in the distribution of said estate. On said hearing appellant offered to prove certain facts, more particularly hereinafter set forth in the affidavit of Thomas Reilly. It was "stipulated by all parties that the matter of the distribution of the estate of said decedent should be submitted to the court for decision and that the facts stated in said affidavit should be considered as an offer of proof by Laioghis Hospital and Homes Committee; that said affidavit contains all the facts which said committee could prove in its behalf; that, in the event that the court should determine that said affidavit did not contain facts sufficient to entitle said committee to distribution of any of the estate of the decedent, it should order distribution in favor of the said heirs at law; that if, on the other hand, the trial court should determine that the affidavit did contain facts sufficient to entitle said committee to distribution of any of the estate of the decedent, it should thereupon announce its decision to that effect, and a reasonable opportunity would be given said committee to present legal and competent proof of the facts stated in said affidavit."

Said affidavit was as follows:

"In the goods of Elizabeth Brady Moeller, deceased, I, Thomas Reilly, the secretary of the Laioghis Hospital and Homes Committee, aged twenty-one years and upwards, make oath and say as follows:

"(1) The Mountmellick Union Workhouse was a governmental institution created by statute, vested in, controlled and managed by, the

Mountmellick poor law guardians under the control of the late local government board for Ireland. The institution is in existence for a period of nearly one hundred years. After the treaty signed between Great Britain and Ireland and ratified in December, 1921, all government property in Ireland became vested in the provisional government of Ireland, and all public boards and institutions were transferred to the control of the provisional government.

"(2) For the purposes of economy and administration all boards of guardians of Ireland, including the Mountmellick poor law guardians, were done away with, and all institutions in every individual county in Ireland formerly vested in and controlled by poor law guardians were vested in and the control of the same transferred to county hospital and homes committees by decree of Dail Eireann (the Irish Parliament) and by order of the local government board for Ireland. Under these powers the Laoighis Hospital and Homes Committee assumed control of the Mountmellick Union Workhouse.

"(3) By act of Parliament of Dail Eireann, the Irish Free State Parliament, called the Local Government Temporary Provisions Act 1923, previous acts and things done by the provisional government of Ireland were confirmed, and under the said act the Laoighis Hospital and Homes Committee are the statutory body having control of and in which is vested the Mountmellick Union Workhouse.

"(4) All legal documents to which public boards, committees or councils in Ireland are parties are legally executed by such public bodies by the chairman of the said board, committee or council affixing the seal of the said body in the presence of the members thereof. The power of attorney in this matter, signed by the chairman of the Laoighis Hospital and Homes Committee was duly and legally executed.

"Thomas Reilly.

"Sworn before me at Maryborough in the Queen's county by said deponent Thomas Reilly who is personally known to me, on the 14th day of January, 1924.

"[Seal] Patrick J. Meehan, Notary Public."

The court, by ordering distribution of said estate to respondents, and by its finding last above referred to, in legal effect, rejected said offer of proof by appellant, and denied it the right and opportunity to present proof of the facts set forth in said affidavit. We think this offer of proof, if followed up by legal and competent evidence of the facts stated in said affidavit, sufficient to entitle the appellant to have distributed to it the residue of said estate. It is true that there is a slight discrepancy between the true name of the beneficiary and that used by the testatrix in referring to it in her will. It is referred to in the will as Mount Mellish Union Workhouse, and in the offer of proof, as set out in the affidavit of Thomas Reilly, as the Mountmellick Union Workhouse. We hardly think that this slight error in the spelling of the name of the beneficiary should defeat a legacy in its favor. In Re Casement, 78 Cal. 136, 141, 20 P. 362, 364, it was held, where a bequest was made to "Old Ladies' Home of San Francisco," that "under the liberal rules of construction applicable to legacies to charitable institutions, the court might properly have distributed the money to" Protestant Episcopal Old Ladies' Home. In Re Gibson, 75 Cal. 329, 331, 17 P. 438, 439, it was held "if from the will itself, or evidence aliunde, the object of the testator's bounty can be ascertained, a misnomer of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision."

[6] It is claimed, however, by respondents that it is necessary for appellant, in order to be entitled to the bequest, to show that the Mounfmellick Union Workhouse is a charitable institution, and that the offer of proof fails to show that fact. Conceding that respondents are correct in their contention that appellant can succeed to such bequest only by showing that the institution under its control is a charitable institution, we think that the offer of proof tended to show the charitable character of the said beneficiary. Up to the time its control was assumed by the agencies of the Irish Free State, it was under the management of the Mountmellick poor law guardians. Under the present government of the Irish Free State, the control is vested in appellant, the Laoighis Hospital and Homes Committee. The names of each of these agencies or boards of control, one the poor law guardians and the other the hospital and homes committee, fairly indicate that their object and purposes were those of administering charity, and we think we are justified in assuming from these names that the Mountmellick Union Workhouse is a charitable institution.

It is next contended by respondents, as the management and control of said workhouse has been by law taken from the Mountmellick poor law guardians, acting under the local government board for Ireland, as said board formerly existed at the date of the execution of said will, and transferred to appellant, whose power is derived from the Irish Free State Parliament, that it cannot be assumed that the testatrix intended that the property of her estate should ever be used for the benefit of said workhouse under such changed conditions and management. We see no force in this argument of respondents. At the time the will was executed, as we have already seen, the workhouse was a governmental institution created by statute, and was administered by guardians under authority of a local government board. Subsequently, as shown by said affidavit, "for the purposes of economy and administration," a change was made in such management, and all such governmental institutions were by statute placed under the control of poor law guardians. Under said statute the Laoighis Hospital and Homes Committee is the statutory body, having control of, and in which is vested, the Mountmellick Union Workhouse. There is no showing whatever that there is any difference in the manner of conducting said workhouse or in the object or purposes thereof under the new committee than that which was in effect under the Mountmellick poor law guardians. In fact, the affidavit of Thomas Reilly, above referred to, in effect negatives any intention to change the character of said institution or the manner in which it had formerly been conducted by providing a different legal agency to administer its affairs. Said affidavit shows that the change was brought about for the purposes of economy and the better administration of the institutions involved. It was the intention of the testatrix to aid by the bequest in her will the operation and maintenance of said poorhouse, and to better provide for the inmates therein, and no good reason has been shown or advanced by respondents, nor does any occur to us, why this intention on the part of the testatrix cannot be carried out as effectively under the present management as well as it could have been had the administration of the affairs of said workhouse still remained under the direction of the Mountmellick poor law guardians.

Finally the respondents contend that, as the bequest was in favor of the Mountmellick Union Workhouse, the appellant herein, the Laioghis Hospital and Homes Committee, is without any right to receive said bequest, and had no standing in the probate court to contest the right of respondents to have the property of said estate distributed to them. As we have already seen, the bequest in favor of said Mountmellick Union Workhouse was a charitable gift. Its purpose was to benefit the inmates of said workhouse, and to assist in the maintenance and operation of the same in caring for said inmates. The appellant offered to prove that it was the legal "statutory body having control of and in which is vested the Mountmellick Union Workhouse." While the Mountmellick Union Workhouse is in itself incapable of taking or holding property, as we may assume from the affidavit of Thomas Reilly, it being merely a building and the premises used in connection therewith wherein the inmates are cared for, the appellant, according to said affidavit, is the agency established by the government, whose legal duty it is to direct and carry on the affairs of said workhouse and to have charge and dominion over its property. As such, there is no question but that it would be the proper and legal body to receive said bequest. The mere fact that the testatrix made the bequest in favor of the workhouse and not in favor of the committee legally in charge of said institution should not defeat said bequest. A case similar to this arose in this state where the decedent made her will in favor of the Old Ladies' Home at St. Mary's Hospital. It was proven to the satisfaction of the court that it was the intention of the testatrix to make said bequest in favor of a department in the St. Mary's Hospital called the Old Ladies' Home, the expenses of which had always been paid by the Sisters of Mercy, who also control said department. The decree of distribution distributed the bequest to the Sisters of Mercy, and the said decree was affirmed on appeal. In re Gibson, 75 Cal. 329, 17 P. 438. We think the same reason for the application of the rule in the above case applies to the bequest before us, and we conclude, therefore, that the court erred in denying the appellant the right to prove the matters set forth in its offer of proof under the stipulation of the parties made in reference to said offer, and that, if the facts stated in said offer of proof are proven by legal and competent evidence, it will be the duty of the probate court to distribute said property to appellant.

The decree of distribution is reversed, with directions to the probate court to permit appellant a reasonable opportunity within which to present proof of the facts set forth in its offer of proof as shown by the affidavit of Thomas Reilly, hereinbefore referred to.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.

80 Cal. App. 159

PEOPLE v. CARMONA. (Cr. 1356.)*

(District Court of Appeal, First District, Division 2, California. Dec. 7, 1926.)

1. Indictment and information 🔑110(3)—Failure to aver particular circumstances of statutory offense which are necessary to constitute complete offense vitiates information or indictment.

Offense may be charged in language of statute, but, where particular circumstances of offense are necessary to constitute complete offense, they should be stated and averred, and failure to do so will vitiate information or indictment.

2. False pretenses 🔑20—Making and passing fictitious instrument may be prosecuted either under forgery statute or under statute relating to uttering fictitious instruments (Pen. Code, §§ 470, 476).

Making and passing a fictitious instrument may be prosecuted either under Pen. Code, § 470, relating to forgery and counterfeiting, or under section 476, relating to making, passing, or uttering fictitious instruments.

3. False pretenses 🔑2—Amendment to forgery statute did not affect statute relating to uttering fictitious instruments (Pen. Code, §§ 470, 476).

Amendment of 1905 (St. 1905, p. 673) to Pen. Code, § 470, relating to forgery in gen-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 3, 1927. Hearing denied by Supreme Court February 3, 1927.

eral, did not affect section 476, prohibiting passing or uttering fictitious bills, checks, etc.

4. False pretenses 🔑26—Information charging uttering "fictitious" check need not allege that it was uttered as true and genuine (Pen. Code, § 476).

Information charging defendant with making, passing, uttering, and publishing fictitious check, in violation of Pen. Code, § 476, need not allege that he made, uttered, passed, and published same as true and genuine; "fictitious" meaning feigned, imaginary, not real, counterfeit, false, not genuine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fictitious.]

5. False pretenses 🔑26—Essential elements to be alleged in information charging issuance of fictitious check are uttering and publishing of check, knowing same to be fictitious (Pen. Code, §§ 470, 476).

In indictment or information laid under Pen. Code, § 470, or section 476, founded on check bearing name of imaginary or fictitious person, essential elements to be alleged are uttering and publishing of such check, knowing same to be fictitious.

6. False pretenses 🔑26—Information charging issuing fictitious check held sufficient (Pen. Code, § 476).

Information charging violation of Pen. Code, § 476, in substance, by making, passing, uttering, and publishing fictitious check, with intent to defraud certain bank, where there was no such person as party whose check it purported to be, and defendant knew that same was fictitious, *held* sufficient.

7. Indictment and information 🔑71—Information need merely enable one of common understanding to know what was intended, and set forth facts enabling court to pronounce judgment (Pen. Code, §§ 950–952).

All that is required under Pen. Code, §§ 950–952, is that information be sufficient to enable defendant or any person with common understanding to know what was intended, and set forth facts so as to enable court to pronounce judgment on conviction.

8. False pretenses 🔑29—Information charging issuance of fictitious check held to show trick or deception used to acquire property (Pen. Code, § 476).

Information charging issuance of fictitious check, in violation of Pen. Code, § 476, by uttering of fictitious check purporting to be check for payment of money of certain person, whereas in truth there was no such person, *held* to set forth trick or scheme used to acquire property.

9. False pretenses 🔑49(1)—Corpus delicti in prosecution for issuing fictitious checks held established by testimony that bank had no account under name used on checks (Pen. Code, § 476).

In prosecution for issuing fictitious check in violation of Pen. Code, § 476, corpus delicti *held* established by testimony of chief clerk of bank on which check was drawn that he was familiar with accounts of bank, and knew there were no accounts under name of party whose name was used on check as drawer, since this testimony is prima facie evidence of nonexistence of drawer of check claimed to be fictitious.

10. Criminal law 🔑805(1)—Instruction using words "prima facie" held not error as not in English as required by Constitution (Const. art. 4, § 24; Code Civ. Proc. § 1833).

Instruction, in prosecution for issuing fictitious checks, that evidence that there was no bank account under name of one named as drawer was "prima facie" evidence of fictitious character of check, *held* not error as violating Const. art. 4, § 24, requiring use of English in judicial proceedings, since words "prima facie" are readily understood by person of common understanding, and Code Civ. Proc. § 1833, defines it.

11. Criminal law 🔑763, 764(1)—Instruction that evidence that drawer had no account with drawee was prima facie evidence that check was fictitious held not on evidence (Pen. Code, § 476).

Instruction, in prosecution for issuing fictitious checks in violation of Pen. Code, § 476, that evidence that no such person as one whose name was signed on check had any account with drawee bank was prima facie evidence of fictitious character of check, *held* not error as invading province of jury, since it merely declares general principle of law.

12. Criminal law 🔑374—Where corpus delicti was established, in fictitious check prosecution, admission of evidence of similar transactions held properly admitted (Pen. Code, § 476).

In prosecution for issuing fictitious checks in violation of Pen. Code, § 476, where corpus delicti had been established, admission of certain evidence of similar transactions *held* properly admitted.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Frank S. Carmona, Jr., alias Leo T. Levin, was convicted of issuing fictitious checks, and he appeals. Affirmed.

Leo R. Friedman, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

PRESTON, Presiding Justice pro tem. Defendant was tried and convicted upon an information filed by the district attorney of Alameda county, charging a violation of section 476 of the Penal Code. From the judgment following the verdict of guilty, and from the order denying his motion for a new trial, the defendant has appealed.

The information is in the language of the statute, and the charging part thereof is as follows:

"Frank S. Carmona, Jr., alias Leo T. Levin, is accused by the district attorney of the county of Alameda by this information of the crime of felony, to wit, a violation of section 476 of the Penal Code of the state of California, to wit, making, passing, uttering, and publishing a fictitious check with intent to defraud, committed as follows: The said Frank S. Carmona, Jr., alias Leo T. Levin, prior to the time of filing this information, and on or about the 20th day of August, A. D. nineteen hundred and twenty-five, at the said county of Alameda, state of California, did then and there willfully, unlawfully, knowingly, fraudulently, feloniously, and with intent to defraud the Farmers' & Merchants' Savings Bank, a banking corporation duly organized and existing under and by virtue of the laws of the state of California, make, pass, utter, and publish to the said Farmers' & Merchants' Savings Bank a certain fictitious check purporting to be the check for the payment of money of Edward J. Caswell, which said fictitious check was and is in the words and figures as follows, to wit:

" '90-1-12 The Oakland Bank 90-1-12
" 'Established 1867. No. 632.
" 'Oakland, Calif., August 19, 1925.

" 'Pay to the order of Leo T. Levin $497.50, four hundred ninety-seven and 50/100 dollars, Levin note in full. Edward J. Caswell.'

"Whereas, in truth and in fact there was then and there no such bank, corporation, copartnership, person or individual as Edward J. Caswell in existence at the time said Frank S. Carmona, Jr., alias Leo T. Levin, so made, passed, uttered, and published said fictitious check as aforesaid, and as the said Frank S. Carmona, Jr., alias Leo T. Levin, then and there well knew, and the said Frank S. Carmona, Jr., alias Leo T. Levin, at the time he made, passed, uttered, and published said check as aforesaid, well knew that the same was fictitious."

The defendant demurred generally and specially to this information, and the demurrer was disallowed by the trial court. Defendant challenged the sufficiency of the information on various grounds; among others, that it did not state a public offense and that it did not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code of the state of California, in that it did not contain a statement of the acts constituting any offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended.

[1] It is well settled under our system of pleading in criminal cases that an offense may be charged in the language of the statute, but, where particular circumstances of an offense are necessary to constitute a complete offense, they should be stated and averred, and a failure to do so will vitiate the information or indictment. People v. Neil, 91 Cal. 465, 27 P. 760; People v. Perales, 141 Cal. 581, 75 P. 170; People v. Earl, 19 Cal. App. 69, 124 P. 887.

The point relied upon in support of the general demurrer is that the information failed to allege that the check in question was uttered, published and passed to the Farmers' & Merchants' Savings Bank as true and genuine.

[2, 3] Since the amendment of 1905 (St. 1905, p. 673) to section 470 of the Penal Code, the making and passing of a fictitious instrument may be prosecuted either under section 470 or section 476 of the Penal Code. People v. Bernard, 21 Cal. App. 56, 130 P. 1063; People v. Lucas, 67 Cal. App. 452, 227 P. 709; 12 Cal. Jur. 654, 655. Prior to 1905, section 470 was primarily a forgery and counterfeiting statute, and did not contain the words "signing of the name of a fictitious person," and prosecutions were had under that section, and many cases failed solely because, upon an information charging forgery, a defendant would cause it to appear that the check was fictitious, and thereby defeat the ends of justice, and the Legislature, to correct this evil, amended section 470 as indicated, so that a prosecution for forgery, where it is accomplished by passing a fictitious check, may now be had under either section 470 or section 476 of the Penal Code. This amendment applies only to the "signing of the name of a fictitious person," with intent to defraud, etc., and did not affect section 476. People v. Harben, 5 Cal. App. 35, 91 P. 398.

It will be noted that the information here charges the defendant with making, passing, uttering, and publishing a fictitious check, with intent to defraud. The information further alleges that the defendant willfully, unlawfully, knowingly, fraudulently, feloniously, and with intent to defraud the Farmers' & Merchants' Savings Bank, did make, pass, utter, and publish to said Farmers' & Merchants' Savings Bank a certain fictitious check, purporting to be the check for the payment of money of Edward J. Caswell. The information sets forth the check in hæc verba, and then further alleges that there was no such bank, corporation, copartnership, person, or individual as Edward J. Caswell in existence, and that the defendant knew the check to be fictitious at the time he made, passed, uttered, and published the same.

[4] Webster defines fictitious as "feigned, imaginary, not real, counterfeit, false, not genuine." See, also, People v. Harben, supra.

It would seem, therefore, where the information charges, as it does here, the defendant with making, passing, uttering, and publishing a fictitious check, knowing it to be fictitious, that it obviates the necessity of also informing the defendant that he made, uttered, passed, and published the same as true and genuine. If the name signed to the check is fictitious, it certainly could not be the true and genuine signature of any person.

[5, 6] If the defendant had been charged under section 470 with forging the name of a real person to a check, and passed and published the same, then it would have been necessary to also allege that he passed and pub-

lished the same as the true and genuine check of the person whose name was signed to it, in order to constitute a complete offense of forgery, but, where an information or indictment is laid under either section 470 or section 476 of the Penal Code, and is founded upon a check bearing the name of an imaginary or fictitious person, then the essential elements to be alleged are the uttering and publishing of such a check, knowing the same to be fictitious, etc. We conclude, therefore, that the information states a complete public offense, and that the general demurrer was properly disallowed.

[7] We think that the special demurrer urged, that the information does not substantially conform to the requirements of sections 950, 951, and 952 of the Penal Code, is without merit. All that is required in this regard is that the information be sufficient to enable the defendant, or any person of common understanding, to know what was intended, and to set forth the acts charged with such degree of certainty as to enable the court to pronounce judgment upon conviction. People v. Gordon, 13 Cal. App. 678, 110 P. 469.

[8] Complaint is also made by the defendant that the information fails to set forth the particulars showing what the artifice, trick, scheme, or deception was that defendant used to acquire the property of the bank. A sufficient answer to this contention is found in the information—there it is alleged that the trick or scheme used was the uttering of a fictitious check purporting to be the check for payment of money of Edward J. Caswell, whereas, in truth and fact, there was no such person in existence. The information fully meets these requirements.

[9] It is also contended by defendant that the corpus delicti was not established, in that the prosecution failed to prove that Edward J. Caswell was or is a fictitious person. The witness A. K. Gibbs, who was chief clerk of the Oakland Bank, upon which the check was drawn, testified that he was familiar with the accounts of the bank; that he had looked particularly for the account of Edward J. Caswell, and had not found any such account; and that he could state positively there were no accounts under the name of Edward Caswell. This testimony has been uniformly held to be prima facie evidence of the nonexistence of the drawer of a check claimed to be fictitious. People v. Eppinger, 105 Cal. 36, 38 P. 538; People v. Bernard, supra; People v. Walker, 15 Cal. App. 401, 114 P. 1009; People v. Thal, 61 Cal. App. 48, 214 P. 296. This prima facie showing was supplemented by a great deal of other testimony to the effect that the name Edward J. Caswell, signed to the check in question as maker thereof, was a myth.

The defendant also complains of the following instruction given by the court to the jury:

> "You are instructed that, in a case where a check is drawn upon some bank, banker, or depositary for money, purporting to be signed by an individual, evidence that no such person as the one whose name purports to be signed to such check had any account with said bank, banker, or depositary for the payment of money, at the time of making, drawing, or uttering of such check, is prima facie evidence of the fictitious character of the check."

[10] One of the objections raised by the defendant to this instruction is that it uses the words "prima facie"; claiming that these words are Latin, and to use Latin words in instructing the jury is a violation of article 4, § 24, of the Constitution of the state of California. This objection seems to be highly technical. The words "prima facie" have, by long usage, become a part of the English language, and their meaning is readily understood by a person of common understanding. Our Code of Civil Procedure (section 1833) recognizes the phrase, and defines it as evidence which suffices for the proof of a particular fact, until overcome by other evidence. This is practically the same definition of the words as used in Webster's Dictionary, which defines the words as evidence sufficient to establish a fact in question unless rebutted.

[11, 12] The next objection to the instruction is that it invades the province of the jury. This objection is also wholly without merit. The instruction merely declares a general principle of law, and has been approved by this court in People v. Thal, supra, as being correct in law and proper in form. Defendant also contends that the court erred in the refusal of certain instructions proposed by the defendant and in the giving of other instructions. We have examined these alleged errors, and we find them without merit. Defendant also complains of the admission of certain evidence of similar transactions, for the reason that the corpus delicti had not been established. What we have already said is a sufficient answer to this contention, and the testimony was properly admitted.

Many other errors on the part of the trial court are urged by defendant, but we have examined all these contentions, and, if any errors at all were made, they are of a trivial character, and did not affect the substantial rights of the defendant, and would not be sufficient for reversal of the judgment of conviction, in the absence of section 4½ of article 6 of the Constitution. In fact, after a careful examination of the entire record, including the evidence, we are firmly of the opinion that the defendant was fairly tried and justly convicted upon evidence that does not admit of any doubt. The defendant's counsel has made a strong presentation of an exceedingly weak case.

The judgment and order are affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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79 Cal. App. 787

MURDOCK v. FISHER FINANCE CORPORATION. (Civ. 5435.)

(District Court of Appeal, First District, Division 2, California. Nov. 24, 1926.)

1. Infants 🔑58(2)—Restoration or offer to restore consideration held condition precedent to maintenance of minor's action to rescind contract for purchase of car (Civ. Code, § 35).

In minor's action to rescind contract for purchase of car, restoration of consideration or offer to restore it *held* a condition precedent to maintenance of action under Civ. Code, § 35.

2. Infants 🔑58(2)—Equity requires restoration or offer to restore personal property contracted for by minor for his use in as good condition as when received, or payment of equivalent, before rescission by him.

A minor, to rescind contract for purchase of personal property for his own use, must first restore or offer to restore it in as good a condition as when received by him, or to pay its equivalent.

3. Infants 🔑58(1)—In minor's actions to rescind contract for purchase of car, accounting of charges and countercharges of each party held necessary to do equity.

In action by minor to rescind contract for purchase of automobile, where he returned it in a partially depreciated condition after having it in possession for about four months, during which time he used it for both business and pleasure, and value of another car taken in exchange by defendant as part payment was not shown, accounting of charges and countercharges as to each party *held* necessary to do equity.

4. Judgment 🔑252(2)—Court can give judgment for relief consistent with case made by complaint and embraced within issue, if complaint is answered (Code Civ. Proc. § 580).

Where complaint is answered, trial court is empowered by Code Civ. Proc. § 580, to give judgment for any relief consistent with the case made by the complaint and embraced within the issue.

5. Infants 🔑58(1)—Minor seeking to rescind contract for purchase of automobile should be charged with its use and depreciation while in his possession.

In minor's action to rescind contract for purchase of automobile, *held*, he should be charged with its use and depreciation during four months it was in his possession.

6. Infants 🔑58(1)—Where minor sought to rescind contract for purchase of automobile, seller, who took another car in part payment, was chargeable with its use and depreciation.

In action by minor to rescind contract for purchase of automobile, where he gave in part payment thereof another car, *held*, seller was chargeable with use and depreciation, if any, of such other car.

Appeal from Superior Court, City and County of San Francisco; Louis R. Ward, Judge.

Action by William A. Murdock by Chas. E. Knight, his guardian ad litem, against the Fisher Finance Corporation. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Franklin T. Poore, of San Francisco, for appellant.

Roy A. Bronson and E. D. Bronson, Jr., both of San Francisco, for respondent.

NOURSE, J. Plaintiff, a minor of the age of 19, sued to rescind his contract with the defendant for the purchase of an automobile. The plaintiff recovered judgment for $615.97, with interest, and the defendant has appealed on a typewritten transcript.

On June 17, 1924, the parties executed their written contract, whereby the plaintiff agreed to purchase from the defendant a Stutz automobile for the stipulated purchase price of $917.12, $450 thereof to be paid upon the execution of the agreement and the balance in equal monthly installments of $51.90 each. Plaintiff satisfied the initial payment by delivering to defendant a Ford automobile, and thereafter paid in cash the sum of $165.75. On October 7, 1924, the plaintiff in writing notified the defendant of his disaffirmance of this contract, offered to restore the Stutz car, and demanded payment of the sum of $615.75. During the period of 3⅔ months, when the plaintiff had possession of the car, he had driven it something over 3,000 miles, using it for both business and pleasure. While driving the car, he had been in collision with another car and had destroyed one of the fenders; he had stripped the gears and otherwise damaged the car to the extent of $128 in repairs, which the defendant was required to pay. When he attempted to rescind the contract, he made no offer to restore the consideration, nor specifically to reimburse defendant for the use of the car, the depreciation through ordinary use, or the cost of the repairs. He merely offered to restore the car in its damaged condition, and demanded that the defendant pay him the sum of $615.75 in money, though he, the plaintiff, had covered $450 of that sum by the delivery to defendant of a second-hand Ford car.

Section 35 of the Civil Code permits a minor to disaffirm his contract upon returning the consideration or paying its equivalent. This right to disaffirm, like the right to rescind accorded a party under section 1688 et seq. of the same Code, is based upon the equitable consideration that, where a contract is made under the circumstances enumerated in the Code, the court should be permitted to use its equity power to place the parties in statu quo as nearly as this may be done. For this reason section 35 provides that a minor over the age of 18 may disaffirm, upon restoring the consideration or paying its equivalent. Section 1691 provides that a party to a contract may, under certain conditions, rescind, but that he must restore to the other party everything of value which he has received, or must offer to restore the same.

[1] It is the settled rule of law that, as a condition precedent to the maintenance of an action in rescission, the plaintiff must have restored the consideration or must have offered to do so. 4 Cal. Jur. pp. 764, 765; Crouch v. Wilson, 183 Cal. 576, 584, 191 P. 916. This rule has become so well established that it has been held that the plaintiff, seeking rescission, must allege and prove that he has either restored or offered to restore the consideration. Crouch v. Wilson, supra. There are no California cases directly on the point, but the reasoning of the cases arising under section 1691 is equally applicable to those arising under section 35, and cases from other jurisdictions arising under similar statutes support the conclusion that, when a minor over 18 years of age seeks to disaffirm his contract, he must, as a condition precedent to the maintenance of an action, either restore the consideration he has received or pay its equivalent, or he must offer to do so.

[2] When the subject of the contract is the purchase of personal property for the use of the minor, equity demands that he restore or offer to restore it in as good condition as when delivered to him, or that he pay its equivalent. Petit v. Liston, 97 Or. 464, 184 P. 328, 191 P. 660, 11 A. L. R. 487; Gaither v. Wallingford, 101 Or. 389, 200 P. 910; Luce v. Jestrab, 12 N. D. 548, 97 N. W. 848; Sparandera v. Staten Island Garage, 117 Misc. Rep. 780, 193 N. Y. S. 392, 395; Rice v. Butler, 160 N. Y. 578, 55 N. E. 275, 47 L. R. A. 303, 73 Am. St. Rep. 703. Pettit v. Liston, supra, involved the purchase of a motorcycle by a minor, and the opinion contains some language which is particularly appropriate here:

> "We think, where the minor has not been overreached in any way, and there has been no undue influence, and the contract is a fair and reasonable one, and the minor has actually paid money on the purchase price, and taken and used the article, that he ought not to be permitted to recover the amount actually paid, without allowing the vendor of the goods the reasonable compensation for the use and depreciation of the article, while in his hands. * * * We think this rule will fully and fairly protect the minor against injustice or imposition, and at the same time it will be fair to the business man who has dealt with such minor in good faith. This rule is best adapted to modern conditions, and especially to the conditions in our far Western States. Here minors are permitted to and do in fact transact a great deal of business for themselves, long before they have reached the age of legal majority. Most young men have their own time long before reaching that age. They work and earn money, and collect it and spend it, oftentimes without any oversight or restriction."

Plaintiff insists that the case is within Le Baron v. Berryessa, etc., Co., 248 P. 779, decided by this court on June 26, 1926. But that case is clearly not in point, because the notice of disaffirmance in that case contained the specific offer to restore the entire consideration moving to the minors out of the transaction, and the trial court found, after a full hearing and upon conflicting evidence, that the entire consideration had been restored. The offer to restore was complete, and the finding was supported by competent evidence; but such is not the case here.

Before proceeding further, it is proper to state that plaintiff had possession of the Stutz automobile for about 4 months, used it for business and for pleasure, and drove it about 3,000 miles. When he returned it to the defendant, it was "in a partially depreciated condition." At the time of the disaffirmance the evidence does not disclose whether the defendant still held the Ford car which it had received in part payment; nor whether that car had been in use, and, if so, the value of that use, and whether that car had been depreciated in value, and, if so, how much, and what was the value of the Ford car at the time that the defendant received it, or at the time of the disaffirmance.

[3-6] Where the original transaction involves such complicated facts as we have recited, it is clear that equity cannot be done until an accounting is had of the charges and countercharges as to each party. Where the complaint is answered, the trial court can give judgment for any relief consistent with the case made by the complaint and embraced within the issue. Code Civ. Proc. § 580. Moreover, in a case where it is necessary to have an accounting to ascertain the sum to be repaid, the rule regarding a tender, etc., is not so strict, because the court will be able to fix the amount after hearing the evidence and thus do equity between the parties. California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 740, 91 P. 593. That the plaintiff should be charged with the use and with the depreciation of the Stutz car is clear. Bray v. Lowery, 163 Cal. 256, 124 P. 1004. For the same reasons the defendant is chargeable with the use and depreciation if any on the Ford car. If, perchance, it had sold the Ford car, its liability on that element would be the reasonable value of the Ford car at the

time it received it from the plaintiff, less the sum of $50 which this defendant paid to the former owner thereof to obtain a bill of sale. Blahnik v. Small Farms, etc., 181 Cal. 379, 384, 184 P. 661.

The fourth finding made by the trial court was as follows:

> "That heretofore, and prior to the commencement of this action, plaintiff paid the defendant on account of said purchase price the sum of $615.75."

The only evidence regarding his payments is that he made three separate payments of $51.90, or $155.70. To ascertain the items of the account above referred to will require the taking of additional evidence and the making of findings thereon.

The judgment is reversed, and the cause is remanded to the trial court for the taking of the additional evidence, and for the purpose of obtaining a finding of that court in accordance with the views herein expressed.

We concur: CABANISS, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 605

PEOPLE v. BLACK et al. (Cr. 1389.)*

(District Court of Appeal, Second District, Division 2, California. Jan. 10, 1927. Rehearing Denied Feb. 8, 1927. Hearing Denied by Supreme Court March 10, 1927.)

1. Criminal law 🔑1136—Defendant cannot complain because codefendant was convicted of lesser offense.

Defendant, convicted of burglary in first degree, cannot complain because codefendant was found guilty of burglary in second degree.

2. Burglary 🔑41(1)—Evidence held to justify conviction of burglary in first degree.

Evidence that dwelling was entered in nighttime, with identification of defendant, who was found with property taken from dwelling in his possession, justified conviction of burglary in first degree.

3. Criminal law 🔑1175—Defendant cannot complain of conviction of offense less than justified by evidence.

Defendant, convicted of burglary in second degree, cannot complain that evidence justified conviction of burglary in first degree.

4. Burglary 🔑41(1)—Conviction of burglary in second degree held warranted.

Evidence *held* sufficient to justify conviction of burglary in second degree.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Bodie Black was convicted of burglary in the first degree and Blanche Welch of burglary in the second degree, and they appeal. Affirmed.

John F. Hyland, of Los Angeles, for appellant Black.

Hal R. Clark, of Los Angeles, for appellant Welch.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

THOMPSON, J. The defendants were charged and jointly tried upon a charge of burglary. The jury returned a verdict of guilty of burglary in the first degree against the defendant Bodie Black and a verdict of guilty of burglary in the second degree against the defendant Blanche Welch. From the judgments pronounced upon the verdicts the defendants prosecute this appeal.

The facts as disclosed by the testimony are as follows: Mrs. Caldwell, whose home was entered during her absence, returned at about 12:10 a. m. on the morning of January 27, 1926, in company with a friend named Brown. Upon arriving at the steps to the front porch, they found an upholstered chair and victrola records, and, upon entering the house, discovered that rugs, lamps, bric-a-brac, console, gas stove, clothes, shoes, and other furniture and personal effects had been taken from the house; that the glass in the rear door had been broken in, a key which had been tied to another key with a ring had been turned in the door, and were then missing, which keys were subsequently found by the officers in the hip pocket of the defendant Black. Prior to the discovery of the chair and victrola records, and upon approaching Mrs. Caldwell's home, she and Mr. Brown saw a Buick automobile standing in a ravine near the house, and a man standing near it, who put his hand in his pocket, and yelled, "Don't come near me, don't come near me." Both Mrs. Caldwell and Mr. Brown identified this man as the defendant Bodie Black. The automobile belonged to the defendant Welch, and in it were found a coat, cloak, and vanity case belonging to her. In it also were found several of the articles removed from Mrs. Caldwell's home. The defendant Bodie Black was seen depositing dishes taken from the Caldwell home in the back yard of the Welch home, and the remainder of the property taken from the house was found in what was described as a vacant house about 75 feet from the Welch house, accessible thereto through the back yard of the Welch place. There is a statement in the transcript that the property was found in the automobile, the vacant house, back yard, and Mrs. Welch's parlor. Bodie Black and Mrs. Welch were seen to pass in front of an adjoining house about 12:30 on the morning of the burglary, and later were heard to hold a conversation in the rear of the residence of the defendant Mrs. Welch, in which Bodie Black stated to her, "Don't worry, I have got it all planted, they will have nothing on us." Both defendants took the stand in their own

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*Rehearing denied. Hearing denied by Supreme Court.

behalf, and endeavored to explain their late hours and the presence of the personal effects of Mrs. Welch in the automobile by saying that they had been to a café that night, drinking heavily, and did not remember what had occurred after their arrival home, except that Blanche Welch had to be assisted from the automobile, and also the defendant Bodie Black says that he remembers that he was awakened by Bob Welch, the husband of the defendant Welch, asking him to carry the dishes in. Contradictory statements, however, made by the defendant Blanche Welch were introduced, in which she said that she went up to the house that was robbed, saw what was going on, got out of the car, and went home. This statement was made to two witnesses on different occasions. The defendant Black was a sort of handy man employed by Mrs. Welch in the operation of a "chili house" where she lived. The arresting officers who arrived between 20 and 30 minutes after Mrs. Caldwell reached home, and saw both defendants shortly thereafter, saw nothing to indicate that defendants were seriously intoxicated.

The appellant Bodie Black complains of his convicton on two grounds, first, that the defendant Blanche Welch was only convicted of burglary in the second degree, while he was convicted of burglary in the first degree. The appellant Blanche Welch complains of the verdict because, there having been no testimony that Bodie Black was armed with a deadly weapon or that he assaulted any person, she could not have been convicted of burglary in the second degree while he was convicted of burglary in the first degree, and also joins with the codefendant in complaining that the evidence is insufficient to justify the verdict.

[1, 2] In so far as the appeal by the defendant Bodie Black is concerned, it is without merit. In effect, it is solely that the evidence does not justify the verdict. He cannot complain because a codefendant was found guilty of a lesser offense. The bare recital of the testimony is sufficient to show that the jury could not possibly have done anything except to return a verdict of guilty as against him. The dwelling was entered in the nighttime; the defendant was identified; he had the property taken therefrom in his possession; the keys which were left in the door were found in his possession. These things would be sufficient to justify the verdict without the other testimony.

[3, 4] In so far as the appeal by the defendant Blanche Welch is concerned, there is more of a question. She cannot, however, be heard to complain that she was convicted of an offense less than that justified by the evidence. In other words, if the evidence justified a conviction of burglary in the first degree, she cannot complain that she was convicted of burglary in the second degree. There are many cases to this effect. It is sufficient to cite People v. Coulter, 145 Cal. 66, 78 P. 348; People v. Cramley 23 Cal. App. 340, 138 P. 123; People v. Tugwell, 32 Cal. App. 520, 163 P. 508; People v. Maroney, 109 Cal. 277, 41 P. 1097, and People v. Lowen, 109 Cal. 381, 42 P. 32. The last two were cases where the defendant was convicted of burglary in the second degree. We are therefore confronted only by the claim that the evidence is insufficient to justify the verdict. In our opinion there is sufficient testimony to justify the jury in returning its verdict. Were it not for the admission made by the appellant Welch that she had been to the house, and the positive identification of her voice in her own back yard talking to Bodie Black, in which Bodie Black said, "Don't worry, I have got it all planted, they will have nothing on us," the case against her would be more doubtful. However, the admissions made by her, the conversation held by her with Bodie Black, the evidence establishing the ownership of the automobile, the ownership of the personal effects in the car, the dishes found in the back yard, the fact that Bodie Black was a handy man for her in the operation of the "chili house," and the fact that she was up and around at that time of the night, not under the influence of liquor so far as the officers could observe, is amply sufficient to establish her connection with the burglary.

The judgments appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

80 Cal. App. 147

BASALT ROCK CO., Inc., v. MacMILLAN, State Commissioner of Corporations.*

(Civ. 3225.)

(District Court of Appeal, Third District, California. Dec. 3, 1926. Rehearing Denied Dec. 31, 1926.)

1. Licenses 🔑25—Permit of commissioner to sell stock only after stock formerly illegally issued was returned held not void (Corporate Securities Act, § 4).

Where corporation failed to sell shares of stock for cash as required by permit of commissioner, commissioner's order issuing new permit for sale of stock to take effect when all shares issued without authority should be returned to secretary of corporation *held* not void as specifying conditions governing sale other than imposed by Corporate Securities Act, § 4 (St. 1925, p. 966).

2. Licenses 🔑22—Whether stock previously illegally sold was given for valid consideration held not determinable in proceeding to which stockholders were not parties.

Where corporation had sold stock illegally because not sold for cash, and new order of commissioner allowed further sales only upon returning certificates illegally sold, question whether stock illegally sold and not surrendered was given for valid consideration could not be

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 31, 1926. Hearing denied by Supreme Court January 31, 1927.

determined in proceeding to which holders of stock were not parties.

3. Licenses ⚿22—Order of commissioner forbidding sale of stock until return of certificates previously illegally sold held not abuse of discretion (Corporate Securities Act, § 11).

Order of commissioner of corporations permitting sale of stock of corporation only on return of certificates illegally sold *held* not shown to be an abuse of discretion so as to be reviewable under Corporate Securities Act (St. 1925, p. 969) § 11, where possible liability existed to holders of illegally issued stock.

Original application for writ of certiorari by the Basalt Rock Company, Inc., to Clifford J. MacMillan, as State Commissioner of Corporations, to review an order of the Commissioner. Order affirmed.

Clarence N. Riggins, of Napa, for petitioner.

U. S. Webb, Atty. Gen., and Thomas H. Christiansen, Deputy Atty. Gen., for respondent.

FINCH, P. J. This is an original application for a writ of review.

September 26, 1924, the commissioner of corporations duly issued a permit, authorizing the petitioner herein to issue and sell a certain number of shares of its capital stock upon conditions specified in the permit. The corporation thereafter sold a large number of such shares of stock in conformity with the terms of the permit and other shares in violation of such terms. For part of the stock illegally sold the corporation received $17,375 in cash, the full par value thereof. The particulars in which the sale of such stock was made in violation of the permit are immaterial to any issue in this proceeding. One of the conditions of the permit was that the stock should be sold at par for cash. The petition alleges that the corporation issued 500 shares of preferred stock to persons named in the petition and that such persons "did not pay or give said corporation any consideration for the issuance of the 500 shares of preferred stock, * * * either in cash or in property; that the question as to whether they gave any valid or legal consideration for the purported issuance of said purported shares was and is a disputed question of fact; that the petitioner alleges and maintains that said persons gave or paid no consideration to said corporation for the issuance of said purported shares to them, unless it was a usurer's bonus or premium upon a loan which was made to the corporation at the time said purported shares were issued to said persons, and which loan has since been wholly paid and discharged." The corporation thereafter ordered the cancellation of the stock so issued without consideration, but the holders thereof refuse to surrender their certificates of stock for cancellation.

In a petition for an amended permit, filed with the commissioner in 1926, and in a petition for a rehearing, the foregoing facts are set forth, and it is therein alleged that such illegal sales of stock were made by the directors of the corporation "in ignorance of the law"; that the purchasers of stock illegally issued, who paid cash therefor in the total sum of $17,375, have surrendered the certificates issued to them, and that the corporation is indebted to them in the sum of $17,375, the purchase price paid by them for the stock; that "petitioner is informed and believes and therefore alleges that all of said persons are willing to buy said stock and pay for the same at par if this commission will permit it to be issued and sold." The final request of the corporation was for a permit authorizing it to issue stock to the persons last named for the respective amounts paid by them for stock illegally issued, "without waiting for the surrender of the void certificates."

[1] The commissioner thereupon issued a permit for the sale of stock upon conditions, of which no complaint is made. The last paragraph of the permit reads as follows:

> "That this permit shall not become effective for any purpose unless and until all certificates purporting to represent any of the shares of stock issued without authority from the commissioner of corporations, or in nonconformity with the terms of the permit issued September 26, 1924, shall be returned to the secretary of said applicant and canceled."

Section 4 of the Corporate Securities Act provides:

> "The commissioner may impose conditions requiring the deposit in escrow of securities, the impoundment of the proceeds from the sale thereof, limiting the expense in connection with the sale thereof and such other conditions as he may deem reasonable and necessary or advisable to insure the disposition of the proceeds of such securities in the manner and for the purpose provided in such permit." Stats. 1925, p. 966.

Petitioner contends that the commissioner is not authorized to impose any conditions upon the sale of stock other than those specified in section 4, and that therefore the last paragraph of the permit is void. That paragraph, however, does not purport to specify the conditions governing the sale of stock under the permit, but the condition upon the performance of which the permit itself shall become effective. It is not contended that the commissioner might not properly have required the corporation to bring about the surrender and cancellation of the stock illegally issued as a condition precedent to the granting of a permit to make further sales, but this is in effect the very thing the commissioner did.

[2, 3] Petitioner alleges that it is a "disputed question of fact" whether "any valid or

legal consideration" was given for the alleged illegal issuance of the stock which has not been surrendered. That "disputed question of fact" cannot be determined in this proceeding, to which the holders of such stock are not parties. If the corporation has incurred an enforceable liability to the holders of that stock, such liability affects the value of the stock which it proposes to sell. The requirement, therefore, that the corporation clear up the question of such liability before the permit shall become effective appears to be a reasonable exercise of the discretion vested in the commissioner. Section 4 of the act provides that a permit shall not be issued to an applicant unless the commissioner shall find "that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof." The par value of the stock which the commissioner required to be surrendered is more than $10,000. To sell stock to purchasers who are in ignorance of this outstanding liability of the corporation, if it shall finally be determined that it is a liability, would be to work a fraud upon them. By section 11 of the act, the court is "limited to a consideration and determination of the question whether there has been an abuse of discretion on the part of the commissioner." No such abuse has been shown. Doble Steam Motors Corp. v. Daugherty, 195 Cal. 158, 232 P. 140; Agnew v. Daugherty, 189 Cal. 446, 209 P. 34.

The order of the commissioner issuing the permit upon the conditions specified therein is affirmed.

We concur: HART, J.; PLUMMER, J.

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79 Cal. App. 780

SIMPSON v. PAYNE, County Auditor.*

(Civ. 5349.)

(District Court of Appeal, Second District, Division 2, California. Nov. 24, 1926.)

1. Clerks of courts 🔑11—Board of supervisors of county operating under freeholders' charter held unauthorized to fix salary of clerk of municipal court at lower figure than that stipulated by Legislature (Const. art. 11, § 7½, and article 6, §§ 1, 11, 12, 18, as amended in 1924; St. 1925, p. 648, § 7).

Board of supervisors of Los Angeles county, which operates under freeholders' charter, *held* not authorized by Const. art. 11, § 7½, to fix salary of clerk in criminal department of municipal court of Los Angeles at lower figure than that stipulated in St. 1925, p. 648, § 7, in view of Legislature's power to fix salary under Const. art. 6, §§ 1, 11, 12, 18, as amended in 1924.

2. Counties 🔑24—County legislation authorized by Constitution under freeholders' charter supersedes inconsistent legislative acts relative to same subject-matter.

Wherever Constitution authorizes county to enact legislation on particular subject-matter under provisions of freeholders' charter, such legislation is exclusive and supersedes all inconsistent acts of Legislature relative to same subject-matter.

3. Constitutional law 🔑26—State's legislative power is vested in people, except as expressly prohibited by Constitution.

Entire legislative power of state is vested in people, acting either by initiative and referendum or through Legislature, except as expressly prohibited by Constitution.

4. Counties 🔑21½—Counties have no legislative authority except as expressly delegated to them.

Counties of state only have such legislative authority as may have been expressly conferred or delegated to them.

5. Clerks of courts 🔑1—"Clerks of municipal courts" are not "officers of an inferior court," or "county officers" (Const. art. 11, § 7½).

"Clerks of municipal courts" are not "officers of an inferior court," within Const. art. 11, § 7½, and are not "county officers," but are necessary adjuncts to municipal court.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Clerk of Court; County Officer.]

Application for writ of mandate by T. F. Simpson, prayed to be directed to H. A. Payne, as County Auditor of the County of Los Angeles, to compel him to issue to petitioner a warrant for payment of compensation for services as deputy clerk in the criminal department of the municipal court of the city of Los Angeles for the month of February, 1926. Peremptory writ granted.

Hewitt, Ford & Crump, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and R. C. McAllaster, Deputy Co. Counsel, both of Los Angeles, for respondent

THOMPSON, J. The stipulated facts show that a municipal court was established in the city of Los Angeles on February 1, 1926; that the petitioner is a clerk in the criminal department of said municipal court, as provided in section 7 of "an act authorizing the establishment of municipal courts, prescribing their constitution, regulation, government, procedure and jurisdiction, and providing for the election and appointment of the judges, clerks and other attachés of such courts, their terms of office, qualification and compensation and for the selection of jurors therein," approved May 23, 1925 (Stats. 1925, p. 648); that the salary of the office held by petitioner is fixed, by section 7 of the act above mentioned, at the sum of $225 per

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*Hearing denied by Supreme Court January 21, 1927.

month, but the board of supervisors of Los Angeles county, acting upon the theory that the salary fixed by the Legislature was without authority so far as counties operating under freeholders' charters were concerned, fixed the salary of the office at $165 for the month of February, 1926, and $175 per month thereafter.

This proceeding is brought, then, for the difference between $165 for the month of February, as fixed by the board of supervisors, and $225 a month, as fixed by the Legislature.

[1] The question presented is: Does the board of supervisors of Los Angeles county, under the freeholders' charter and section 7½ of article 11 of the Constitution, which provides that charters so adopted shall make provision "for the number of justices of the peace and constables for each township, or for the number of such judges and other officers of such inferior courts as may be provided by the constitution or general law, for the election or appointment of said officers, for the times at which and the terms for which said officers shall be elected or appointed, and for their compensation, or for the fixing of such compensation by boards of supervisors, and if appointed, for the manner of their appointment," give to the board the power of fixing the salaries of the officers or attachés of municipal courts, or does the Legislature have that power under section 1 of article 6 of the Constitution of California, as amended in 1924? That section, as so amended, reads as follows:

> "The judicial power of the state shall be vested in the Senate, sitting as a court of impeachment, in a Supreme Court, District Courts of Appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county."

As amended, section 11 of article 6, after making provision for the cities in which municipal courts may be established and giving the Legislature authority to determine the number of judges and providing for certain jurisdiction, states:

> "The Legislature shall provide by general law for the constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section, and for the establishment of municipal courts in cities or cities and counties governed under charters framed and adopted under the authority of this constitution, and having the population hereinbefore in this section specified. Upon the taking effect of such general law, a municipal court may be established in any such city or city and county whenever the charter thereof or amendment to such charter shall provide that there shall be a municipal court therein, or whenever the assent of a majority of the qualified electors of such city or city and county voting upon the question of the establishment of such municipal court, and expressed in such manner and form as the Legislature shall by general law prescribe, is given to the establishment thereof. The manner in which, the time at which, the term for which the judges, clerks and other attachés of municipal courts shall be elected or appointed, the number and qualifications of said judges and of the clerks and other attachés, except as such matters are otherwise provided in this article, shall be prescribed by the Legislature. The compensation of the justices or judges of all courts of record, shall be fixed and the payment thereof prescribed by the Legislature."

By section 12 of article 6 the municipal courts are made courts of record, and section 18 of the same article provides that judges "of the municipal court shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected or appointed, and no justice or judge of a court of record shall practice law in any court of the state during his continuance in office."

On these constitutional provisions it is asserted that the board of supervisors have the right to fix the salaries of the attachés of the municipal court, for the following reasons: First, that county ordinances enacted pursuant to a freeholders' charter supersede any general law enacted by the Legislature on the same subject; second, that section 7½ of article 11 of the Constitution confers on the board of supervisors operating under a freeholders' charter the exclusive authority to fix the salaries of judges and officers of all courts in the county except the superior court or police courts or courts established by city charters; third, that municipal courts are inferior courts within the meaning of subdivision 3 of section 7½ of article 11 of the Constitution; fourth, that the amendment to section 11 of article 6 of the Constitution does not deny to the board of supervisors the right to fix the salaries of attachés of a municipal court; and, fifth, that the petitioner, as clerk in a criminal department of the municipal court, is an officer of an inferior court within the meaning of section 7½ of article 11 of the Constitution.

In addition to asserting the unsoundness of the propositions advanced by respondent, the petitioner contends that the board of supervisors has no power to fix the salaries of clerks of the municipal court of Los Angeles city, because the provisions of the charter in that behalf are null and void in that they do not comply with the requirements of section 7½ of article 11 of the Constitution, and also that the power to make provision for the salaries of the attachés of a municipal court was never conferred upon the county.

[2] We think it is conceded and established that wherever the Constitution authorizes the county to enact legislation upon a particular subject-matter, under the provisions of

a freeholders' charter, such legislation is exclusive and supersedes all acts of the Legislature relative to the same subject-matter and inconsistent therewith. Graham v. Mayor, etc., of Fresno, 151 Cal. 465, 91 P. 147; Martin v. Election Commissioners, 126 Cal. 404, 58 P. 932. The general law or act of the Legislature applies, however, where there has been no provision in the charter or legislation thereunder. Fleming v. Hance, 153 Cal. 162, 94 P. 620. It would seem to us, therefore, that the first essential inquiry is as to the proper interpretation to be given to the amendment of the organic law of 1924. In so doing it is well to note that prior to the amendment of 1924 the judicial power of the state was disposed of and vested in the Supreme Court, District Courts of Appeal, superior courts, and such inferior courts as the Legislature might establish in any incorporated city or town, township, county, or city and county, and that this was the case at the time section 7½ of article 11 was adopted. In other words, the only authority that could be conferred upon the counties operating under freeholders' charters by section 7½ of article 11 was referable to such inferior courts as the Legislature might then establish. The fact that the language of section 7½ of article 11 reads, "such inferior courts as may be provided by the Constitution or general law," does not alter the situation because the only inferior courts in mind or provided for by the Constitution were those the Legislature was authorized to create. And in arriving at the true intent it is well to note that prior to 1911 when section 7½ of article 11 was added and section 1 of article 6 was amended, justices of the peace were directly provided for in the Constitution and distinguished from "such inferior courts as the Legislature may establish." This amendment, however, did not abolish the justices' courts theretofore established by the Constitution. In re Woods, 161 Cal. 238, 118 P. 792; People v. Creeks, 170 Cal. 368, 149 P. 821. In view of this fact it is as though the provision read, "such inferior courts as may be provided" by general law under the constitutional provision therefor or those heretofore established by the Constitution. It must be granted that the Legislature had no authority to establish municipal courts with the jurisdiction and powers of the municipal courts, the establishment of which was provided for in the amendments of 1924 to the Constitution. Perhaps it is not helpful to endeavor to classify the municipal court as an inferior court for the reason that inferior is such a relative term that it ranges all the way from next to omnipotence to next to nothing. It is of importance, however, to determine whether or not they are the kind of courts within the contemplation of section 7½ of article 11 of the Constitution. In addition to the fact that they could not possibly have been in the mind of the voters in 1911 when that section was adopted, it must also be remembered that the municipal courts are granted jurisdiction greatly in excess of that exercised by justices of the peace and police courts, or any inferior court which might have been created without constitutional amendment. We may well ask the question: Did the people of California and the Legislature intend to surrender to the counties any portion of their authority relating to the establishment of courts for the purpose of exercising a jurisdiction with which the counties theretofore had no voice? We think they did not.

[3] At this juncture it seems proper to refer to an established principle of law that the entire legislative power of the state is vested in the people acting either by way of the initiative and referendum or through the Legislature, except as expressly prohibited by the Constitution of the State. Sheehan v. Scott, 145 Cal. 684, 79 P. 350; Mendenhall v. Gray, 167 Cal. 233, 139 P. 67; People v. Rinner, 52 Cal. App. 747, 199 P. 1066, and In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[4] The converse of this proposition is also true, that political subdivisions of the state only have such legislative authority as may have been expressly conferred or delegated. Unless we can find, therefore, that the authority has been conferred or delegated to the county, such authority must still be resident in the Legislature. It appears, therefore, from the fact that municipal courts as provided for in the amendments of 1924 were not in mind at the time section 7½ of article 11 was adopted, that the jurisdiction of the municipal courts as adopted is much more extensive in character than the inferior courts therein provided for, and from the further fact that the municipal courts were designed for the purpose of exercising a large share of the judicial power of the state as courts of record with judges devoting their entire time and attention to judicial functions, that we cannot say that any authority over their functions or management either with relation to its attachés or otherwise was delegated to counties operating under a freeholders' charter. We think the very fact that the voters of the cities were required to assent to their establishment is indicative of the true purpose and intent of the Constitution (article 6, § 11a), to wit, to "provide by general law for the constitution, regulation, government and procedure of municipal courts" unhampered by any other legislative action.

[5] Holding, as we do, that the municipal courts are not inferior courts within the meaning and intent of section 7½ of article 11 of the Constitution, the attachés of that court are not officers of an inferior court

within its meaning. Nor must we confuse their status with that of the county clerk and his deputies, who are county officers. Clerks and attachés of the municipal court are necessary adjuncts of that court. Noel v. Lewis, 35 Cal. App. 658, 170 P. 857; Martin v. Superior Court, 194 Cal. 93, 227 P. 762.

Under the view we entertain it is unnecessary to determine whether or not the provisions of the charter under which the ordinance is enacted are valid.

The peremptory writ will issue

We concur: WORKS, P. J.; CRAIG, J.

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80 Cal. App. 167

PEOPLE v. WARRINGTON. (Cr. 1343.)*

(District Court of Appeal, Second District, Division 2, California. Dec. 7, 1926.)

1. Principal and agent 🔑99—General power of attorney does not authorize agent to divert funds intrusted to him for specific purpose.

General power of attorney, reciting that it is for all purposes to buy, incumber, and sell realty, personalty, and choses in action, given to agent for specific purpose, does not authorize agent to divert funds intrusted to his care for specific purpose.

2. Larceny 🔑40(8)—Objection to introduction of checks on ground that they were not lawful money of United States as charged held properly overruled.

In prosecution of agent for larceny of lawful money of United States obtained from principal, objection to introduction in evidence of checks obtained from principal on ground that they were not lawful money of United States *held* properly overruled.

3. Criminal law 🔑1144(13)—Appellate court must consider in strongest light evidence tending to support verdict and disregard inconsistent evidence.

Appellate court must consider in its strongest light all evidence tending to support verdict and disregard conflicting evidence inconsistent therewith.

4. Witnesses 🔑388(7)—Papers in civil proceeding should have been shown prosecuting witness before questions concerning contents were asked for impeachment purposes (Code Civ. Proc. § 2052).

Under Code Civ. Proc. § 2052, papers in civil proceeding brought by prosecuting witness should have been shown to her before any questions concerning contents thereof were asked for purpose of impeaching her testimony in larceny case.

5. Larceny 🔑47—In prosecution of agent for larceny of principal's money directed to be paid on escrow agreement, admission in evidence of such agreement held not error.

In prosecution of agent for larceny of money received from principal to be paid under escrow agreement, admission of evidence as to terms of escrow agreement and discussion thereof by district attorney *held* not error, notwithstanding agent was not party to such agreement.

6. Witnesses 🔑268(1)—Refusal to permit cross-examination of prosecuting witness in larceny case, who denied having heard of certain deal, as to what she heard respecting deal, held not error.

In prosecution of agent for larceny of principal's money, in which principal denied that she gave money to agent to be applied on oil deal and had not heard of such deal until after money was received by agent, refusing to permit cross-examination as to what she heard of such deal *held* not error.

7. Criminal law 🔑1170(4)—Exclusion of accused's testimony on certain issue, if error, held not prejudicial, where he subsequently testified fully thereon.

In prosecution of agent for larceny of principal's money, exclusion of defendant's testimony as to why he paid money to certain person, if error, was not prejudicial, where he subsequently testified fully as to such matters.

8. Indictment and information 🔑132(3)—Refusal to require district attorney to elect on which count of indictment he would rely held not error (Pen. Code, § 954).

Under Pen. Code, § 954, refusal to compel district attorney to elect on which of ten counts in indictment he would rely *held* not error.

9. Larceny 🔑14(1)—Instruction that procuring possession by fraud or artifice with intent to steal it is "larceny" if owner retains title held correct.

Instruction that obtaining possession of property from another by fraud or artifice with felonious intent of stealing it when accused gets possession thereof constitutes "larceny" if owner retains title *held* correct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Larceny.]

10. Larceny 🔑65—Evidence held to warrant conviction of agent for grand larceny of principal's money.

Evidence *held* to warrant accused's conviction of grand larceny in diverting principal's money from purpose for which it was given to accused.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

L. B. Warrington was convicted of grand larceny, and he appeals. Affirmed.

J. E. Light, of Glendale, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant was indicted by the grand jury of Los Angeles county in ten counts charging embezzlement, grand larceny, and obtaining money under false pretenses. The last four counts were dismissed, and the jury found the defendant not guilty

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 6, 1927. Hearing denied by Supreme Court February 3, 1927; Shenk, J., dissenting.

of embezzlement, but convicted him of grand larceny as charged in counts numbered 2, 4, and 6 of the indictment.

It appears that appellant was a neighbor and friend of one Emma J. Baker, who testified that she had confidence in him and trusted him; that prior to August 8, 1923, he represented to Mrs. Baker that he was the owner of interests in oil lands and leases, and that he contemplated the establishment of an oil refinery upon certain land adjoining that of one Frank Hutter; that if she would purchase Hutter's property for $30,000, such investment would yield large returns. It is admitted that appellant brought Mrs. Baker and Hutter together, and that on said date she signed escrow instructions and deposited her check for $1,000 with a bank at the city of Long Beach. On September 11, 1923, the prosecuting witness delivered to the defendant another check for $1,000, upon which he wrote, "For Ranch"; $2,300 was likewise given him on September 20, 1923, and on October 20, 1923, he received $800. It was testified that each such payment was solicited by Warrington and delivered to him by Mrs. Baker to be paid into the escrow or to Hutter. She averred that her experience in handling money was exceedingly limited, and that she did not know how the defendant intended to handle the payments, but that she had never given him permission to apply them otherwise than by delivery to the bank or to Hutter, and that it was immaterial to her so long as she got the land; that she "did not want him to have it for nothing." Nevertheless, that not one dollar of the moneys received by Warrington from Mrs. Baker was paid to Hutter or into the escrow, or returned to her, was established by an abundance of uncontradicted evidence. Hutter and Mrs. Baker ultimately closed the escrow, the $1,000 deposited by the latter was returned to her, and she subsequently sued the appellant for approximately $2,300 and instituted this criminal proceeding.

Counsel for appellant stresses the asserted importance of a general power of attorney which appeared to have been executed to him by the prosecuting witness on May 14, 1923, giving the defendant full authority for all purposes to buy, incumber, and sell real property, as well as goods, wares and merchandise, choses in action, and other property in possession or in action. However, the power of attorney contains no reference to the transaction here involved. Mrs. Baker testified that the defendant "came to us in a great rush one day, and said he could make us a lot of money if we gave him a power"; that they proceeded to the office of a Mr. Griffith, "and he told Mr. Griffith, 'You might as well make it a power of attorney' "; that "he fixed up the power of attorney, but it was never used except to defraud us"; that a few days later she demanded it, but that appellant replied, "Oh, I tore it up." This latter statement proved to be false, since it was introduced in evidence at the trial, and appellant attempted to show that it authorized him to use the escrow moneys above mentioned as he might see fit.

[1] We are cited to no authority, nor are we aware of any, which could be said to sanction the exercise of authority under a general power of attorney executed in May, 1923, to divert funds intrusted to an agent in confidence for a specific purpose which was limited and made definite by his principal. The prosecuting witness testified that the defendant had never rendered her an accounting of the moneys obtained from her, nor offered to return any part of them. During her cross-examination she was shown and identified a paper which was introduced in evidence, purporting to account for various amounts paid to persons not connected with the escrow transaction. She testified that "he stayed away for a week or two, then came to the house and gave me a paper where he stated he gave Looney $3,000"; that "he said, 'Now here is your paper and I am through with you; that is what I have done with the money.' I had never had any dealing with Looney or any one." Among the items so charged to Mrs. Baker appeared $58.30 and $100 to lawyers, $20 for chicken feed, $120 for chickens, $35 for a cow, "one thousand dollars ($1,000) to W. R. Looney, * * * and twenty-three hundred dollars ($2,300) check which was to be used in escrow or as Mr. L. B. Warrington saw fit, but was to go to Mr. W. R. Looney three thousand dollars ($3,000) escrow amount, or he was to use his own judgment as long as it was to take care of Mr. Looney's escrow interests, with a receipt to the escrow department."

It appears at once that the defendant did not attempt to account for any money in accordance with the terms of his trust. Hutter testified that Looney had an oil lease on the property in question, but was not entitled to any money under the escrow; that Looney and others gave him a quitclaim deed to their interests on October 30, 1922, but that he subsequently discovered that they had assigned all their interests therein to Warrington, so that the quitclaim was worthless. Notwithstanding that fact, it appears that the defendant obtained the funds from Mrs. Baker upon representations that he would clear the title, and that she would lose the land if she "did not have the money to make a big payment." The defendant testified that Looney was indebted to him in a considerable amount, but admitted on cross-examination that the Baker moneys were at times paid to Looney, and at other times deposited to the defendant's personal account in a bank as a credit against the Looney debt to himself.

[2] Objection was repeatedly interposed by the defendant to the Baker checks being offered in evidence, upon the ground that they were not "lawful money of the United States," which he was charged with having obtained from her. Such objections were overruled, and the action of the trial court is here assigned as prejudicial error, but there is no merit in this contention. The checks were drawn upon Mrs. Baker's account in the bank which held the escrow, and were cashed by Warrington. He does not argue that he expended approximately $4,100 in lawful money of the United States belonging to Mrs. Baker, "as Mr. L. B. Warrington saw fit," nor that he availed himself of the most effective, though meretricious, methods of obtaining it, but the jury were warranted upon the evidence before them in concluding that such was the fact.

Several other real estate transactions of Mrs. Baker were injected into the defense, and she was interrogated about them on cross-examination, obviously for the purpose of showing that some of her money was expended in connection therewith. However, the terms of his trust did not permit of such expenditures and Mrs. Baker testified that she had never had any other dealings with the defendant. A $500 check was also offered in evidence by the defendant, which amount he contended he had paid to Mrs. Baker. But she denied that she received any money from him, and swore that she deposited money in the bank for Warrington and gave him a check, that she later drew the money and delivered it to him in person, and that he then handed to her the check in question.

[3] The greater portion of appellant's alleged grievances as argued at the time of the trial, and advanced here as grounds for reversal, consist of criticisms of witnesses for the people and of sharp conflicts between their evidence and that of the defense. An appellate tribunal, however, is not authorized to discredit testimony which, by their verdict, a jury has indicated that they believed to be true. As recently said by this court, in passing upon the sufficiency of the evidence we must consider in its strongest light all evidence tending to support the verdict, and disregard such conflicting evidence as is inconsistent with the jury's decision. People v. Ferlin (Cal. App.) 250 P. 690.

[4] It having appeared during the trial that Mrs. Baker had filed a civil suit for the moneys herein mentioned, defendant's counsel sought to examine her regarding such civil proceedings, to which the district attorney objected upon the ground, among others, that no proper foundation had been laid. The objections were sustained. Thereupon counsel for the defendant offered the judgment roll, and read the verification to the complaint contained in it, but objections were sustained against his attempts to secure admittance of this evidence in the manner indicated, the court basing its rulings upon the ground that no proper foundation had been laid. Defendant's counsel indicated the purpose of these questions to be to show contradictory statements of the witness. Obviously the method of impeachment prescribed by section 2052 of the Code of Civil Procedure, where the alleged impeaching statement is contained in a writing, was not followed. The witness should have been shown the writing before any question was put concerning it. The objections were therefore properly sustained.

[5] It is argued that the defendant was prejudiced by the admission of the original escrow instructions in evidence, but he later admits that he was "not seriously prejudiced" thereby, although he was not a party to them and did not know their contents. They were offered by the district attorney, and at first admitted, for the purpose of showing that Looney was not mentioned in, nor a party to, the escrow. During the argument the district attorney was permitted to read and discuss some of the terms of the escrow agreement. This was objected to at the time, and is assigned as error. It appears that the defendant caused the parties to execute such agreement, and obtained money from Mrs. Baker to apply thereon, but later insisted that he was authorized to and did apply the money as he saw fit. The court had previously ruled that either party might read from the documents in evidence, and it seems eminently desirable that the jury should understand the whole transaction. It was incumbent upon the prosecution to prove the offense charged, and, if Mrs. Baker was induced to enter into a contract with Hutter, with which Looney had no connection, and the defendant was paying to Looney money which it was intended that he should apply on the Hutter sale to Mrs. Baker, the escrow agreement and instructions, together with the report of the bank, constituted material evidence tending to show what was required and that no such amounts were received by the latter. The terms of the escrow agreement were not in themselves in any way prejudicial to the defendant, and being material, it was not error for the district attorney to discuss and explain them in his argument to the jury.

[6] Mrs. Baker testified that the $800 check was given to Warrington in the same transaction and that she had no other dealings with him. Upon her cross-examination she was asked if as a matter of fact she did not give him said check to be applied on a Texas oil deal. She replied that she did not hear of the Texas land until after the defendant had received the $800. She was then asked what she heard about the Texas deal, to which an objection that it was not proper

cross-examination was sustained. There was no error in the ruling last mentioned.

[7] During the direct examination of the defendant a juror asked him why Looney should receive the Baker money, to which he replied that Looney had expended $7,500 on the property. The witness was then interrupted by an objection of the district attorney that it was immaterial, but that he would later show the connection, and such objection was sustained. It appears that the prosecuting witness was subsequently called and testified that Looney had never been mentioned to her in connection with the transaction. It is argued here that to sustain the objection amounted to a ruling that, inasmuch as the evidence sought by the juror was immaterial, the defendant's acts were not justified, and that the case was decided by the court. We think the defendant was entitled to testify fully to his theory of the transaction, and to give his reasons for evading or varying the alleged trust agreement between himself and Mrs. Baker. However, both prior to and succeeding the ruling in controversy the defendant and his witnesses testified extensively, and documentary evidence was introduced, as to the general power of attorney, as to other realty transactions of Mrs. Baker, and the disposition of the moneys, and the defendant had ample opportunity to, and apparently did, state his reasons for each of his acts, which the evidence of the prosecution flatly and unqualifiedly denied. It was, therefore, for the jury to believe either contention which, from all the evidence before them, seemed to have been established. Hence, we do not deem the error to have been of appreciable consequence or sufficient to justify a reversal, even if we concede for the sake of argument that there was error.

[8] As heretofore stated, the indictment contained ten counts. The defendant at various stages of the trial sought to compel the district attorney to elect upon which counts the people would rely, but the court below denied each motion, and the rulings in that regard are assigned as prejudicial error. Section 954 of the Penal Code expressly provides that two or more different offenses connected together in their commission, or different statements of the same offense, may be charged under separate counts, and that the prosecution is not required to elect between them.

[9, 10] Other points argued are obviously so untenable that we deem it wholly unnecessary to discuss them. The jury were fully instructed upon the credibility of witnesses, and as to the constituents of embezzlement and grand larceny. They were charged that "when, by means of fraud or artifice, or any other kind of contrivance, the possession of property is fraudulently obtained from another, and the party obtaining this possession acquires it by means of this fraud or artifice, with the felonious intention of stealing it when he gets possession of it, then the crime is larceny, provided that the owner" retains title thereto. Under this proper statement of the law the facts as delineated by the people's witnesses justified the verdict rendered by the jury. People v. Raschke, 73 Cal. 378, 15 P. 13; People v. Arnold, 20 Cal. App. 35, 127 P. 1060; People v. Knox, 32 Cal. App. 158, 162 P. 407; People v. Dye, 29 Cal. App. 169, 154 P. 875.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

80 Cal. App. 74

BRUN v. EVANS et al. (Civ. 5534.)

(District Court of Appeal, First District, Division 2, California. Nov. 29, 1926.)

1. Appeal and error 🔑870(3)—Order denying change of venue, being appealable, cannot be reviewed on appeal from judgment (Code Civ. Proc. §§ 939, 956, 963).

An order denying change of venue being appealable, under Code Civ. Proc. §§ 939, 963, is not reviewable on appeal from judgment under section 956.

2. Appeal and error 🔑959(3)—Pleading 🔑236(4)—Motion for leave to file amended answer after trial is addressed to discretion of court, and order not disturbed save for abuse.

Motions for leave to file amended answer after trial of cause are addressed to discretion of court, whose orders will not be disturbed except for plain abuse.

3. Pleading 🔑236(4)—Denial of leave to amend answer after trial of action to recover deposit made to secure performance of lease held not abuse of discretion.

In action to recover deposit made to secure performance of covenants of lease, refusal to permit amendment of answer after trial of cause *held* not abuse of discretion.

4. Appeal and error 🔑1071(6)—In action to recover money deposited to secure performance of lease, failure to find that money was to be forfeited if any of conditions were broken held not prejudicial.

In action to recover money deposited as security for performance of covenants of lease, failure of court to find that money was to be forfeited if any of terms and conditions of lease were broken *held* not prejudicial, where evidence showed that breaches complained of were consented to by defendants.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by B. J. Brun against J. A. Evans and another. Judgment for plaintiff, and defendants appeal. Affirmed.

F. E. Davis, L. E. Dadmun, and Davis & Dadmun, all of Los Angeles, for appellants.

Albert I. Loeb, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued to recover the sum of $2,000 paid to the defendants as security for the performance of the covenants and conditions of a certain lease of real and personal property between the parties. Plaintiff had judgment for $1,555.56, and the defendants have appealed on a typewritten record.

The lease contained the condition that the sum of $2,000 was to be paid "as security for the performance of all the covenants and conditions herein contained * * * to be returned by said lessors to said lessee when the term of this lease shall have expired, but is to be forfeited should any of the terms or conditions of this lease be broken by the said lessee." The trial court found that the lease was terminated by mutual agreement, and that at that time the plaintiff owed the defendants the sum of $444.44. This sum was deducted from the amount sued for, and this accounts for the judgment as rendered. The points advanced by appellants will be treated in order.

[1] The order denying appellants' motion for a change of venue was based upon conflicting affidavits. Appellants insist that the motion should have been granted. The order is one from which an appeal may be taken (section 963, Code Civ. Proc.), provided notice thereof is given within 60 days from entry of the order (section 939, Code Civ. Proc.). This was not done, and the merits of the order cannot be considered on this appeal from the judgment (section 956, Code Civ. Proc.; Bohn v. Bohn, 164 Cal. 532, 539, 129 P. 981).

[2,3] About 90 days after the cause was fully tried and submitted to the trial court for decision the appellants asked leave to file an amended answer. The proposed amendment was based upon some parol testimony offered by the appellants in contradiction of the express writings made at the time of the termination of the lease. The trial court refused the application for leave to amend, and this is assigned as error. Motions of this nature are primarily within the discretion of the trial court, and its orders will not be disturbed unless such discretion is plainly abused. 21 R. C. L. 572, 594. We are satisfied that in this instance this discretion was properly exercised.

[4] The appellants complain that the trial court failed to find in accordance with the strict terms of the lease that the money was to be forfeited if any of the terms and conditions of the lease were broken. They point out that oral testimony was taken to show that certain conditions of the lease relating to the cutting of trees and the care of the linen and other household effects were not complied with. This evidence was in direct conflict with their own written stipulations—express consent to the cutting of the trees having been given in writing and an express "O.K." having been given to the inventory on the return of all the personal property. Thus, though the finding may be technically incorrect, it is apparent that no prejudice resulted from it, as appellants have not shown how a finding favorable to them could have been made.

Other points do not require consideration. Judgment affirmed.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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79 Cal. App. 770

WESTERN ELECTRIC CO., Inc., v. COOLEY et al. (Civ. 2944.)

(District Court of Appeal, Third District, California. Nov. 24, 1926.)

1. Electricity 🔑8—"Property" subject to mechanic's lien includes all material used in construction of electric power line (Const. art. 20, § 15).

Within Const. art. 20, § 15, providing that mechanics and materialmen shall have a lien on the property, electric light poles, wires, and whatever material is used in construction of power line constitutes "property."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property.]

2. Mechanics' liens 🔑24—Within statute giving materialmen lien on building or "other structure," quoted term includes all objects built on the soil, which is property, within Constitution, having permanency and put in place to accomplish some definite purpose (Code Civ. Proc. § 1183; Const. art. 20, § 15).

Within Code Civ. Proc. § 1183, giving materialmen lien on building or "other structure," quoted phrase is not limited to objects similar in kind, but includes all objects built on the soil, and, in some instances, beneath the surface which is property, within Const. art. 20, § 15, having permanency and put in place to accomplish some definite purpose.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

3. Electricity 🔑8—Electric power line is "structure," within statute giving lien on building or other structure (Code Civ. Proc. § 1183).

Within Code Civ. Proc. § 1183, giving materialmen a lien on the building or other structure, an electric power line is a "structure," it being attached to the soil to enhance its value and owner's comfort, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Structure.]

4. Deeds ⚷117—Electric power line, is "improvement" and passes as appurtenant to land.

An electric power line, consisting of poles and wires, would pass as appurtenant to the land by deed to the soil and is included within the term "improvement."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement (of Land).]

5. Electricity ⚷8—Materialmen may have lien on electric power line, though built on highway (Code Civ. Proc. § 1183).

That electric power line was built on public highway, owned and controlled by state, used for highway and not subject to lien, could not prevent materialmen's lien attaching to power line, under Code Civ. Proc. § 1183, since the lien attaches primarily to the superstructure and to the land only, as embraced in common ownership with it, in view of section 1192.

6. Electricity ⚷8—In foreclosing lien on electric power line, one interested in private line to be connected need not be joined.

That individual was not made party to action to foreclose materialmen's lien on electric power line was immaterial, where he was interested only in a private line to be connected with it.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action to foreclose materialman's lien on an electrical power line, brought by the Western Electric Company, Inc., against Ida E. Cooley and others. Judgment for defendants, and plaintiff appeals. Reversed.

Willard P. Smith, of San Francisco, for appellant.

J. E. Ebert, of Marysville, and A. C. McLaughlin, of Yuba City, for respondents.

PLUMMER, J. Action to foreclose lien upon an electric power transmission line on account of materials furnished for and used in the construction thereof. Defendants had judgment, and the plaintiff appeals.

The pleadings set forth the necessary allegations concerning the corporate existence of the plaintiff, the business in which it was engaged, and the furnishing of materials used in the construction of an electric power line, the nonpayment therefor, the filing and recording of the lien and the time showing that this action was begun within the period limited by the statutes.

The facts, as found by the court, necessary to be set forth herein are substantially as follows:

That Clayton avenue is a public road and highway extending north and south through a certain tract called the Los Plumas tract in section 24, township 13 north, range 3 east, M. D. B. and M., Sutter county; that defendants herein own small tracts of land adjoining said Clayton avenue; that Clayton avenue is intersected by a certain other public road called Central avenue, along which the Pacific Gas & Electric Company maintains an electric power line; that the defendants, desiring power for irrigation and other purposes, entered into a contract with Lester W. Lack and Eldon J. Robinson, doing business under the firm name and style of Lack & Robinson, to erect a power transmission line along Clayton avenue in front of the properties belonging to said defendant, this power line to be connected by private lines to pumping plants situated on tracts of land owned by the different defendants; the line along Clayton avenue was about a half mile in length and was intended to be connected with the power line maintained by the Pacific Gas & Electric Company. The record shows the power line was erected by the said Lack & Robinson; that supplies, including poles, insulators, wires, and the various kinds of material necessary to be used in the construction of a power line, were furnished by the plaintiff to the said Lack & Robinson and used in the construction of the said half mile of power line on said Clayton avenue; that the amount due upon the contract for materials furnished by the plaintiff and so used in the construction of said power line was the sum of $435.99. After finding these facts and others not necessary to be set forth herein, the court made the following findings, Nos. 26 and 27, to wit:

> "(26) That said power transmission line so built by said Lack & Robinson, on Clayton avenue, as aforesaid, was built as specified in contracts 2 and 3, as set forth in finding 10 hereof, and is not a 'structure,' as defined in section 1183 of the Code of Civil Procedure of the state of California.
>
> "(27) That the said power transmission line is built on a public highway which is owned and controlled by the state of California, and during all the times mentioned in the complaint and is now used for highway purposes and is not subject to any lien of this plaintiff for any purpose whatever."

Under findings Nos. 26 and 27 there are but two questions necessary to be considered in the determination of this appeal. No other questions involving the merits of the action need be considered, as no error or irregularity in any other particular is urged upon our attention going to the merits of the action.

[1] Did the court err in holding that an electric power line, consisting of poles, wires, and other materials necessarily entering into the construction of the same, is not a structure, within the meaning of the language used by the Legislature in section 1183 of the Code of Civil Procedure? In answering this question, it may be profitable to first consider the language of section 15 of article 20 of the state Constitution, which reads:

> "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the Leg-

islature shall provide, by law, for the speedy and efficient enforcement of such liens."

The language of this section is direct and positive that materialmen shall have a lien upon the property for which they have furnished material. We think it unnecessary to cite authority to support the statement that electric light poles, wires, and whatever material enters into and is used in the construction of a power line constitutes property. Again, the section of the Constitution is broad and comprehensive in its terms and intendments, having for its purpose the giving to both laborers and materialmen more security for the labor performed and the materials furnished, without specifying the kind, character of the thing or object called property upon which the labor is performed or in the construction of which the materials furnished are used. So long as it comes within the definition of property, the constitutional provision is sufficiently liberal to extend the protection of a lien. In pursuance of this constitutional provision, the Legislature, in providing the machinery for the enforcement of such liens, has used both particular and general terms of definition. So far as material here, section 1183, Code of Civil Procedure, reads:

> "Materialmen, * * * furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road *or other structure*, shall have a lien upon the property upon which they have bestowed labor or furnished materials," etc.

[2] We think the Legislature, in the use of the term "other structure," must have had in mind the comprehensive language of the Constitution where use is made of the word "property," and that a liberal and fair interpretation would lead to the conclusion that the Legislature so intended, and not that the term "other structure" is limited in its meaning to an object, which is in kind similar either to a house, a wharf, a bridge, or a wagon road, but includes all objects built upon the soil, and, in some instances, extending beneath the surface of the soil, which partake of the nature of permanency, that is, a structure is an object which is built upon the soil and is not necessarily a house, or similar to a house, a bridge, or similar to a bridge, but is property, under the constitutional definition, having the nature of permanency and put in place to accomplish some definite purpose.

In 40 Cal. Jur. p. 65, § 32, we find the following:

> "The meaning of the word 'structure.' as used in a statute authorizing a lien for labor performed or materials furnished in connection with the creation, improvement, or repair of a structure, is to be ascertained by referring to the meaning of the words associated with it, and, where all the associated terms designate classes of property attached or appurtenant to, or a part of, the land, the word 'structure' is to be likewise restricted, notwithstanding the fact that it is susceptible of other definitions."

[3] There can be little doubt that a power line constitutes property appurtenant to the land, that it is a creation or an improvement entering into the value of the land just as permanently and with the same valuable characteristics as other objects mentioned. All of the terms used in the statute, which we have quoted, relate to material improvements attached to or having to do with soil, which would lead to the conclusion that a power line which, necessarily, in the erection of its poles must be attached to the soil, is within the definition of a structure erected thereon just as much as a house or a barn. The use is different, to be sure, but the ultimate purposes are the same—the enhancement of the value of the land and the enabling of the owner thereof to subsist thereon in comfort.

In Barnes v. Montana Lumber & Hardware Co., 67 Mont. 481, 216 P. 335, the Supreme Court of Montana, in seeking to define the word "structure," uses the following language:

> "When we have a case such as the one at bar, where all other associated terms share the common element of being attached to, appurtenant to, or of the land, we believe the rule is particularly applicable. We are therefore of the opinion that, as used in section 8339, supra, the word 'structure' must be held to partake of the element which is common to the associated terms, notwithstanding other possible definitions thereof. This is especially true since the word 'structure' is ordinarily understood as meaning a building. * * * We do not wish to be understood as saying that the words 'structure' and 'building,' as used in the statute, mean the same thing. We are however, of the opinion that a 'structure,' to be lienable, must, at the same time the labor is performed upon it or the materials are used in connection with its creation, improvement, or repair, be attached to land. In other words, without partaking of that nature of fixtures which in certain instances makes them nonremovable portions of the real estate, the 'structure' must be affixed to the land or be of or appurtenant to it before a valid lien can be secured thereon."

[4] There can be no question that a power line, consisting of poles set in the ground and wires strung thereon, would pass as appurtenant to one's land upon the owner executing a conveyance of the soil upon which the poles of the power line stood or were imbedded. That such a power line comes within the term "improvement," we think beyond controversy, just as much as a water ditch or an irrigation canal.

In Ogden v. Byington, 244 P. 332, the Supreme Court of this state, speaking through Justice Richards, takes up and considers the element of permanency in relation to improvements made upon land and shows when and in what instances irrigation ditches come within the lien law, depending upon the permanent character of such improvement.

In Mendoza v. Central Forest Co., 37 Cal. App. 289, 174 P. 359, this court, in a case where a rehearing was denied by the Supreme Court, held as follows (quoting from the syllabus):

> "Under section 1183 of the Code of Civil Procedure, providing for mechanics' liens on specified improvements 'or other structure.' farm development consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity designed to convey water to and distribute it over the land, and constituting a permanent improvement thereto, increasing its value, is a 'structure.'"

In the opinion in that case, we find the following definition quoted from volume 27, Am. & Eng. Ency. of Law (2d Ed.) p. 191, as follows:

> "In the broadest sense, a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner."

A power line is composed of definite parts, it is artificially built up, the parts are joined together in a definite manner, and it constitutes a construction having permanency and fixedness of place and a usefulness of purpose in connection with the soil. As to what constitutes a structure, under section 1183, Code of Civil Procedure, is also considered at length in the case written by Justice Richards in the case of Western Well Works, Inc., v. California Farms Co., 60 Cal. App. 749, 214 P. 491. It was there held that a well sunk by the appellant constituted a structure, within the meaning of that word as used in section 1183, Code of Civil Procedure. Practically all the California cases on this subject are there cited.

We may also refer to the case of Williams v. Mountaineer G. M. Co., 102 Cal. 134, 34 P. 702, 36 P. 388, and Silvester v. Coe Quartz Mine Co., 80 Cal. 510, 22 P. 217, being instances where the word "structure" has been held to apply to shafts and tunnels. In the case of Roebling Sons Co. v. Bear Valley Irrigation Co., 99 Cal. 488, 34 P. 80, two questions were presented to the Supreme Court: Whether a telephone line was a structure within the meaning of the lien law of this state, and whether the evidence showed that the materials furnished entered into the construction of the same. Without passing upon the question as to whether the telephone line constituted a structure, the court remanded the cause for a new trial on the ground that the testimony did not show that the materials furnished were used in the construction of the same, inferentially inducing the conclusion that the court was of the opinion that a telephone line was a structure. Otherwise, the cause would not have been reversed and sent back for trial upon the single question of whether the materials furnished entered into the construction of the same.

The only case where the question we are now considering came directly in point, to which our attention has been called, is that of Forbes v. Willamette Falls Electric Co., 19 Or. 61, 23 P. 670, 20 Am. St. Rep. 793. Under a statute identical with ours in regard to the words "other structure," the Supreme Court of Oregon, in a case having to do with the determining whether a lien could exist against an electric power line, used the following language:

> "The principal question litigated on this appeal is whether or not this statute gives a lien for labor against the property described in the complaint; in other words, do these poles planted in the ground, connected together with wires and insulators, constitute a structure, within the true intent and meaning of this statute? In answering this question, but little aid can be had from the decisions of other states, for the reason that no general principle of law is involved, and such decisions have generally turned upon the special or peculiar phraseology of the particular statute. Without attempting to indulge in any refined distinctions or definitions, and having in view the object and purpose of the enactment in question, I think it may properly be held that the poles, wires, insulators, etc., mentioned in the complaint, constitute a structure, within the meaning of the statute, and that the same is subject to a lien for labor performed thereon. In reaching this conclusion, we do not find it necessary to go as far as the court did in Helm v. Chapman, 66 Cal. 291, 5 P. 352, where it was held that a mine or pit sunk within a mining claim was a structure, within the meaning of the statute giving a lien on a building, improvement, or structure."

That decisions from other states are of little value in considering our statute arises from the fact that, in almost every instance which we have examined, there is a difference in the wording employed by the Legislature, but in the Oregon case the language is identical with our own, and we think the holding of the court in that case conforms with the intent of section 15 of article 20 of our Constitution and the enactments of the Legislature, as expressed in section 1183, Code of Civil Procedure, and that an electric power line, consisting of poles and wires strung thereon, insulators, and such materials as enter into the work, constitutes a structure upon which materialmen may be entitled to a lien, other provisions of the law necessary to the enforcement thereof being complied with.

The conclusion from the premises which we have laid down necessarily follows that finding No. 26, which is partly a finding of facts and also a conclusion of law, is, in so far as it is a finding of facts by reference to other findings showing the erection of the power line, as we have herein stated, is correct, but, that, in so far as it is a finding of fact or a conclusion of law that the power line so erected is not a structure, as defined by the mechanics' lien law of this state, it is contrary to the provisions of section 1183 of the Code of Civil Procedure.

[5] Finding No. 27, as we have said, is to the effect that a power transmission line was built upon a public highway owned and controlled by the state of California, used for highway purposes, and is not subject to any lien. Upon this finding, as well as upon finding No. 26, the trial court based its judgment.

To what extent the tracts of land owned by the defendants along Clayton avenue are coincident with the half mile stretch of the power line does not appear in the findings. Hence we pass by the usual presumption that the owner of the land along a highway has title to the center thereof and base our opinion as to this branch of the case upon the following excerpt, taken from section 15, vol. 17, p. 28, of California Jurisprudence:

> "Lien claimants are given a lien 'upon the property upon which they have bestowed labor or furnished materials,' as well as upon the land upon which any building, improvement, well, or structure is constructed, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, if at the commencement of the work or the furnishing of materials the land belonged to the person causing the improvement to be undertaken; if he owned less than a fee, only his interest is subject to the lien, except as the owner of the fee may have failed to give notice of nonliability, as provided in section 1192 of the Code of Civil Procedure. Under these statutory provisions, the lien on the building, or other structure, is the primary thing, and the lien in the land is merely an incident to it. No lien can be acquired on the land, if none is acquired on the building, but a lien may exist on the building without attaching to the land. Hence it is not essential to the existence of a mechanic's lien on a building that the person causing its erection should have owned or had any interest in the real property on which it is located. This distinction between land and superstructure, the lien attaching primarily to the latter, and to the former only as it was embraced in a common ownership with the building, has existed in California from the very earliest times."

A number of cases are there cited supporting the rule stated in California Jurisprudence, only two of which need be cited: Linck v. Meikeljohn, 2 Cal. App. 506, 84 P. 309, and McGreary v. Osborne, 9 Cal. 119. This disposes of the contention that the property was so situated as not to be subject to a materialmen's lien.

[6] The objection that one Frank Souza was not made a party defendant, as urged by the respondent, is answered by finding No. 23 of the court, to the effect that Souza was not interested in the half mile power line referred to, but only in a short private line to be connected therewith.

The judgment is reversed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

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80 Cal. App. 151

PEOPLE v. BATEMAN. (Cr. 1339.) *

(District Court of Appeal, First District, Division 1, California. Dec. 7, 1926.)

1. Criminal law 🔑531(3)—Shorthand reporter's testimony and preliminary questions and answers held to warrant admission of confession as free and voluntary.

Shorthand reporter's testimony that no hope of reward or immunity from punishment was held out to induce defendant to make statement, nor any force, threat, duress, or intimidation used to compel him to do so, and preliminary questions and answers in confession itself *held* sufficient to warrant its admission.

2. Criminal law 🔑736(2), 741(3)—Whether confession was voluntary and true held for jury on subsequent evidence.

Whether confession, for admission of which sufficient foundation was laid, was freely and voluntarily made and true *held* for jury on evidence, offered after prosecution rested, as to promises to defendant before he was taken to district attorney's office where confession was made.

3. Criminal law 🔑736(2)—Whether confession was free and voluntary is, first for court, but ultimately for jury.

Court must first pass on question whether confession sought to be introduced was freely and voluntarily made, but jury must ultimately determine whether it was so made, and hence entitled to consideration.

4. Criminal law 🔑1158(4)—Decision supported by substantial evidence will be upheld, where evidence as to admissibility of confession is conflicting.

Where evidence on question of admissibility of confession is conflicting, reviewing court will uphold decision, if supported by substantial evidence.

5. Criminal law 🔑673(4)—Admission of codefendant's confession held not error, in view of instruction limiting purpose.

Admission of codefendant's confession, which appealing defendant argued was not binding on him, *held* not error, in view of instruction that it was admitted only as against codefendant and must be disregarded so far as appealing defendant was concerned.

6. Criminal law 🔑369(2)—Admission of codefendant's confession of other robberies held not error, where different transactions were inextricably interwoven.

In robbery trial, admission of codefendant's confession referring to other robberies *held* not error, where different transactions were so interwoven that it was impossible to separate portion dealing with robbery charged.

7. Criminal law 🔑393(1)—Prosecution held entitled to cross-examine defendant as to truth of statements in confession, contrary to those on direct examination (Pen. Code, § 1323).

Where defendant's confession was admitted, and he testified on direct examination that he answered questions therein, as detailed by shorthand reporter, prosecution had right, under Pen. Code, § 1323, to cross-examine him as to whether such statements were true, and show by his admissions that they were contrary to statements on direct examination.

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*Rehearing denied January 4, 1927. Hearing denied by Supreme Court February 3, 1927; Curtis and Preston, JJ., dissenting.

8. Criminal law 🔑520(1)—Confession induced by promises of immunity or leniency will be rejected.

If confession is induced by any promise of immunity or leniency, it will be rejected as involuntary.

9. Robbery 🔑24(1)—Conviction of robbery held sustained by evidence aside from confession.

Evidence, aside from defendant's confession, *held* sufficient to sustain conviction of robbery.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Ronald M. Bateman and Claude Brooks were convicted of robbery, and defendant Bateman appeals. Affirmed.

Cormac, Bolles & Surr, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

CAMPBELL, Justice pro tem. The defendant, Ronald M. Bateman, and one Claude Brooks were jointly charged with the crime of robbery and convicted. The defendant Brooks did not appeal. The trial court having denied defendant Bateman's motion for a new trial, he has taken an appeal to this court from such order denying him a new trial and from the judgment of conviction, and the grounds of such appeal are as follows:

(1) It is claimed for defendant that the trial court erred in admitting over his objection a confession which was not freely and voluntarily made; (2) in denying his motion to strike out such confession; and (3) that there is no evidence outside of the purported confession which indicates any connection on defendant's part with the crime charged.

On the evening of January 2, 1926, a Mutual Creamery store, located at 2716 East Fourteenth street in the city of Oakland, was robbed. The defendant, Brooks, dressed in a brown overcoat and a gray fedora hat, entered the store in question, threatened the manager, Mary Hey, with a 38-caliber revolver, and took approximately $14 from the cash register. The manager followed defendant Brooks to the door and saw two people in a Ford coupé, which had been standing about 10 or 15 feet from the store, drive away. Subsequently, on the 18th day of January, a police officer of the city of Oakland noticed a Ford coupé parked on an Oakland street without a license plate on the rear of the car. A search of the coupé revealed a box of 32-caliber cartridges and a box of 38-caliber cartridges, together with certain other articles, including a holster, an overcoat, five hats and two caps. Within a short space of time the two defendants came up to the machine and were questioned by the officer. Upon being asked to produce credentials, the dedefendant Brooks attempted to draw a 32-caliber revolver. The revolver was knocked from his hand, and handcuffs were placed upon both defendants. The proof further established that defendant Brooks had traded in the 38-caliber revolver used in the robbery for the 32-caliber revolver which was found on him at the time of the arrest of the defendants. The defendant Bateman stated that he was the owner of the Ford coupé and the hats found therein. One of these hats, a gray fedora, bore the initials R. M. B. and was identified as the hat that defendant Brooks wore at the time the Mutual Creamery store was robbed. A clerk in another Mutual Creamery store in Oakland testified that she saw the defendants together in her store on the 21st of December, 1925; that there was a Ford coupé parked in the vicinity of the store, and that she saw defendants get into it and drive away; that the Ford coupé had no license plate upon the rear. In addition to this direct and circumstantial evidence, there was introduced, in evidence, a complete confession of the robbery in question, made by each of the defendants.

[1] Upon the question of whether or not the confession of the defendant Bateman was voluntary, James L. Meegan testified that he was present at a conversation held with the defendants in the office of the prosecuting attorney in the city of Oakland on January 19, 1926, and that he took notes of that conversation in shorthand; that no hope of reward or immunity from punishment was held out to induce the defendant to make a statement; and that no force or violence, threat, duress, or intimidation was used to compel the defendant to make a statement. In fact, the confession itself shows that the defendant, in making it, expected to receive no favors of any character, as will be seen from the preliminary questions asked and the answers given by the defendant in his confession preceding his acknowledgment of guilt:

"Q. You know Inspectors Sanderson and Goodwin, Captain McSorley, your brother, you understand who I am (my name is Fred L. Donahue, Deputy District Attorney), and the one taking the shorthand notes is Mr. Meegan. Now, Mr. Bateman, first, we have before us a report, police report dated January 2, 1926, of what purports to be a report of a holdup at a Mutual Creamery store, 2716 East Fourteenth street in the city of Oakland, at about 7 p. m. in the evening. We have this report before us. We have read it, and you are now here in the custody of the officers, and you know what the inquiry is going to be, do you not? A. Yes.

"Q. Are you willing to make a statement in this matter at the present time? A. Yes.

"Q. And when you make your statement, are you going to make it freely and voluntarily? A. Yes.

"Q. Tell us the truth? A. Yes.

"Q. And no reward or immunity from punishment has been granted you? A. No, sir.

"Q. And in making this statement, if you implicate any one else than yourself, you are going to tell the absolute truth, nothing but the truth, is that right? And the whole truth, is that right? A. That is right.

"Q. Now, you have listened to considerable talk about this matter, and, as I have stated, you know exactly in your own mind what you are going to tell us, and inasmuch as you have no counsel to advise you, we want to inform you now and instruct you to give this matter full consideration, that it is a serious matter, and once again I want to say to you whatever you say, tell us the truth. You understand, Mr. Bateman, that when you give this statement, that this statement will be used against you in the future at any trial or preliminary examination. You understand that? A. I understand that; yes, sir.

"Q. Now, you can make your statement, and I might state this, that in making your statement, nobody has threatened you with any violence, nor intimidated you in any way or otherwise? A. No, sir.

"Q. Make your statement in your own way."

[2] When the question of the admissibility of the confession was before the court and the witness Meegan, who had taken down the confession in shorthand, had testified that the statement was made freely and voluntarily and that no reward or immunity from punishment had been granted to the defendant, that he understood that the statement would be used against him in the future at any trial and that no one had threatened him in any way, the court, in overruling the objection, stated to defendant's counsel:

> "Now, if you claim the statement is involuntary, of course, I will give you an opportunity of showing that."

No offer was made or permission asked to call any witnesses, and the confession was read in evidence. Subsequently, however, after the prosecution had rested, the defendant called several witnesses who testified as to promises made to the defendant before he was taken to the district attorney's office, where he made the confession received in evidence. Appellant claims that, upon this evidence being given, the trial court should have stricken the confession from the record and taken it from the consideration of the jury. If this were the law, it would lie within the power of the defendant to clear from the case all confessions by his own evidence or such evidence as he might produce, and this regardless of the truth of such testimony.

[3] Where it is sought to introduce a confession of a defendant in evidence, the court is called upon primarily to pass upon the question of fact as to whether the confession was freely and voluntarily made, and it is for the jury to determine ultimately whether it was so made and therefore entitled to consideration. People v. Oliveria, 127 Cal. 376, 381, 59 P. 772; People v. Thomson, 145 Cal. 717, 725, 79 P. 435.

The foundation laid was sufficient to admit the confession, and, having been admitted, the conflict in the evidence which developed later presented a question of credibility, and it was for the jury to determine whether the confession was freely and voluntarily made, and whether it was or was not true. People v. Burns, 27 Cal. App. 227, 235, 149 P. 605. On this issue the court instructed the jury as follows:

> "The defendant Bateman has introduced testimony to establish the fact that such alleged statement or confession was not voluntary and was not therefore admissible as testimony in this case. You are instructed that the action on the part of the court in admitting such alleged statement or confession into evidence does not bind you to accept the court's conclusion. Whether such alleged confession or statement, if made, was voluntary or not is for you to decide. If you conclude that it was not made voluntarily, or was made under threats, or violence, or because of promises or improper inducements, then you have the right to and it is your duty to disregard the alleged statement or confession altogether."

[4] The deputy district attorney emphatically stated to defendant Bateman that his confession would be used at his trial or preliminary examination, and defendant replied that he understood that, and no promise of any kind had been made to him. As to whether he told the truth, when he made his confession, that no inducement had been held out to him, or whether the testimony of the witnesses who testified to promises having been made prior to defendant's going to the office of the district attorney is correct, is a question of fact, and, on the question of the admissibility of a confession where the evidence is conflicting, it is subject to the universal rule applicable to cases on appeal that the reviewing court will uphold the decision, if there is substantial evidence to support it. People v. Fowler, 178 Cal. 657, 662, 174 P. 892.

[5] The defendant Brooks also made a confession in the presence of the defendant Bateman which was, likewise, taken down in shorthand by the witness Meegan. No objection is urged on appeal that the statement of defendant Brooks was not admissible, although it is argued that the statement is in no way binding upon the defendant Bateman. On this question the court instructed the jury specifically as follows:

> "You are instructed that the alleged confession claimed to have been made by the defendant Claude Brooks is admitted only as against the defendant Claude Brooks, and you are admonished that, as the court instructed you at the time of the admission of the said alleged

confession, you are to absolutely disregard it so far as the defendant Ronald M. Bateman is concerned."

[6] Reference is also made in the confession of defendant Brooks to other robberies, but it was conceded by counsel for appellant at the trial that the different transactions related in the confession are so interwoven that it is impossible to separate the portion which deals with the particular robbery under investigation.

[7] Defendant Bateman took the stand in his own behalf and testified that he was at home at the time of the robbery. He further testified that he had given the answers to the questions in his confession, as detailed by Mr. Meegan in his testimony. On cross-examination, the following questions were asked and answers given:

"Q. By the way, these statements that you have made and which were taken down in shorthand by Mr. Meegan were true, were they not? A. As far as I can recollect; yes, certainly.

"Q. Everything you told then was the truth, wasn't it? A. As well as I can remember at that time they were the truth; yes."

No objection was made to this evidence at the time of its reception into the record, but it is now claimed that, by this cross-examination, defendant was compelled to be a witness against himself. There can be no question but that the prosecution had the right to fully cross-examine the defendant as to all matters concerning which he was examined in chief (Pen. Code, § 1323), and in so doing show by his admissions that he had made statements contrary to those made upon his direct examination. If such admissions constitute a confession of guilt of the offense for which the defendant is on trial, such confession could not be used in the absence of proof of its having been voluntarily made (People v. Clifton, 186 Cal. 149, 198 P. 1065). In the instant case, the confession having been received in evidence and defendant having testified concerning the same subject-matter on his direct examination, its use in the manner complained of was permissible.

[8] Counsel for appellant cites numerous California cases to the effect that our law has cast about the guiltiest prisoner the greatest safeguards to protect him from being convicted by his own extrajudicial utterances; that, if it appears that a confession is induced by any promise of immunity or leniency, the court will reject such alleged confession as not voluntary and will refuse to listen to statements thus elicited. We fully agree with counsel for appellant that the principle enunciated is the law of this state and is also the established rule in all other jurisdictions, but the question he presents was passed upon by the trial court when the confession was offered, and as the only preliminary proof before the court at the time was that the confession was freely and voluntarily made and without any hope of reward or inducement of any character, and that no one had threatened or intimidated the prisoner in any way, and that being so, the confession was properly admitted in evidence, the dispute as to its voluntary character and as to its verity became a question for the jury.

It follows that the trial court did not err in admitting the confession in evidence, and, it being properly admitted, it was not error to refuse to strike it out.

[9] As to the remaining point urged, that aside from the confession there is no evidence which indicates any connection on defendant's part with the crime charged it is sufficient to say that, aside from the confession of the defendant, the record, as a whole, strongly indicates the defendant's guilt.

The judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 61

ARENA v. BANK OF ITALY et al. *

(Civ. 3196.)

(District Court of Appeal, Third District, California. Nov. 29, 1926.)

1. Appeal and error 🔑1096(3)—Where appellants were respondents on former appeal, they will be permitted to question issue of insufficiency of evidence to support findings.

Where appellants were respondents on former appeal, and, as such, unable to attack findings of fact for insufficiency of evidence, they will be permitted to bring such issue before court for review.

2. Attachment 🔑151—One wrongfully securing release of attached property cannot, by virtue of stipulation in writ as to amount, complain of subsequent judgments secured by plaintiff as being excessive (Code Civ. Proc. §§ 537, 555).

Where property attached, under Code Civ. Proc. § 537, was released by sheriff without redelivery bond, required by section 555, one securing such release cannot attack subsequent judgment as excessive, since only purpose of stipulation in the writ of amount is to fix sheriff's liability, and to designate amount of property to be seized, and to protect interests of innocent third parties.

3. Appeal and error 🔑640—Whether record is properly authenticated to bring motion for new trial before court will be determined on consideration of merits of appeal.

Proper practice, where it is contended that motion for new trial is not properly before court because record was not authenticated, as provided by law, is to dispose of such question on consideration of merits of appeal itself.

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*Hearing denied by Supreme Court January 28, 1927.

4. New trial 🔑99—Motion for new trial for newly discovered evidence of assistant vice-president of defendant bank held properly denied.

Motion for new trial because of newly discovered evidence, consisting of testimony of assistant vice president of defendant bank, who had been assistant manager of credit department and was familiar with controversy, *held* properly denied.

5. Appeal and error 🔑981—Refusal of new trial for newly discovered evidence will not be disturbed except for abuse of discretion.

Motions for new trial on newly discovered evidence are not favorably regarded, and appellate courts will not disturb action of trial court in refusing to grant motion, except where it clearly appears there has been abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Joseph Arena against the Bank of Italy and others for conversion. Judgment for plaintiff, and defendants appeal. Affirmed.

Louis Ferrari and J. J. Posner, both of San Francisco, for appellants.

A. P. Dessouslavy, of San Francisco, for respondent.

PULLEN, Justice pro tem. Upon the original trial of this case in the superior court, judgment was rendered for defendant. Thereupon an appeal was prosecuted by the plaintiff herein to the Supreme Court (reported in 194 Cal. 195, 228 P. 441), and the judgment of the trial court was reversed, with direction to enter judgment for plaintiff. A petition for rehearing was denied, but the court directed that, inasmuch as the Bank of Italy had been a coactor with its codefendant, the sheriff, in procuring an unlawful release of attachment of the property in question and the delivery thereof to itself, the bank was liable for whatever damages plaintiff had sustained by reason of the conversion of the property.

Thereupon the trial court entered judgment for plaintiff in accordance with the directions of the Supreme Court, and also gave its judgment for the amount of damages sustained by plaintiff by reason of the conversion mentioned. The facts in issue are fully set forth in the opinion of the Supreme Court written by Mr. Justice Richards and need not be repeated.

Appellants rely upon three grounds for reversal: (1) Insufficiency of the evidence to support the findings. (2) Excessive amount of the judgment. (3) Error of the trial court in denying defendants' motion for a new trial.

[1] It may be conceded for the purposes of this opinion that, inasmuch as on the former appeal the present appellants were respondents, they as such respondents were unable to attack the findings of fact for insufficiency of the evidence and, therefore, may in this appeal bring that issue before this court for review. Lambert v. Bates, 148 Cal. 146, 82 P. 767; 2 Cal. Jur. p. 839, § 492. Appellants contend that the evidence is insufficient in the following particulars: (1) As to the ownership of the goods. (2) As to Dellaira's pledge to the bank. (3) As to the failure of the sheriff to demand indemnity from the plaintiff upon the filing of the amended third party claim. As to the insufficiency of the evidence to support the finding that Dellaira, at the time of the levy of the attachment, "was the owner and in the exclusive possession, custody, and control of said merchandise," the testimony upon that subject is, quoting from the record:

> "Mr. Ferrari: If you will admit that the transaction as set forth in the amended claim is true, that is all that we desire to prove; in other words, the warehouse receipt, the date, the time we acquired title, and those matters; I am willing to submit the matter.
>
> "Mr. Dessouslavy: You claim, I understand, that this property had been pledged to you to secure a debt.
>
> "Mr. Ferrari: It was assigned to us.
>
> "Mr. Dessouslavy: Assigned or pledged. Practically, that the property had been either assigned or pledged to you to secure a debt, and the property was warehoused, and you got the warehouse receipts as collateral, and on the 2nd or 4th of June, 1919, the warehouse receipts or the property itself came into Dellaira's possession, and he had it in his place of business on Front street. That is what you are seeking to prove?
>
> "Mr. Ferrari: That, in brief, is what I am seeking to prove.
>
> "Mr. Dessouslavy: We will admit that."

The foregoing embraces the stipulation of counsel, and those facts, under the reasoning and authorities cited by Mr. Justice Richards in the opinion rendered by the court in the case of Arena v. Bank of Italy, above referred to, fall far short of sustaining appellants' contentions. As to the question of Dellaira's pledge of merchandise to the bank previous to the pledge or assignment back to him, we believe the evidence amply sustains the finding that, prior to the levy of the writ referred to, the merchandise in question had been pledged to defendant bank by Dellaira, as does also the fact that the defendant sheriff released the property upon the filing of the amended third party claim and without notice to the respondent. We are of the opinion, therefore, that the evidence fully supports the findings.

[2] As to the second specification of error, namely, that the amount of the judgment was excessive, we also find that the claim of appellants is without merit. The sheriff was directed by the writ to attach certain property, which was done, and thereafter by

means of an unlawful release the property passed into the possession of one not entitled thereto. Upon the direction of the court, the property is now restored to its original status, and, still being lawfully in the hands of the sheriff by virtue of a writ regularly issued, it is now available to respondent from which he may satisfy his judgment. The only purpose of the stipulation of the amount in the writ is to fix the liability of the sheriff, and to designate the amount of property to be seized, and to protect the interests of innocent third parties, but here neither contingency is before the court.

Section 537 of the Code of Civil Procedure provides that the plaintiff may have the property of the defendant attached "as security for the satisfaction of any judgment that may be recovered." Section 555 of the Code of Civil Procedure provides for a bond for the release of an attachment conditioned for the redelivery of the attached property "to be applied to the payment of any judgment in such action." In its opinion denying a rehearing, the Supreme Court stated that defendants were guilty of conversion. This case, then, is not one affecting the rights of innocent third parties, but involves the consequences of a tortious act as the result of which respondent was deprived of his rights to have the attached property continued to be held by the attaching officer and to be applied to the payment of any judgment he might recover. Appellants' contention that any right to limit, abridge, or cut off the amount which respondent would thus have been entitled to recover from the proceeds of the attached property could be initiated by or founded upon their own wrongful act is obviously untenable and contrary to settled principles of law.

[3] Respondent urges that the motion for a new trial is not properly before the court, in that the record is not authenticated as provided by law, but, as this court, in the case of Oberkotter v. Spreckels, 63 Cal. App. 683, 219 P. 1010, said, the proper practice is to dispose of such a question upon a consideration of the merits of the appeal itself, and upon that theory we have examined the proceedings upon the motion for a new trial.

[4] In support of the claim of newly discovered evidence, appellants have filed two affidavits, one by the assistant vice president of the Bank of Italy setting forth the transactions between various parties and the defendant bank with respect to the property here in question, which facts, as set forth, are considerably at variance with the facts stated in the original and amended affidavits on attachment and with the evidence produced at the trial, and furthermore no showing is made as to why the testimony of affiant was not produced upon the original hearing, particularly in view of the statement that the affiant is assistant vice president of the Bank of Italy and had been in the employ of said Bank of Italy continually since June 1, 1918, and that during the year 1919 he was assistant manager of the credit department of said Bank of Italy and was familiar during all of said time with the account of Luigi Dellaira doing business as California Grape Association.

The affidavit of Mr. Ferrari, one of the attorneys for appellants, also filed in support of the motion for a new trial, is indefinite and somewhat contradictory, and also does not sufficiently show a reason for not producing the evidence before the trial court.

[5] No rule is better settled in the courts of this state than that motions for a new trial upon newly discovered evidence are not favorably regarded, and that appellate courts will not disturb the action of a trial court in refusing to grant a motion of this kind, "except where it clearly appears that there has been an abuse of discretion." Fresno Estate, etc., v. Fiske, 172 Cal. 583, 601, 157 P. 1127, 1134.

And again, as is said in Gallatin v. Corning Irr. Co., 163 Cal. 405, 420, 126 P. 864, 870 (Ann. Cas. 1914A, 74):

> "The evidence could not be deemed newly discovered, since there was ample time within which the plaintiffs might have ascertained all of these facts before the trial."

Obviously, appellants cannot predicate their motion for a new trial upon evidence which was, at all times, in the bank's own files, or upon the testimony of one who was its employee at the time of the first trial.

We find nothing, therefore, in the record or argument of counsel to warrant reversal.

The order and the judgment are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

80 Cal. App. 599

CITY OF SAN DIEGO v. CUYAMACA WATER CO. et al. (LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST., Intervener). (Civ. 5353.)

(District Court of Appeal, Second District, Division 1, California. Jan. 10, 1927.)

1. Eminent domain 🔑253(1)—Judgment determining right to condemn realty for public use and amount of compensation is "final appealable judgment"; "final order of condemnation."

Judgment affirming right to condemn realty for public use and determining amount of compensation is final or principal judgment from which appeal lies; final order of condemnation being in nature of special order made after final judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment; Final Order.]

2. Eminent domain 🔑257—Appeal after rendition, though before final entry of condemnation judgment, is not premature (Code Civ. Proc. § 939).

Under Code Civ. Proc. § 939, appeal from portion of judgment affirming right to condemn realty for public use is not premature, though prior to formal entry of judgment, if judgment was rendered before date of notice of appeal.

3. Eminent domain 🔑257—Order in condemnation proceedings that "judgment be entered accordingly" held rendition of judgment authorizing appeal before entry thereof (Code Civ. Proc. § 939).

Where jury's verdict, awarding compensation and damages for condemnation of realty for public use, had been entered and fact findings made, court's order that "judgment be entered accordingly" was rendition of judgment, entitling any dissatisfied party to appeal, under Code Civ. Proc. § 939, without waiting for entry of judgment.

4. Appeal and error 🔑133—Judgment from which appeal lies exists when court adds conclusions of law to fact findings or jury's verdict and orders entry of judgment accordingly (Code Civ. Proc. § 939).

While no appeal lies from fact findings and conclusions of law or jury's verdict, judgment, from which appeal lies under Code Civ. Proc. § 939, exists when court adds its conclusions of law to determinations of fact and orders that judgment be entered accordingly.

5. Appeal and error 🔑934(1)—It may be assumed that court stayed entry of judgment on verdict until determination of matters to be tried by court without jury (Code Civ. Proc. § 664).

Though record contains no order of court directly staying entry of judgment on verdict in condemnation proceedings, as required by Code Civ. Proc. § 664, to relieve clerk from entering judgment within 24 hours after rendition of verdict, it may be assumed that actual entry was stayed until court's determination of matters to be tried without jury.

6. Eminent domain 🔑253(1)—Order granting new trial of issues determined by jury in condemnation proceedings does not affect right of appeal from judgment.

Order granting new trial does not absolutely vacate judgment in condemnation proceedings, so as to affect right of appeal therefrom, but judgment remains in existence pending appeal from order granting new trial of issues determined by jury, though subject to modification as to amount awarded on new trial.

Appeal from Superior Court, Orange County; M. W. Conkling, Judge.

Action by the City of San Diego against the Cuyamaca Water Company and others, in which the La Mesa, Lemon Grove & Spring Valley Irrigation District intervened. From a part of the judgment, and an order granting plaintiff's motion for a new trial of part of the case, defendants and intervener appeal. On motion to dismiss the appeal. Motion denied.

Crouch & Sanders and Sweet, Stearns & Forward, all of San Diego, for appellants.

S. J. Higgins, City Atty., and Arthur F. H. Wright, both of San Diego, and Hunsaker, Britt & Cosgrove, of Los Angeles, for respondent.

CONREY, P. J. In this action to condemn real property for public use, compensation and damages were assessed by a jury's verdict, which was returned and filed on the 9th day of July, 1925. Other issues relating to the action were tried before the court without a jury, and on those issues findings of fact were signed by the judge and filed on the 22d day of August, 1925. These findings, while they recite that an order had been made directing that the issues involving compensation and damages be submitted to a jury, did not directly include any statement of the amount of compensation and damages which had been awarded by the jury. The court, however, did proceed to include, with its findings of fact, conclusions of law to the effect that the plaintiff is entitled to a judgment of condemnation, and directed that judgment be entered accordingly.

Thereafter the plaintiff served and filed its notice of intention to move for a new trial of the issues submitted to and determined by the jury. On the 4th of September, 1925, the court made and entered an order granting plaintiff's said motion for a new trial of that portion of the case decided by the jury. Formal entry of the judgment of condemnation has not been made. On the 30th day of September, 1925, the defendants served and filed notice of appeal "from that certain portion of the judgment made and rendered in said action on the 22d day of August, 1925, which adjudges that the plaintiff is entitled to condemn the lands described in its complaint as amended, subject to the reservations and restrictions contained therein and the further restrictions in the findings of fact and conclusions of law specified"; also "from the order made and entered on the 4th day of September, 1925, granting plaintiff's motion for a new trial of that portion of the case decided by the jury and setting aside the verdict of the jury heretofore rendered in said action on the 9th day of July, 1925, and from the whole of said order."

Now comes the plaintiff and moves that an order be made dismissing the appeal, which is an appeal from a part of the judgment. This motion is made "upon the ground that no final judgment has been rendered, given, or entered in said action, and that said appeal was prematurely taken."

[1, 2] In an action or proceeding of this kind, the judgment which affirms the right to condemn and determines the amount of compensation to be paid, although sometimes called an interlocutory judgment, is in its nature the final or principal judgment. The so-called final order of condemnation is in the nature of a special order made after final judgment. County of Los Angeles v. Rindge, 69 Cal. App. 72, 76, 230 P. 468. The point urged by respondent here is not based upon any claim that the judgment directed by the conclusions of law will be an interlocutory and not a final judgment, so far as the nature of the judgment is concerned. The contention of respondent is that the appeal is premature because the judgment actually has not been rendered by the trial court. It is provided by section 939 of the Code of Civil Procedure that no appeal shall be dismissed upon the ground that it was taken after the rendition of judgment and before formal entry.

It is not necessary to discuss here the meaning of the words "rendition of judgment," or the difference between the rendition and the entry of a judgment. The subject has been covered and the principal earlier decisions reviewed in a recent decision of the Supreme Court. Aspegren & Co., Inc., v. Sherwood, Swan & Co., 250 P. 400. In accordance with our understanding of those decisions, we are of the opinion that the appeal against which the motion is directed was not premature, if there had been a rendition of judgment prior to the date of the notice of appeal, and that we have only to determine on this motion the question whether or not the signing and filing of the findings of fact and conclusions of law—closing with the order, "Let judgment be entered accordingly," and preceded as it was by the verdict of the jury—constitutes a rendition of the judgment of such form and force that there remained only the ministerial act of entry of the judgment in order to place the same fully upon the record as the complete judgment of the court.

[3] We think that it should be conceded that at the time when the findings of fact and conclusions of law were signed and filed, the entire cause was before the court ready for decision, and that the court then and there had power to render its judgment. If the assessment of compensation and damages to be paid had been included in the matters submitted to the court without a jury, and if the findings of fact had included the items of compensation and damages, the court, having thus determined at one time all of the issues of fact in the case, could have rendered a judgment, and its order that "judgment be entered accordingly" would have been the rendition of judgment, and would have entitled any dissatisfied party to appeal without waiting for entry of the judgment. The fact that here the compensation and damages had been awarded by the verdict of a jury really makes no material difference in the situation. The verdict of the jury having been entered and the findings of fact having been made, the court had the right to and presumably did take cognizance of the record containing the verdict, as part of the basis of its order for entry of judgment. The court was vested with this authority just as completely as if the facts so determined by the jury had been included in findings of fact by a judge trying the case without a jury.

[4] In accordance with the views hereinabove expressed, we conclude that from and after the 22d day of August, 1925, there was in existence a judgment duly rendered, from which the defendants had a present right of appeal. It may be granted that there is no such thing as an appeal from findings of fact and conclusions of law or from a verdict of the jury. No doubt that is the law. But when the court has added to these determinations of fact its conclusions of law and its order that judgment be entered accordingly, there exists in contemplation of law a judgment, notwithstanding that the formal entry thereof has not been made. The provision to which we have referred, of section 939 of the Code of Civil Procedure, assumes an existing judgment from and after the rendition of judgment.

[5] Counsel for respondent suggests that, giving to the conclusions of law the construction most favorable to defendants, they cannot be held to constitute a direction by the court to the clerk to enter a judgment fixing the amount of the damages, and that before any judgment was rendered the verdict was set aside and a new trial granted as to the issues affecting the amount of damages. We have stated herein our opinion that upon a reasonable construction of the conclusions of law and the order of the court that judgment be entered accordingly, these conclusions and this order, based upon all of the facts as theretofore determined, did constitute a rendition of judgment. The general rule con-

cerning judgments based upon verdicts is established by statute. Section 664 of the Code of Civil Procedure directs that the clerk enter judgment in conformity to the verdict within 24 hours after the rendition of the verdict, unless the court order the case to be reserved for argument or further consideration, or grant a stay of proceedings. We are not aware that there is in the record any order of the court directly staying the entry of the judgment upon the vredict, but it may be assumed that the actual entry of judgment upon the verdict was stayed, as appropriately as it should have been, until the determination by the court of those matters which were to be tried by the court without a jury. As soon as those matters were settled by the filing of findings of fact and the court's order thereon to which we have referred, it immediately became appropriate to enter judgment in accordance with the verdict of the jury as supplemented by the court's findings of fact and conclusions of law.

[6] Although in connection with this point counsel for appellant have mentioned the order granting a new trial, we do not understand it to be insisted upon or claimed that the granting of the motion for new trial, if in fact a judgment had been rendered, would in any way affect the right of appeal from the judgment. An order granting a new trial does not absolutely vacate the judgment; the judgment is absolutely vacated only when such an order becomes a finality. Sherwin v. Southern Pacific Co., 168 Cal. 722, 145 P. 92.

Pending the appeal from the order granting a new trial of the issues which were determined by the jury, the judgment remains in existence as a judgment of the trial court, although subject to modification as to the amount of the awards if the order shall be affirmed and if there shall thereafter be another trial of those issues.

The motion to dismiss appeal from part of the judgment is denied.

We concur: HOUSER, J.; YORK, J.

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80 Cal. App. 31

PEOPLE v. SWIGART. (Cr. 933.)

(District Court of Appeal, Third District, California. Nov. 27, 1926.)

1. Homicide 🔑250—Conviction for manslaughter held sustained by evidence.

Evidence *held* to sustain conviction for manslaughter.

2. Criminal law 🔑1159(2)—Reviewing court must appraise probative value of testimony according to face value.

Reviewing court considering testimony is required to appraise its probative value according to its face value.

3. Homicide 🔑339—Excluding evidence on plea of self-defense that deceased had beaten others, if error, held harmless, in view of defendant seeking encounter.

In prosecution for murder, wherein defendant asserted that he acted in self-defense, exclusion of evidence that deceased, without justification, had violently beaten other men, if legally erroneous, *held* not prejudicial, in view of other evidence, showing defendant, with knowledge of such facts, brought about the fatal interview.

4. Homicide 🔑190(7)—Evidence of uncommunicated threats by deceased is admissible on aggression affecting self-defense.

Where defendant pleads self-defense, and question as to who was aggressor becomes pertinent, it is competent for defendant to show threats by deceased, whether or not communicated to defendant prior to homicide.

5. Criminal law 🔑720(9)—Argument of district attorney that defendant had fabricated evidence to support plea of self-defense held not improper under evidence.

In prosecution for murder, where there was evidence that defendant, after shooting deceased on highway, stopped automobile and particularly drew driver's attention to iron bar lying near deceased, argument of district attorney that defendant had shot deceased and then said to the witness, " 'See what I have done? There is the deadly weapon,' and he placed it there himself, 'and I am going to make you a witness;' that is the testimony in this case, * * *" *held* not improper.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

John T. Swigart was convicted of manslaughter, and he appeals. Affirmed.

L. B. Schlingheyde and Hugo McKinley, both of Modesto, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, by an information filed in the superior court of the county of Stanislaus, was charged with and tried for the crime of murder, and was convicted by the jury of the crime of manslaughter. The cause has been brought to this court on an appeal from the judgment of conviction and the order denying the motion of the defendant for a new trial.

The homicide took place in the early morning of the 30th day of July, 1925, on the highway running in front of and near the Stanislaus county hospital; said hospital being situated a short distance from the city of Modesto, the county seat of said county. The defendant and the deceased, one William Sullivan, were at the time of the fatal shooting, and had been for some time prior thereto, inmates of or patients residing at said hospital.

No one, other than the defendant and the deceased, was present at the scene of the shooting when the homicide occurred. The defendant was therefore the only living witness to the circumstances immediately attending or surrounding the act of killing. Upon other circumstances, however—those occurring prior to the date of the fatal meeting between the parties, together with certain incriminatory extrajudicial statements made by the defendant before and after the homicide took place—the people relied for a conviction, and which, it is urged here by the people, constitute an impregnable barrier against just interference on appeal with the result arrived at below upon the claim by the defendant that, as a matter of law, such result is without sufficient evidentiary support.

The claim the more earnestly urged here by the defendant is that, even if it were necessary to concede that the verdict is afforded sufficient evidentiary support, nevertheless the evidence tending to prove the defendant's guilt is so slight, or, in other language, the question of guilt is, upon the evidence, so close as to have imparted to the few assigned errors carried into the court's rulings upon the question of the admissibility of certain testimony a singularly prejudicial effect upon the substantial rights of the accused in the trial of the case.

[1] The record is voluminous and is brought here in two large typewritten volumes. These we have carefully read, and our conclusion from such reading is that the verdict is supplied with abundant evidentiary support. Like all criminal cases in which the people, in making their case, are compelled, from the intrinsic nature of the situation, to rely wholly upon the proof of a multiplicity of circumstances of a varying character, the trial before the court below covered a wide field or range of inquiry. The exigencies of the case, as it stands before this court, whose function is limited to a determination of the question whether the record under review in all vital respects legally sustains the result reached below, do not require us to enter herein upon an examination of every material circumstance which might have tended to contribute either to the condemnation or the exoneration of the defendant. A general statement of the facts, with a reproduction now and then of brief excerpts from certain portions of certain testimony, will well subserve the purposes of the decision herein.

Sullivan, the deceased, had been an inmate of the county hospital of Stanislaus county for some time prior and down to the date of his tragic death. He was, at the time of the tragedy, past 70 years of age. He was afflicted with rheumatism, which had become chronic with him. His feet, at some time prior to his entrance as a patient into the hospital, had been frozen, and for that cause had been amputated "as far up as the instep" of each foot.

The defendant first entered the hospital as an inmate suffering from some heart trouble in the early part of July, 1924. He remained at the hospital until the month of November, 1924, when he took his departure therefrom. He returned, however, a few days before Christmas, 1924, remaining there until the 4th or 5th of June, 1925, when he again left the hospital. After the last-mentioned date—either late in the month of June or early in the month of July—he again entered the hospital as a patient and there remained until the 30th day of July, 1925, on which day he shot and killed Sullivan.

Defendant became acquainted with Sullivan when first he (defendant) became an inmate of the hospital in the year 1924, and it seems that it was not long after the two men became acquaintances that a bitter feeling of hostility arose between them. It appears to be well established by the evidence that the genesis of this personal enmity between the two men was in a suspicion conceived by Sullivan that the defendant became an inmate of the hospital, not only for the reason that he needed support and medical aid at the expense of the public, but largely for the reason that he (defendant) had been employed by the public authorities to locate in the institution as a detective or a spy with a view of ascertaining whether intoxicating liquors were being clandestinely furnished the inmates of the hospital by some "bootlegger" or "bootleggers." This suspicion finally and within a short time developed into a positive belief in the deceased that such was the real purpose of the defendant in registering as a patient at the hospital. Here it may be stated that the conclusion arrived at by the deceased that the defendant was being used by some one in authority as a detective for the purpose suggested seems to have been well founded, the defendant having admitted after the homicide occurred that he was a "stool pigeon" at the hospital for the sheriff to find and report on any illicit liquor traffic which might be carried on with patients at the institution while inmates thereof. Sullivan, however, was a quick and high-tempered man, and when he became convinced that Swigart was acting at the hospital in the rôle of a detective to run down any "bootlegging" business that might be in operation there, he became very much incensed and embittered against the defendant, and lost no time or occasion to denounce him in bitter terms. On nearly every occasion on which the two met (and this was at least once every day), Sullivan would call defendant a "stool pigeon," always adding force to the offensive signification of that appellation by preceding it with adjectives not to be found in the dictionary. On the return the last time of defendant to the hospital, the deceased, addressing him in opprobrious language, said, in effect: "Why have you returned here? you are a d——n old ——— 'stool pigeon'; nobody here has any use for you." And so the bickerings of the two old men (defendant was about 68 years of age), continued at frequent intervals and until defendant called on the member of the board of supervisors who issued to him the permit upon the authority of which he (defendant) entered the hospital the last time before the date of the homicide and complained to that official that a "number of old men"—patients—at the hospital were constantly "picking on" and abusing him and threatening to inflict upon him personal injury, and asked the supervisor to cause the said "old men" to be turned out of the hospital. The supervisor promised to investigate and did subsequently cause an investigation of the charge. This investigation was conducted a few days only before the date of the homicide by the superintendent of the hospital and the supervisor referred to. Both the defendant and the deceased and other inmates of the hospital were called before the officials and closely questioned regarding the trouble and occasion thereof. The details of this investigation it is not necessary to repeat herein. It is enough to say that, after full inquiry into the matter, Sullivan promised the officials to cease quarreling with and abusing the defendant or in any manner molesting him thereafter. There is, however, some testimony to the effect that the deceased, notwithstanding the promise so made, continued to "pick on" and pursue the offensive course toward the latter that brought about, on the complaint of defendant, the investigation by the supervisor and the superintendent of the hospital.

The deceased was accustomed to rising early in the morning—at 6 o'clock or thereabouts—and taking walks back and forth for short distances along the highway running in front of and bordering upon the hospital grounds. With this custom of the deceased the defendant was familiar.

The defendant was the owner of a revolver, and, on returning to the hospital in the early part of July, 1925, carried the weapon with him, but, being acquainted with the rule prohibiting inmates, while such, from carrying or having possession of deadly weapons on the hospital grounds, hid or concealed his revolver near an old creek not far distant from the hospital. He kept the weapon there for several days and then removed it to and concealed it in the branches of a cypress tree standing near the fence separating the hospital premises from the highway. On the night immediately preceding the morning of the tragedy, the defendant took the revolver from its place of concealment and "oiled it up," and then placed it in a scabbard attached to a belt. On the morning of the fatal shooting the defendant saw the deceased in the act of leaving the hospital and going to the highway mentioned above. Within a very short space of time thereafter the defendant, with his revolver on his person, carrying it in a scabbard attached to the belt, which he buckled around his waist between his shirt and vest, also went to the highway. There he met and shot and killed Sullivan, having fired at the latter twice, both shots taking effect in the body of the deceased. Immediately following the fatal shooting the defendant observed a motorist traveling in the direction of the scene of the homicide and signaled the latter to stop. The motorist paid no heed to the signal, but passed on. Shortly thereafter, one Roy Albertson was driving an automobile from the town of Riverbank toward the city of Modesto, and, as he was approaching and not far from the point on the highway where the shooting took place, he saw the defendant in the center of the highway "waving his arms." Albertson, on reaching the spot where the defendant stood, stopped his car. Thereupon the defendant said to Albertson that he (defendant) "had shot a man" and requested Albertson to "go to the hospital and report it." Albertson thereupon drove to the hospital and told a nurse connected with the institution of the shooting, and, at her request, he conveyed her in his auto to the scene of the homicide. The dead body of Sullivan was lying partly on and partly off the paved portion of the road at a point something over 100 feet from where the defendant stood when he stopped Albertson, as explained. The defendant asked Albertson his name, and called his attention to an iron bar lying a few feet from the body of the deceased, saying: "I want you to notice the iron bar lying there. I want to get a square deal out of this." The fact of the killing was promptly communicated to the police office in Modesto and within a very short time thereafter Officer Dingley of the Modesto police force went to the scene of the shooting. The defendant was placed under arrest and his weapon taken from his possession by Dingley. Other parties, including another peace officer, soon followed Dingley to the place where the homicide occurred. The defendant was taken to the county jail and the body of the deceased removed to the morgue by the coroner.

The story of the tragedy as told by the defendant, omitting the details of the feud which had developed between him and the deceased, as briefly given above, and which culminated in the homicide, is: That, as was also his custom, he started to the highway to take a morning walk before breakfast; that, prior to entering the highway, he went to the cypress tree in which he had the night before secreted his revolver and got the weapon and placed the belt to which was attached the scabbard containing the pistol around his waist; that, with the revolver, loaded, thus upon his person, he entered the highway, and, feeling the effect upon the action of his heart of the walk from the hospital, he took a seat on a bench on the sidewalk bordering upon the highway in front of the hospital; that, while so resting, the deceased made his appearance around a curve in the highway on the side opposite to that upon which the defendant was sitting; that deceased, in an angry and sarcastic manner, said something to the defendant relative to a "still" which he (deceased) said was being maintained either upon the hospital grounds or on the outside thereof in near proximity thereto, and asked him why he did not investigate it, or words to that effect; that the deceased at the time had a good-sized rock in his left hand and, immediately after making the statement about the "still," removed the rock to his right hand and with the latter threw it at the defendant; that the defendant thereupon quickly arose from his position on the bench and took shelter behind a telephone pole near by; that deceased, all the time approaching the spot where the defendant stood, threw another rock at the latter, and finally drew from his person—apparently, defendant said, somewhere from his trousers—the iron bar already mentioned and continued to walk in the direction of defendant; that the latter drew his revolver and commanded the deceased to stop, otherwise, he told him, he would shoot and kill him; that the deceased, with the iron bar in his hand, threateningly continued approaching the defendant, when the latter fired two shots at the deceased, who, after the first and before the second shot, still moved toward the deceased, although, defendant admitted, there elapsed a very short interval of time between the two shots, not more than a second or two.

The foregoing statement embraces a recital, in substance, of the facts and circumstances immediately preceding and attending the act of killing as it was told by the defendant to the officers at the scene of the homicide and immediately after it occurred and as substantially they were testified to at the trial by him. This recital excludes, of course, those parts of the statements and the testimony of defendant to the effect that deceased not only started and kept up a systematic abuse of the defendant, but often threatened to inflict upon him bodily injury. At the trial, however, the people, after proving by evidence of circumstances and of the the admission of the defendant that the latter slew the deceased, introduced evidence of other extrajudicial statements by the deceased relative to the circumstances leading to and eventuating in the killing that tended strongly to support the theory of the people that the defendant's crime in taking the life of the accused was nothing short of murder of the first degree. In substantiation of this conclusion, reference may be made to the following significant considerations: That the deceased was a man past 70 years of age and so far crippled in the left arm as the result of chronic rheumatism as to make that member practically useless; that both feet, as far up as the instep of each, had been amputated, so that his power of locomotion and consequently his ability to move with alacrity were greatly impaired, if not actually destroyed, of which physical deficiency the defendant was fully cognizant; that the defendant was, according to his own admission, aware of the custom of the deceased, during the years he was a patient and an inmate of the hospital, to take early morning walks for short distances over and along the highway running immediately in front of the hospital grounds; that defendant knew of the bitter feeling of hostility cherished against him by the deceased; that he knew that the deceased was of an irascible, as well as of a pugnacious, nature, a fact which he (defendant) himself proved at the trial; that, knowing all these things, and further knowing that the deceased had gone to the highway on the morning of the homicide, he himself shortly thereafter not only went to the highway, but went there with a loaded revolver which he had never carried on his person while on the hospital premises. All these facts and circumstances stand in the record without contradiction. Indeed, the defense itself introduced evidence tending strongly to show, not only that the general reputation of the deceased for peace and quiet was bad, but also that he was very often seized with violent paroxysms of anger, and on certain occasions, while in such a mental state, had assaulted certain individuals. The other facts and circumstances to which we have referred were also brought into the record either through the defendant's extrajudicial declarations or his own testimony. But the defendant even went further in the way of incriminatory extrajudicial declarations than as already indicated. On the morning that he killed Sullivan, between a half an hour and an hour after his arrest and incarceration in the county jail, the defendant was interviewed, at said jail, by the deputy district attorney, Deputy Sheriff Wright, the chief of police of Modesto and the sheriff of Stanislaus county and questioned concerning the circumstances leading to and ending in the homicide. His statement at that time was written down in longhand by Wright, by the latter immediately thereafter put in typewriting, and the same read to defendant, who, upon such reading, stated that the writing embraced a correct statement of the facts and circumstances of which the killing was the outgrowth as he had given them to said officers. Wright testified that, upon his request, the defendant "talked slow" so that he was able to take in longhand the statement "word for word." The statement is as follows:

"I didn't tell any one that I had a gun. I kept it in my grip. I left the hospital a few days before Thanksgiving, 1924, to go to Fresno. I took the gun with me. I carried it on myself inside my shirt. I got back to the hospital about two days before Christmas. I had the gun with me. Sullivan came to the hospital some time in September, 1924. The nurse found my gun in my coat pocket, overcoat. About a month after I got back, at Christmas time, Mr. Trask took the gun and kept it. I got the gun back from him about the 1st of May, 1925. I took the gun at this time and hid it in the creek. I have had several quarrels with Sullivan. Sullivan always took a walk in the morning. I watched him from the hospital Monday the 27th, Tuesday the 28th, Wednesday the 29th, take a walk along the highway. On the 29th, I went to the creek and got my gun. I hid it along the cemetery fence. On Thursday, the 30th of July, 1925, I went out early in the morning and met Sullivan. Sullivan was on the south side of that road and I was on the north. Sullivan started to throw rocks at me. I got behind the telegraph pole. He started towards me with a piece of iron. I told him to stop or I would kill him. I didn't tell him I had a gun. He couldn't see it. I had it inside my shirt on my belt. He didn't stop so I shot him. He didn't stop then so I shot him again. I shot two shots just as fast as I could. He fell when I shot the second shot. He never got closer than 10 feet to me. It was about 20 minutes before a car came along. I couldn't get him to stop. I got the next car stopped about 10 minutes later. A boy was driving it. I told him to tell the superintendent of the hospital that I had killed this fellow. *I wasn't surprised when I met Sullivan. I expected to meet him. I knew that Sullivan couldn't run. He had his toes froze off and had rheumatism. I could have got away from him, but I don't have to run from any man.*"

Gray B. Leet, connected with the Stanislaus county welfare board, testified that he saw and talked with defendant at some time during the day the killing took place. The witness had gone to the county jail to see another prisoner, and, as he (the witness) entered the jail, the defendant stepped out of a cell and opened a conversation with the witness. The latter said to the accused: "That is some jam that you have got into, killing this old fellow." Defendant replied that he did it to protect himself, and proceeded to describe how the deceased attacked him by throwing rocks at him and following the attack by approaching him in a threatening manner with an iron bar in his hands. Leet then said to the defendant: "I understand that this old fellow, Sullivan, has got both of his feet off. He couldn't show much speed in chasing you. You look pretty healthy—you ought to have been able to get out of the way." The accused answered by saying, "Well, I kicked him off." The witness thereupon said, "You must have been laying for Sullivan, to know just exactly when to get him," to which the defendant replied, "Oh, I've been over by the T. B. ward and for four mornings watching him to see which way he would go; I knew just the way he would go because he went that way every morning." Defendant further stated to Leet that Sullivan and others of the old inmates at the hospital had accused him of being a "stool pigeon"; that he was not a "stool pigeon," but a detective.

F. E. Lockridge, a deputy sheriff, testified that, while "taking him to court," he had a conversation with the defendant about the homicide, that he said to the accused, "You have got yourself in a h——ll of a jam," to which the accused replied, "Oh, it's not much trouble." The witness, proceeding said, "I wouldn't want to be in your place," to which the accused responded, "Well, one of us had to go in the basket; I thought it just as well be him. If you will turn me loose," continued the defendant, "two or three more of those old s——ns of b——hes out there I'll kill."

The record contains the testimony of other witnesses giving the details of statements made to or in their presence by the accused after his arrest and prior to his first trial, which involved like incriminatory admissions by the defendant. The testimony of Deputy Sheriff Wright, giving the defendant's statement at the county jail and hereinabove reproduced in full, as Wright committed it to writing, was corroborated to some extent by the sheriff, who was present a part of the time only when the statement was being made. In fact, the defendant, when on the stand, while stating that all that was said by him on the occasion that Wright wrote out his statement was not contained in said statement, admitted that Wright's written statement of what he (defendant) said on the occasion referred to was correct as far as it went. He admitted that Wright, after copying in typewriting his written memoranda of what he (defendant) then had to say about the homicide, read the statement to him, and that he pronounced it correct.

The superintendent of the county hospital and some other parties connected with that institution testified that the deceased, by reason of his physical afflictions already described, was not able to travel on his feet much faster than a "walking gait"; that there was no spring to his movement when walking, but, to the contrary, he always walked like one whose lower limbs were "in a stiffened condition."

The people also introduced testimony of other circumstances and also evidence of physical facts bearing upon the general situation at the scene of the shooting, which tended to strengthen the hypothesis maintained by the state at the trial that the homicide was the result of a deliberate purpose in the defendant to slay Sullivan without legal necessity, cause, or excuse.

[2] The defendant testified, and thus made a rather feeble attempt to present a case of self-defense. He also denied making certain inculpatory statements attributed to him by witnesses to whom or in whose presence he essayed an extrajudicial explanation of the circumstances eventuating in and immediately attending the act of killing. It was, of

course, with the jury to consider and determine the probative force and the effect of his testimony upon the case made by the people. But it is perfectly clear, from the record, that there is no substantial ground for the claim made on this appeal that the verdict does not derive sufficient support from the evidence. The point especially emphasized here is, as above explained, that the question of guilt upon the evidence rests upon such a narrow margin as to intensify the damaging or baleful effect upon the rights of the defendant at the trial of certain alleged errors occurring during the trial, and which involve rulings upon the question of the legal propriety of certain evidence to the admission of which the defendant objected, the alleged misconduct of the district attorney in making statements in his argument to the jury not warranted by the evidence and the refusal by the court to instruct the jury to disregard such statements when requested to do so by counsel for the accused. As we have in effect stated, if the proofs advanced by the people in support of the claims of the indictment are to be accepted at the face value of the testimony by which such proofs were made, then, it is clear, the jury, in finding the accused guilty of manslaughter—the less grievous offense embraced within the crime charged—accorded to the defendant a degree of clemency far beyond what he was legally and justly entitled to. In considering the testimony upon which a finding is predicated, a reviewing court is required to appraise its probative force according to its face value, and, if it be not inherently improbable, so must be accepted as sufficient to support the fact found. This is true because it is to be presumed on appeal that the jury, who are essentially the weighers of the evidence, accepted such testimony as revealing the truth concerning the issue to which it was and is addressed. At any rate, it is perfectly clear from the record as thus far we have considered it, that the alleged errors of law forming the basis of the assignments here are to be reviewed, not upon the hypothesis that, under the evidence the question of the guilt of the accused is close, but in view of the impregnable proposition, presented by the record, that the verdict is strongly supported, evidentially. In that light the assignments will be considered.

[3, 4] The first of the assignments arises out of a futile offer by the defendant to prove that the accused was a man of quick and violent temper and of a pugnacious nature by the introduction of testimony showing that on different occasions he had struck and violently beaten other men; it being admitted that the defendant had not witnessed the assaults, and, prior to the date of the homicide, had not heard or known that they occurred. The theory upon which the proposed testimony was offered was that, particularly where no other living person but the accused was an eyewitness to the circumstances immediately leading to and characterizing the act of killing, it would tend to show and to support the defendant's claim and his testimony in support thereof that the deceased was the aggressor or the one who initiated the trouble culminating in the homicide and, consequently, tend to sustain the defendant's plea of self-defense. That such an inquiry is permissible to show that the deceased was a quarrelsome, high and quick tempered man and violently vindictive, the defendant contends is declared by Prof. Wigmore in his treatise on the Law of Evidence (volume 1 [2d Ed.] § 63), and the following cases: State v. McIver, 125 N. C. 645, 34 S. E. 439; State v. Rutledge, 135 Iowa, 581, 113 N. W. 461, 464; State v. Jones, 48 Mont. 505, 139 P. 441, 446, 447; People v. Thomson, 92 Cal. 506, 511, 28 P. 589. It is now a pretty generally accepted or approved rule that, in a case of homicide, where the defendant sets up the plea of self-defense, and the question as to which of the two combatants, the defendant or the deceased, was the aggressor, becomes a pertinent and an important issue in the case, it is competent for the defendant not only to show, as tending to prove that the deceased was the aggressor, that the general reputation of the deceased for the quality of peace and quiet was bad, but also that the deceased had made threats, whether communicated or not communicated to the defendant prior to the homicide, to commit physical violence upon the latter. The rule as thus stated is, in its entirety, perfectly sound, since, obviously, uncommunicated threats of the character mentioned would as effectually show the animus or hostile state of mind of the deceased towards the accused as would or could threats of which the latter had been informed prior to the fatal meeting, and testimony of such uncommunicated threats would therefore have as direct and forceful a bearing upon the question as to which of the two was the starter of or aggressor in the fatal combat as would or could threats by the deceased against the defendant which had been, prior to the homicide, communicated to him. And there might be some support in logic for the admissibility of proof that the deceased, in the presence of the defendant, had assaulted other persons without provocation sufficient to justify the assault, or any other fact, with which the defendant was himself personally familiar, which would tend to show that the deceased was by nature quarrelsome and belligerent. But even testimony of such specific acts of violence would inject issues of a collateral nature into the case which, if the rule sanctioning it were to be justly applied, would have to be tried out, for it would be manifestly unfair if the people were not permitted to show or make an effort to show that the acts of violence committed by the deceased in such instances were justifiable or excusable under the law. The result of the trial of such collateral matters would ob-

viously have a tendency to cause confusion or the loss of sight of the main issue to a dangerous degree and also to prolong the trial of the principal issue to an unreasonable length. These observations apply even with greater force to the proposition that evidence of acts of violence by the deceased, not communicated to the defendant, or of which he had no knowledge prior to the date of the homicide, is permissible as in support of the claim of the accused that the deceased was the aggressor in the mortal affray. The courts of our own state have not as yet gone as far in applying the character rule in instances such as we have here as counsel for the defendant would have us go. The case of People v. Thomson, 92 Cal. 506, 511, 28 P. 589, 590, supra, is not an authority for the rule as it would be applied by the defendant here. After referring to the fact of the killing and the fact that the defendant therein set up the plea of self-defense, claiming that "the deceased made the first attack," the court said:

> "Under these circumstances, all the acts and conduct of the deceased, either in the nature of overt acts of hostility, or threats communicated or uncommunicated, were proper evidence to be considered by the jury as shedding light—to some extent, at least—upon the issue as to whether the deceased or the defendant was the aggressor in this fatal affray. These principles are elementary in criminal law, and a citation of authorities not demanded; but the general principles are found discussed in People v. Arnold, 15 Cal. 479; People v. Scoggins, 37 Cal. 677; People v. Travis, 56 Cal. 252; People v. Tamkin, 62 Cal. 469."

By the words in the above excerpt, "overt acts of hostility," the court undoubtedly had in mind such "overt acts" committed by the deceased upon the defendant and not acts of personal violence committed by the deceased upon others and of which, prior to the homicide, the defendant had no knowledge. But the situation in the instant case does not require us to express an unqualified opinion herein as to the legal soundness or propriety of the character rule which would sanction proof in cases of this character of uncommunicated acts of personal violence inflicted by the deceased upon other parties as bearing, under a plea of self-defense, upon the question as to which of the two parties was the aggressor. It may be granted, as the defendant repeatedly charged, that the deceased was a man of bad reputation and character for peace and quiet and was often engaged in personal encounters with others. It may be granted that the deceased, as the defendant repeatedly declared was true and offered testimony to show, long cherished a profound dislike for the accused, and had frequently threatened to commit personal violence upon the latter, and that the accused consequently had reason to expect and did expect to be attacked by the deceased at any time. Yet, as above suggested, fully cognizant of this hostility and the threats thus manifested and made against him by the deceased, and fully familiar with the custom of the deceased to take early morning walks along the highway in front of the hospital, the defendant himself, first arming himself with a loaded revolver, which he admitted he had not been in the habit of carrying on his person, and, as he further admitted, having observed the deceased at an early hour of the morning of the tragedy—about the hour he usually took for his daily walks—going to the highway, also almost immediately went to the road and thereby placed himself in a position where he knew that he would in all likelihood meet the deceased, his enemy, the man who had threatened to injure or kill him. Thus, in proving the bad character of the deceased for peace and quiet and proving that the latter had often threatened to inflict injury upon him, the defendant himself disclosed knowledge of facts which, if he was not designedly looking for or seeking trouble with the deceased, should have operated as a sufficient incentive to keep him from the highway on that tragic morning. In other words, proof by the defendant that the deceased was of a quarrelsome, turbulent, and pugnacious disposition and a dangerous man for a person he hated, as the defendant knew that he hated him, to come in contact with, and that he had often threatened to injure or kill the latter, tended, as such should have been the tendency, under the circumstances of the case, to destroy rather than to sustain his plea of self-defense. Therefore, if it was legally improper to exclude testimony of instances in which the deceased had committed acts of physical violence upon persons other than defendant, and of which instances the latter had no knowledge prior to the date of the homicide, the rulings foreclosing the right in the accused to make such proof was entirely without prejudice. What we have said on the question in hand applies, of course, to all other objections to rulings disallowing testimony offered by the accused designed to show similar uncommunicated acts of violence by the deceased.

[5] The other assignments of error, to which counsel have directed our attention, involve alleged misconduct of the district attorney in his argument of the case to the jury on behalf of the people, and which it is here claimed seriously prejudiced the case of the accused, and the refusal of the court to instruct the jury, upon motion of counsel for the defense, to disregard the remarks of the district attorney which constitute the foundation for the misconduct charged against the officer. The following are the remarks of the prosecutor of which the defendant complains:

> "Mr. Brown (in argument to jury): It is not a question of manslaughter, but it is a question of this man coolly and calculatingly going out

there and making his preparations and waiting until the unarmed man stubbed along there, then shot him down like a dog, and stood over his dead body and says to the witness, 'See what I have done? There is the deadly weapon,' *and he placed it there himself*, 'and I am going to make you a witness.' *That is the testimony in this case*, and it is clear and conclusive. * * *"

In using the foregoing language, the district attorney did not leave the realms of legitimate argument in this case. The language merely involved the prosecutor's interpretation of the effect of, and the expression of his conclusion from, certain testimony properly received into the case—an interpretation and conclusion which the jurors themselves could justly have made of and drawn from the testimony. It will be borne in mind that the witness Roy Albertson, who was driving an automobile over the highway in the direction of the spot where the shooting took place, within a few moments thereafter, and who, when near the spot, was hailed by the accused and thereupon stopped near where the body of the deceased lay in the road, testified that the defendant immediately called his (the witness') attention to the iron bar lying near the dead body of Sullivan, and, after declaring that the deceased. with the iron bar in his hands, menacingly approached and threatened to use the instrument upon him (defendant), and that he thereupon shot and killed Sullivan, in effect, asked the witness particularly to notice the bar and its position on the ground with reference to the body of the deceased, expressly adding, "I am going to get a square deal out of this," referring to the homicide. The theory of the people, in presenting the case to the jury, was that the deceased did not at any time have the iron bar in his possession, but that, having gone to the highway that morning with the intention of meeting Sullivan and assaulting and perhaps killing him, the defendant himself, after firing the fatal shot, placed the iron bar near the body of the deceased to be used by him as evidence tending to support a claim by him that, in slaying Sullivan, he acted in necessary self-defense. This theory was built up by the district attorney from the circumstances developed by the evidence which finally resulted in the homicide and of which a brief recital has hereinabove been given. Obviously, the circumstances, taken together, afford reasonable ground for the support of such a theory, and the district attorney was justified in advancing it. "The district attorney," says the court in People v. Rossi, 37 Cal. App. 778, 782, 174 P. 916, 918, "has the right in argument to build up a theory of his case as it is made by the evidence, and often in doing so he may give expression to thoughts which have been drawn from the realms of his imagination. If thus he keeps within the general character of the case as it is made by the proofs, then he remains within the sphere of legitimate argument. * * * As was said in People v. Glaze, 139 Cal. 154, 160, 72 P. 965, in reply to an objection that the district attorney abused his rights in his argument to the jury, so it may with equal propriety be said here: 'A defendant on trial for murder is not entitled as of right to be spoken of as if he were an innocent man in an argument by the officer who is endeavoring to show his guilt.' Hence, it has been well said that, in his address to the jury, a prosecuting officer may descant upon the facts proved or admitted; arraign the conduct of the parties or the witnesses; 'impugn, excuse, fortify, or condemn motives, as far as they are developed in the evidence; assail the credibility of witnesses, when impeached by direct evidence, or by the inconsistency of incoherence of their testimony, * * * their appearance upon the stand, or by circumstances. His illustrations may be as varied as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.'" Tucker v. Henniker, 41 N. H. 323. See, also, People v. Molina, 126 Cal. 505, 59 P. 34; People v. McMahon, 124 Cal. 436, 57 P. 224; People v. Soeder, 150 Cal. 12, 87 P. 1016; People v. Weber, 149 Cal. 325, 86 P. 671; People v. Wheeler, 65 Cal. 77, 2 P. 892; People v. Ye Foo, 4 Cal. App. 730, 741, 742, 89 P. 450.

What is here said obviously disposes of the complaint that the court erred to the prejudice of the accused in declining to instruct the jury to disregard the criticised language of the prosecutor in his address to the jury. The court below held, as we hold, that the district attorney was well within his rights in expressing to the jury his views, founded upon all the circumstances, as to how the iron bar happened to be in the position, in point of proximity to the body of the deceased, in which the witness Albertson and other witnesses saw it shortly following the homicide.

The case was ably and carefully tried, the accused accorded a perfectly fair trial, and a reflective consideration of the evidence seems to indicate that, as before suggested, the jury were extremely merciful to the accused in reducing his offense to that of manslaughter.

The judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

200 Cal. 39

LIPTAK v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA. (S. F. 11633.)

(Supreme Court of California. Dec. 16, 1926.)

1. Master and servant 🔑385(11¼)—Employee having but one eye, and losing it by injury, sustained permanent total disability within Workmen's Compensation, Insurance and Safety Act of 1917 (St. 1917, p. 831, § 9, subd. [b], par. 2 [10], section 11, subd. [f], and section 69, subd. [a]).

Workmen's Compensation, Insurance and Safety Act of 1917, § 9, subd. (b), par. 2 (10), being susceptible of construction in light of section 69, subd. (a), that percentage of permanent disability caused by an injury shall be computed without reference to any injury previously suffered or any permanent disability caused thereby, *held* to authorize award under section 9 and section 11, subd. (f), of total permanent disability to employee having but one eye and losing it.

2. Master and servant 🔑348—Workmen's Compensation, Insurance and Safety Act of 1917 liberally construed (St. 1917, p. 831, § 69, subd. [a]).

Where a provision of Workmen's Compensation, Insurance and Safety Act of 1917, is susceptible of an interpretation either beneficial or detrimental to an injured employee, court is required, under section 69, subd. (a), to adopt construction beneficial to such employee.

In Bank.

Petition by John Liptak for writ of review to review an order of the Industrial Accident Commission awarding compensation for injuries. Award annulled.

Robert M. Searls and Milton L. Schmitt, both of San Francisco, for petitioner.

Frank J. Creede and G. C. Faulkner, both of San Francisco, for respondent.

R. P. Wisecarver, of San Francisco, amicus curiæ.

PER CURIAM. A rehearing was granted herein, in order that the court might give further consideration to the matters presented by respective counsel upon application therefor. Upon resubmission of the cause the court is satisfied with the correctness of its opinion heretofore filed herein, and hereby adopts the same and reaffirms the order directed to be made therein. Said opinion reads as follows:

The petitioner seeks to review an award made by the respondent Industrial Accident Commission for the loss of petitioner's remaining eye. The only point involved in the proceeding is whether or not the respondent commission erred in not awarding petitioner more than 26¼ per cent. disability rating for the loss of his remaining eye on July 28, 1924, through an industrial accident. The other eye had been lost many years previously through a nonindustrial accident. It is contended by the petitioner that under the Workmen's Compensation, Insurance and Safety Act (Stats. 1917, c. 586, p. 831) he should have been given a total permanent disability rating.

We quote the pertinent provisions of the act:

Section 9 (b) (2):

"(9) The following permanent disabilities shall be conclusively presumed to be total in character: Loss of both eyes or the sight thereof; loss of both hands or the use thereof; an injury resulting in a practically total paralysis; an injury to the brain resulting in incurable imbecility or insanity. In all other cases, permanent total disability shall be determined in accordance with the fact.

"(10) The percentage of permanent disability caused by any injury shall be so computed as to cover the permanent disability caused by that particular injury without reference to any injury previously suffered or any permanent disability caused thereby."

Section 11, paragraph (f):

"The fact that an employee has suffered a previous disability, or receives compensation therefor, shall not preclude him from compensation for a later injury, or his dependents from compensation for death resulting therefrom, but in determining compensation for the later injury, or death resulting therefrom, his average annual earnings shall be fixed at such sum as will reasonably represent his annual capacity at the time of the later injury."

Section 69, paragraph (a):

> "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

It is contended by petitioner that—

> "The provisions of section 9, above quoted, expressly fix the loss of the sight of both eyes as a permanent disability. If the sight of one eye has already been lost then an accident causing the loss of the remaining eye results in the loss of the sight of both eyes, that is, total blindness, the condition contemplated by subdivision 9 as requiring a permanent disability rating."

The respondent commission concedes that the above-quoted provisions of the Workmen's Compensation Act "are possibly susceptible of different constructions." To justify the award, however, it sets forth a brief history of the legislation, stating, in effect, that two reasons prompted the enactment of subdivision 10 of section 9 (b) (2), above quoted, namely: (1) Public policy—it was thought that serious discrimination by employers against employees having but one eye might result if a heavy liability were imposed upon the employer in whose service the remaining eye was lost; and (2) the allaying of uncertainty as to whether or not the appellate courts of the state would uphold its awards under the law as it stood before the enactment of said subdivision 10 of section 9 (b) (2). It is then concluded by the respondent commission that—

> "In view of the probability that the California Workmen's Compensation Act as enacted in 1913 would have been interpreted to allow a 100 per cent. disability for loss of a second eye, it would seem that the adoption of subdivision 10 of section 9 (b) (2) can be explained only upon the theory that the Legislature desired to avoid this conclusion."

A brief was also filed by the State Compensation Insurance Fund, which states, in substance, that the only issue is the proper construction to be given to section 9 (b) (2) (10) of the Workmen's Compensation Act, and that in construing this section due consideration should be accorded to the interpretation given it by the Industrial Accident Commission for the past 10 years, to the history of the amendment, its purposes, and to public policy.

In reply to these two briefs the petitioner asserts that—

> "The provisions of section 9 (b) (2) (10) admit of the construction for which the petitioner here contends; that it is the plain duty of the court under the further provisions of section 69 of the act to give petitioner the benefit of every doubt, if any exists in the mind of the court, in construing that section so as to make it effective for his benefit."

[1, 2] It is plain to us from the ambiguous and uncertain language of subdivision 10 of section 9 (b) (2) that it is, in a sense, susceptible of either of the constructions contended for, and that it might, were it not for paragraph (a) of section 69, support either interpretation. The language of the subdivision is such that it may properly and reasonably be said to support the construction urged by petitioner, namely, that the percentage of permanent disability caused by an injury shall be computed without reference to any injury previously suffered or any permanent disability caused thereby, which, in the case of an employee having but one eye and losing it, would be a total permanent disability. Where, as here, a provision of the act is susceptible of an interpretation either beneficial or detrimental to an injured employee, we are called upon, under the provisions of section 69, to adopt the construction beneficial to such employee.

That the loss of a remaining eye through an industrial accident results in permanent total disability would seem to be suggested by the declarations of appellate courts in other jurisdictions. In Branconnier v. Travelers' Insurance Co., 111 N. E. 792, 223 Mass. 273, the court declared:

> "The total capacity of this employee was not so great as it would have been if he had had two sound eyes. His total capacity was thus only a part of that of the normal man. But that capacity, which was all he had, has been transferred into a total incapacity by reason of the injury."

It is stated in Re J. & P. Coats, 103 A. 833, 41 R. I. 289, that—

> "The resulting total and permanent loss of vision must be productive of the same disability, whether the injured person before the accident had one or two eyes. In the case of the man with one eye the employer is not by this interpretation made to give him compensation for the earlier loss of the other eye, as seems to be suggested, inasmuch as the compensation to be paid is based upon the presumably fair wage paid the employee for his earning capacity at the time of the injury, which totally deprived him of that capacity."

We quote from Brooks v. Peerless Oil Co., 83 So. 663, 146 La. 383, the following:

> "The rationale of these Employers' Liability Acts is that the employment in which the workman has been disabled owes him a living, and it stands to reason that the workman is as totally disabled from work by the loss of one eye as by the loss of two, if he had but one, and by the impairment of the sight as much as by the loss of it, if the impairment be to such a degree as to disable entirely from work. In speaking of the workman being only partially disabled by the loss of one eye, one arm, or one foot, the Employers' Liability Act has reference, evidently to the normal man, having both eyes, arms, or feet."

We find no merit in the contention of respondent commission that the decisions of other jurisdictions are distinguishable and not controlling, for the reason that no provision similar to our subdivision 10 of section 9 (b) (2) was involved, for, as already indicated, this subdivision is ambiguous and open to possible conflicting interpretations and must, under section 69, be construed in favor of the injured employee.

In view of the foregoing, the award of the respondent commission is annulled, and the Industrial Accident Commission is hereby ordered and directed to make and enter an award of permanent total disability in favor of petitioner.

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199 Cal. 750

In re FLEMING'S ESTATE.

FLEMING v. DOVER et al.

(L. A. 9209.)

(Supreme Court of California. Dec. 9, 1926.)

1. Trial 🔑168—Court has power to direct verdict.

In proper case, court has full power to direct jury to render verdict.

2. Judgment 🔑199(3)—Denial of motion for directed verdict because grounds were not sufficiently stated does not prevent granting judgment, notwithstanding verdict (Code Civ. Proc. § 629).

That motion for directed verdict was properly denied because grounds thereof were not sufficiently stated, does not bar granting motion for judgment notwithstanding verdict; Code Civ. Proc. § 629, relating to granting of motion for judgment notwithstanding verdict in a case in which motion for directed verdict "should have been granted" on the evidence.

3. Trial 🔑143—Substantial conflict in evidence is necessary to deprive court of power to direct verdict.

It is not necessary that there should be absence of conflict in evidence to warrant direction of verdict, but court is deprived of such right only where there is substantial conflict.

4. Wills 🔑166(1)—Will held not procured by undue influence.

Evidence *held* not to show that will was procured by undue influence on testator.

5. Wills 🔑163(1)—Burden of proof respecting undue influence is on contestant.

Burden of proof on issue of undue influence in procuring will is on contestant, and not on beneficiary not in confidential relation to testator, nor participating in procuring will.

6. Wills 🔑324(3)—Proponent's motion for directed verdict on issue of undue influence should be granted, unless evidence supports finding thereof.

In will contest on ground of undue influence, proponent's motion for directed verdict should be granted, unless evidence is sufficient to legally support finding of undue influence.

7. Wills 🔑166(7)—Mere proof of opportunity, coupled with motive, does not sustain finding of undue influence.

Mere proof of opportunity to influence testator's mind, though coupled with interest or motive to do so, will not sustain finding of undue influence, in absence of testimony showing pressure operating directly on testamentary act and affecting terms of testament.

8. Wills 🔑159—General influence not operating on testamentary act is no ground for setting aside will of person of sound mind.

General influence not operating on testamentary act, however controlling, is not such undue influence as will afford ground for setting aside of will of person of sound mind.

9. Wills 🔑82—Unnaturalness of will is not alone sufficient to overturn it.

Objection that will of testator having testamentary capacity is unnatural is not alone sufficient to overturn will.

10. Wills 🔑82—Will excluding testator's mother held not unnatural.

Facts *held* to show that will leaving property to sister of testator's former wife, to exclusion of his aged mother, was not unnatural.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Proceeding by Ruth Dover and others to probate the will of Fred Fleming, otherwise known as Ferdinand Fleming, deceased, opposed by Henrietta Fleming. From a judgment admitting the will to probate, contestant appeals. Affirmed.

Tobias R. Archer, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles (H. F. Clary, of Pomona, of counsel), for respondents.

WASTE, C. J. A petition was presented in the court below for the probate of an instrument purporting to be the olographic will of the decedent, Fred Fleming, by the terms of which he bequeathed his entire estate to Ruth Dover. Henrietta Fleming, surviving mother of the deceased, filed a contest alleging that the decedent was of unsound mind, and had not testamentary capacity, and that the will was the result of the undue influence of Ruth Dover, J. C. Duncan, and Kathryn Duncan, who were named as respondents. The matter was heard before a jury, and at the close of the contestant's opening proof the respondents moved the court for a nonsuit as to each of the grounds of contest, but the motion was denied. When the evidence was all in, and before the cause was submitted to the jury, the respondents moved the court for a directed verdict on each and all of the grounds of contest. That motion was also denied. In answer to special interrogatories submitted to it, the jury found the deceased was competent, but that at the time of the execution of the will he was not free from undue influence exerted on him by the Duncans and Mrs. Dover. The respondents thereupon moved for a judgment notwithstanding the verdict of undue influence, and the motion was granted. The will was admitted to probate, and the respondent J. C. Duncan was appointed administrator. The contestant has appealed, claiming that the motion for a directed verdict was properly denied, and that the lower court therefore erred in subsequently granting the motion for a substituted judgment.

[1, 2] It is a settled rule of law regarding trials by jury that in a proper case the court has full power to direct the jury to render a verdict. Estate of Sharon, 179 Cal. 447, 459, 177 P. 283. When a motion for a directed verdict, which should have been granted, has been denied, and a verdict rendered against the moving party, it is the duty of the court, at any time before the entry of judgment, either of its own motion or on motion of the aggrieved party, to render judgment in favor of the party aggrieved, notwithstanding the verdict. Code Civ. Proc. § 629. Appellant is here contending that the power of the trial court in these matters is limited, by the provision of the section, supra, to granting a motion for judgment notwithstanding a verdict in those cases in which the antecedent motion for a directed verdict "should have been granted," and that, therefore, if for any reason the motion for a direction by the court was properly denied, the court is without power to grant the motion for judgment notwithstanding the verdict. Her first contention is that the motion for a directed verdict was properly denied, for the reason that the grounds on which it was based were not sufficiently stated, from which it follows, she argues, the court had no authority to grant the motion for judgment notwithstanding the verdict.

Assuming, but not deciding, that the motion for a directed verdict was properly denied for the reason stated, it does not follow that such denial was a bar to the granting of the motion for judgment notwithstanding the verdict. Appellant was not injured. Had the motion for a directed verdict been granted on an assignment of grounds which was insufficient, and the contestant thereby deprived of the opportunity to meet objections, which should have been more precisely stated, by introducing other evidence, she would be in position to complain. But that did not happen. The motion was denied, and the case was submitted to the jury, carrying with it the benefit of the court's ruling in the contestant's favor. We are of the view that section 629 of the Code of Civil Procedure relates to the granting of a motion for judgment notwithstanding the verdict in a case in which the motion for a directed verdict "should have been granted" on the evidence, and does not lend itself to the narrow construction appellant attempts to put upon it. Her first contention must therefore fail.

[3] Appellant's second contention is that the motion for a directed verdict in this case was properly denied, for the reason that the evidence was sufficient to take the case to the jury. The trial court had power to direct the jury to render a verdict in favor of the respondents, unless there was substantial evidence tending to prove all the controverted facts necessary to establish the contestant's case. It was not necessary that there should have been an utter absence of conflict in the evidence. To deprive the court of the right to exercise its power, if there was a conflict, it must have been a substantial one. Estate of Sharon, supra, 459 (177 P. 283); Estate of Baldwin, 162 Cal. 471, 123 P. 267. The question as to whether or not at the time of the execution of the will the decedent, Fleming, was of unsound mind and incompetent to make testamentary disposition of his estate is disposed of by the contrary verdict of the jury. The appellant is not here complaining of that finding. The only issue, therefore, remaining in the case is that of undue influence on the part of the respondents over the mind of the decedent at the time of the execution of the will. The contention in that regard presented by the pleadings is, briefly, that the decedent was, on January 1, 1923, and prior thereto, weak and debilitated in body and mind from the use of intoxicating liquor for many years, which, with consequent dependence on his part on the Duncans, and ten years' employment by Mr. Duncan, causing a confidential relation in which respondents assumed to act as Fleming's confidential advisers, enabled them to easily influence, dominate, control, and direct the decedent, and that they did unduly influence him to make the will in their favor.

[4-6] The evidence does not support the contention of the appellant. Ruth Dover, the beneficiary under the will, is a widow with five children. She is a cripple, without adequate resources, and partly dependent upon her sister and brother-in-law, the respondents Kathryn and J. C. Duncan. There is no evidence that she exercised any influence over Fleming. She sustained no confidential relation to the testator, so far as the record discloses, and did not participate in any way in procuring the execution of the will. No burden was, therefore, cast upon her to show that the will was not the result of undue influence. The burden of proof rested on the contestant. Therefore, unless the evidence was of such a nature that it was sufficient to legally support a finding of undue influence, the motion for a directed verdict should have been granted. See Estate of Baird, 176 Cal. 381, 384, 168 P. 561.

Appellant sought by her evidence to establish that the Duncans, and particularly

Kathryn Duncan, brought about the execution of the will. Briefly, the facts are that Fleming was addicted to the use of strong drink from boyhood. He married the respondent Kathryn Duncan, then Kathryn Root, in 1895, and they lived together for 15 years, when, because of Fleming's excessive use of liquor, they separated. Mrs. Fleming obtained a divorce, but there appears to have been an entire absence of bitterness between the two. During their separation, and after the granting of the divorce, they were on friendly terms, and subsequently lived together for about 3 years. Fleming continuing his drinking, Mrs. Fleming again left him, and he was for a time committed to the State Hospital for treatment for his intemperance. In 1917 Mrs. Fleming married the respondent J. C. Duncan, and the two are now husband and wife. The friendly relations between Fleming and his former wife continued after her marriage to Duncan, and Fleming was employed by Duncan, and apparently continued to work for him until the time of his death. He was a frequent and apparently a welcome visitor at the home of the Duncans. He was a competent and trustworthy workman, and Duncan gave him steady employment and paid him well. Mr. and Mrs. Duncan advised him, and apparently assisted him in saving and accumulating his wages. He frequently expressed his gratitude to them for the way in which they befriended him, and stated that he desired to make a will in favor of Mrs. Duncan. His offer was declined by both Mr. and Mrs. Duncan, who told him they did not need to be thus remembered, and that they did not want his money. In spite of frequent statements to that effect on the part of the Duncans, Fleming persisted in his desire to leave his estate to his former wife. Finally, both Mr. and Mrs. Duncan suggested that the decedent leave his property to Mrs. Dover, and the result was the making of the will here in question.

[7-9] There is no question but that the Duncans were so situated as to have had ample opportunity to dominate the mind of Fleming, if that were possible, and they had been so disposed; but mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act, and to such an extent as to affect the terms of the testament. Estate of Kilborn, 162 Cal. 4. 11, 120 P. 762; Estate of Purcell, 164 Cal. 300, 128 P. 932. In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will he executes is not the expression of his own desire. The presumption of undue influence is not raised by proof of interest and opportunity alone. Estate of Bryson, 91 Cal. 521, 541, 217 P. 525. The respondents Duncan have no interest in the will, and the record is silent as to the circumstances attending its actual execution. When or where it was executed, or who was present, does not appear, and it is not shown that any one knew the circumstances of its execution. As in Estate of Clark, 170 Cal. 418, 149 P. 828, it may be said that—

> "The evidence utterly fails to reach the dignity of proof of that sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of the testamentary act. Without such proof no will should be held invalid on the ground of undue influence."

It must be borne in mind that the jury has found that Fleming was competent to make a will. General influence, not brought to bear upon the testamentary act, however controlling, is not such undue influence as will afford ground for setting aside a will of a person of sound mind. Estate of Donovan, 140 Cal. 390, 394, 73 P. 1081.

Appellant has built her contention of undue influence exerted on the decedent in bringing about the execution of the will very largely on the theory that, because of Fleming's excessive use of intoxicating liquor, he was susceptible to the direction and dominance of the Duncans, for whom, as the evidence shows, he had an apparent affectionate regard. There is no doubt, from the evidence, that at times Fleming drank to excess, but he appears to have been a man of ordinary intelligence and capacity, and was a competent and trustworthy workman. It is possible for long-continued use of intoxicating liquor to so permanently impair the intellectual faculties of the person indulging in it as to render him or her incompetent to do any legal act. "But the question, in a case like the one at bar, always is, not what might have been the mental condition of the testator at the time of the execution of the will, but what was that condition." Estate of Wilson, 117 Cal. 262, 275, 49 P. 172, 176 and 711. On that question the record is silent. The evidence affords no pretense for contending that Fleming was intoxicated at the time of his testamentary act, nor does it support the theory of appellant that his mind was so impaired by the use of liquor as to render it susceptible to undue and improper influence in arranging his final affairs.

[10] Appellant insists that the will is unnatural, and that it is contrary to the expressed intention of the decedent, for which reasons, she asserts, undue influence in its procurement must be presumed. The contention rests upon the fact that she testified that her son had, upon occasions, indicated that he proposed to leave his money to her, and that prior to his death he had delivered to her the bank book covering the deposit of his savings, under a belief that he was thereby transferring the money to her. There is no merit in the contention. Estate of Donovan, supra. If the will here could be considered unnatural, the objection would not be sufficient to overturn it in the face of the established fact of testamentary capacity in Fleming at the time it was executed. Estate of Wilson, supra, 278 (49 P. 172). His will is not unnatural. He had no intimate friends other than the Duncans, and had no close relatives other than his mother. He apparently held her in affectionate regard, but rarely discussed his affairs with her. She was quite old, and there is evidence from which it may be gathered that she was sufficiently well cared for. These, and the other facts and circumstances surrounding the testator prior to and at the time of making his will, will constitute a reasonable explanation of his testamentary act, and a clear intent to do it with a full and present knowledge of conditions and consequences. See Estate of Wilson, supra. The fact that he said that his mother must not be informed of his making his will is of but little consequence, and falls readily within the explanation of his entire conduct just referred to.

There is much in the somewhat lengthy record which tends to shed light on the situation and relation of all the parties to this controversy and the cirucmstances under which Fleming's will was made. From our examination of the evidence, we are satisfied that the trial court was correct in its conclusion that Fleming's mind was not held under subjugation by the respondents, or either of them, and that the will was not brought about by the exercise of undue influence exerted upon him. The motion for a directed verdict should have been granted. Consequently the court had power, and it was its duty, to enter judgment in favor of the respondents below notwithstanding the verdict of the jury rendered on the issue of undue influence.

The judgment is affirmed.

We concur: SEAWELL, J.; FINLAYSON, J.; RICHARDS, J.; SHENK, J.; SULLIVAN, J.; CURTIS, J.

80 Cal. App. 222

VIEUX et al. v. VIEUX. (Civ. 4657.) *

(District Court of Appeal, Second District, Division 1, California. Dec. 10, 1926.)

1. Husband and wife 🔑263—Circumstances of purchase of property should be considered in determining spouses' rights therein.

For purpose of determining respective property rights of husband and wife, circumstances surrounding purchase of property should be considered.

2. Husband and wife 🔑266—Status of property may be changed from separate to community, and vice versa, by agreement between spouses.

By agreement between husband and wife, status of property owned by them may be changed from separate to community, and vice versa.

3. Husband and wife 🔑254—Facts found held to warrant conclusion that property husband contracted to buy before marriage belonged to both spouses, at least so far as paid for from community funds.

Facts found *held* to warrant conclusion that property, which husband contracted to purchase before marriage, was property of both husband and wife, at least so far as community funds contributed to payment of purchase price.

4. Husband and wife 🔑254—Property husband contracted to purchase before marriage should be considered community, so far as community funds participated in its acquisition or protection (Civ. Code, §§ 163, 654).

Husband's ownership, to exclude wife's interest entirely, must be absolute under Civ. Code, § 163, declaring all property owned by husband before marriage his separate property, though section 654 and other statutes specify right of exclusive possession and use as indicia of ownership, and property which husband contracted to purchase on installments before marriage should be considered "community," so far as community funds participated in acquisition or protection of vested rights therein.

5. Husband and wife 🔑265—Wife cannot be excluded from home, though husband had right of possession under purchase contract made before marriage (Civ. Code, § 157).

Under Civ. Code, § 157, wife cannot be excluded from property used by her and husband as their home, though he had right of possession and use under contract, made before marriage, to purchase it on installments.

6. Husband and wife 🔑254—Property purchased before marriage is separate property, though not conveyed nor paid for until after marriage, except as paid by community.

Property purchased by one spouse before marriage is separate property, though deed is not executed and delivered, and part of purchase price is not paid, until after marriage, in absence of showing that any part of balance was paid with community funds, and is community, in any event, only to extent and in proportion that purchase price is contributed by community.

7. Husband and wife 🔑254—Community interest is entitled to share in title to property, which husband contracted to purchase before marriage, in proportion to amount paid by community.

Where required conditions of contract, made by husband before marriage, to purchase property on installments, were met with funds furnished by community after marriage and funds

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court February 7, 1927.

issuing directly from property itself, community interest was entitled to share in title in same proportion as amount contributed to purchase price by community bore to total amount paid.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Hubert A. Vieux against Coralyn A. Vieux, who filed a cross-complaint against Aristide Vieux and wife. From part of the judgment rendered, defendant appeals. Reversed with direction.

Schweitzer & Hutton, of Los Angeles (F. C. Stevens, of Los Angeles, of counsel), for appellant.

Fogel & Beman and Niles C. Folsom, all of Los Angeles, for respondents.

HOUSER, J. This is an appeal from a part of the judgment rendered in a suit for divorce.

The facts material to this inquiry are set forth in the findings by the trial court as follows:

> "That shortly prior to the marriage * * * plaintiff and defendant discussed and considered the purchase of lot 24, and together viewed said property, and it was agreed between them that said property would be a desirable purchase. That prior to said marriage the plaintiff entered into a contract for the purchase of said property * * * and the plaintiff did, at the time of entering into said contract, pay the sum of $280 on account of the purchase price thereof, and immediately took possession of said property. That thereafter plaintiff and defendant married, and after their marriage the plaintiff and defendant expended on said real estate from community funds, for payment on account of principal, interest, and taxes, the sum of $553.68. That subsequent to the marriage of plaintiff and defendant, to wit, on or about the 25th day of November, 1921, the plaintiff received the sum of $2,200 as payment for a bonus for the execution of an oil lease covering said property, and that said sum of $2,200 was paid by the plaintiff on account of the balance of the purchase price on said property. That subsequent to the payment of said sum of $2,200 the plaintiff executed and delivered a deed of conveyance to said property to his parents, Aristide Vieux and Stephanus Vieux. That the plaintiff received no consideration from his parents for the execution and delivery of said deed, but said conveyance was made by the plaintiff for the purpose of getting the property out of his name and avoiding any claim or right which the defendant might have in said property. * * * That, during the married life of the plaintiff and defendant, they accumulated community property to the amount and value of $713.60. That of said sum $553.68 was expended in and upon the hereinabove described real property."

From said findings it was adjudged and decreed that the defendant Coralyn A. Vieux had no right, title, or interest in and to the the real property to which reference was made in the findings, but that said defendant "have and recover from said plaintiff the sum of $713.60, the value of the community property in the possession of said plaintiff, the sum of $150 as attorney's fees, and for the sum of $50 per month from November 16, 1922, until the further order of court, as alimony."

It is appellant's contention that that part of the judgment to which reference has just been had, to wit, that the defendant Coralyn A. Vieux had no right, title, or interest in and to the property in question, is not supported by the findings, for the reason that the findings show that the said real property, or a portion thereof, was either the separate property of the defendant, or that it was community property of plaintiff and defendant, or at least that defendant has some right, title, or interest therein.

The ultimate question presented to this court for its determination is whether, in the circumstances as set forth in the foregoing findings of fact, the property therein referred to was the separate property of the husband. Although the findings do not specifically so state, it may be inferred therefrom that the total purchase price of the property was in the neighborhood of $3,000—the sum of $280 having been paid by the husband prior to the marriage, the sum of $553.68 thereafter having been paid out of the community funds, and the further sum of $2,200, derived from the bonus for an oil lease on the property, having been used to complete the purchase price. It is therefore apparent that, so far as outlay on the part of the husband from his separate property was concerned in acquiring the property in question, he actually expended the sum of $280, or somewhat less than one-tenth of the purchase price; while the sum of $553.68, or approximately one-fifth of the purchase price, was contributed from funds belonging to the community.

Section 163 of the Civil Code provides that:

> "All property owned by the husband before marriage, * * * with the rents, issues, and profits thereof, is his separate property."

The only case arising in this state, having a direct bearing upon the facts herein, to which the attention of this court has been directed, is that of Martin v. Martin, 52 Cal. 235, wherein it was held that, if a husband purchased land on credit and afterward paid a portion of the price with his separate property, and he and his wife secured the remainder of the purchase price with their joint note and a mortgage on the same, and he then sold a part of the land at a profit, and with the profit and proceeds paid the note, and with the remainder, increased by some of his separate property, built a house on the land not sold, the land not sold, and the house thereon, were the separate property of the husband.

It will be noted that the facts in the Martin Case differ from the facts in the instant case, particularly in that in the Martin Case no community funds were used in payment of the property, while in the instant case a large portion of the purchase price was paid by the community. A reading of the opinion in that case discloses the fact that the Supreme Court limits the decision to the point that the circumstance that the wife executed a joint note and mortgage with her husband in payment of the balance of the purchase price of the property could not affect the property rights of the parties, and that the Supreme Court expressly declined to decide whether the profits derived from the sale of a portion of the property purchased by the husband were community property.

[1-3] For the purpose of determining the respective property rights of the husband and the wife, the circumstances surrounding the purchase of the property should receive consideration. While no transcript of the evidence received on the trial of the action has been presented to this court, sufficient facts are set forth in the findings to enable this court to perceive that, prior to the marriage, the parties together viewed the property and concluded that it was desirable for community purposes. The fact that thereafter they may have used it in that manner, and applied community funds in payment of the purchase price of the property, confirms the thought that, as between the husband and the wife, the property was considered as "community" rather than "separate." The authorities are in accord that by agreement between husband and wife the status of any property owned by them may be changed from separate to community, and vice versa. While no finding of the court recites the fact that the parties were "agreed," either at the time of the purchase or at any time thereafter, that the property in question was "community," their action in the premises at least encourages the belief that before the marriage each of them considered the property as being prospectively "community" and after marriage the property was to be improved, sustained, supported and finally completely and absolutely owned by them by reason of their common and joint efforts and savings. In the circumstances here present, it requires no wild stretch of the imagination to perceive a "meeting of the minds" without the form of express words, either spoken or written, to the effect that the property in question was not considered by the parties as exclusively in the husband, with the wife having absolutely no material right, title, or interest therein; but, to the contrary, that the property was "theirs," each of the parties enjoying therein equal rights and privileges, at least as far as the community funds contributed to the payment of the purchase price thereof. In effect, it was somewhat in the nature of a partnership relationship that existed between the parties—the husband on the one side, and the community consisting of the husband and the wife, on the other side.

[4] For purposes affecting strangers, the acquisition, through an installment contract, of the right to purchase real property, may be considered as ownership of such property, in that such holding may entitle the intending purchaser to the possession and the use of the property to the exclusion of others; but, as between husband and wife, where community funds are used to a considerable extent in the payment of the purchase price, the meaning of the statute relating to the definition of separate and community property of spouses cannot be so limited. The confidential relationship existing between husband and wife forbids such a strict construction to be placed upon the statute as will destroy the probable intent of the husband and wife with reference to the manner in which the ownership of the property is enjoyed. Any other construction in these days of liberal terms, with reference to installment purchase price contracts for the sale of real property, including the possible provision of "a dollar down and a dollar per week," would permit a husband or a prospective husband, to buy or to agree to buy any reasonable quantity of lots or lands on the payment by him from his separate funds of a comparatively insignificant sum and thereafter to pay practically the entire purchase price from the community funds, and yet successfully maintain that, because in its inception the naked right to purchase, carrying with it the right of use and possession, was his separate property, it so remained. It would seem improbable that, through general definitions of terms, the intention of the lawmakers was to bring about a result which, in many if not a majority of instances, would be of so disastrous and unjust a consequence. Rather should it be assumed that, when the Legislature undertook to define separate property as that owned by the husband before marriage, even though in other statutes the right of exclusive possession and use was specified as the indicia of ownership, the "ownership" in the husband through and by virtue of which the wife's interest would be entirely excluded, would necessarily be an absolute ownership, as distinguished from a limited ownership, and that, so far as community funds might participate in the acquisition or protection of vested rights, to that extent proportionally should the property be considered as "community."

[5] In general terms, as provided by section 654 of the Civil Code, "the ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others." While under the qualified ownership of the husband of the property here in question it is probable that he had the right of possession and use of it, if it may be assumed

that the husband and wife were using it as their home (which fact, however, does not appear by the findings), the wife could not be excluded therefrom. Civ. Code, § 157.

[6] In passing upon the meaning of the word "owner," as contained in a provision of a city charter, the Supreme Court of this state has ruled that "the term 'owner' includes any person having a claim or interest in real property, though less than an absolute fee." Higgins v. City of San Diego, 131 Cal. 294, 304, 63 P. 470, 476. That authority, however, can be regarded as nothing more than a generality, so far as the facts in the instant case are concerned. Cases from other jurisdictions, particularly Guye v. Guye, 63 Wash. 340, 115 P. 731, 37 L. R. A. (N. S.) 186; Barrett v. Franke, 46 Nev. 170, 208 P. 435, and Heintz v. Brown, 46 Wash. 387, 90 P. 211, 123 Am. St. Rep. 937, in effect to hold that, in circumstances analogous to those indicated in the findings herein, to which reference has been had, a part of property involved may be regarded as community and a part as separate—depending upon conditions, not essentially on the manner in which the contract for the purchase of the property was entered into or ostensibly acquired, but rather upon the manner in which the payments were made; and, while the principle announced in such decisions has been subjected to some criticism, the administration of strict justice to the parties concerned, rather than the application to the facts of the hard rules of law, lends an appealing force to the conclusions reached in the cases to which reference has been had. The governing rule is indicated in 5 Ruling Case Law, p. 834, as follows:

> "Thus property purchased by one spouse before marriage is separate property, though the deed therefor is not executed and delivered until after marriage, and this is true though a part of the purchase price is not paid until after marriage, in the absence of a showing that any part of the balance was paid with community funds. In any event it would be community property only to the extent and in the proportion that the purchase price is contributed by the community."

[7] In the instant case, the husband having acquired an inchoate right, on compliance with certain conditions, to become an absolute owner of the property in question, and the facts showing that the required conditions were met with funds furnished by the community, aided by other funds issuing directly from the property agreed to be purchased, justice demands that the rights of the parties should be measured by the direct contributions made by the respective parties to the purchase price of the property. Accordingly, the judgment of the trial court herein should have indicated that the community interest was entitled to share in the title to the property in the same proportion as the amount contributed to the purchase price by the community, to wit, $553.68, bore to the sum of $833.86—the total amount paid by the respective parties therefor.

It is ordered that that part of the judgment from which the appeal herein is taken be and the same is reversed; and the trial court be and it is directed to enter a new judgment on its findings of fact in accordance with the law as indicated by the opinion herein.

We concur: CONREY, P. J.; YORK, J.

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80 Cal. App. 293

PEOPLE v. McGOWAN. (Cr. 1315.)

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1926.)

1. Witnesses 🔑277(2)—Defendant's testimony that he was not at scene of attempted robbery opened door for cross-examination as to where he was, and with whom.

Where defendant, charged with attempted robbery, had testified that he had not run away from garage attempted to be held up, as stated by prosecuting witness, between certain hours, his testimony opened door for cross-examination as to where he had been, and with whom he was, during hours mentioned.

2. Witnesses 🔑277(1)—Defendant offering himself as witness is subject to same rules of cross-examination as other witnesses (Pen. Code, § 1323).

Where defendant in criminal action waives privilege under Pen. Code, § 1323, and offers himself as witness in his own behalf, he is subject to same rules of cross-examination as any other witness.

3. Criminal law 🔑696(3)—Defendant's testimony that he was taking lady home at time of attempted robbery, was properly stricken, where he refused to disclose name of lady (Pen. Code, § 1323).

Where defendant, charged with attempted robbery, had testified that he was not at scene of attempted robbery, but was taking lady home at that time, his testimony was properly stricken, when he refused on cross-examination to disclose name of lady, in view of Pen. Code, § 1323.

4. Criminal law 🔑1122(4)—Instruction as to evidence of previous conviction held properly refused, where transcript showed no reference to prior conviction.

Refusal of instruction relating to presumption of defendant's innocence in spite of prior conviction, which was given in part, and of instruction relating to purpose of evidence of previous conviction, *held* proper, where transcript of evidence contained no reference to defendant's prior conviction.

5. Criminal law ⚷815(9)—Instruction confining jury's consideration to evidence offered by prosecution held properly refused.

Instruction that, if there was reasonable doubt whether prosecution had offered sufficient proof of attempted robbery, jury must find defendant not guilty, *held* properly refused, since jury were not entitled to consider proof merely offered, and were not confined to consideration of evidence produced by prosecution.

6. Criminal law ⚷814(2)—Instruction that jury could consider testimony of defendant which was properly stricken held properly refused.

Instruction that jury, being sole judges of facts, must consider testimony given under oath by defendant, regardless of court's order striking same out, *held* properly refused, where testimony had been properly stricken from record.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Martin McGowan was convicted of attempt to commit robbery, and he appeals. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

CAMPBELL, Justice pro tem. Appellant was convicted of the crime of attempt to commit robbery, and from such judgment of conviction and an order of the trial court denying his motion for a new trial has appealed.

At about 1:40 or 1:50 o'clock on the morning of May 4, 1925, appellant was taken to the Mission Emergency Hospital in San Francisco suffering from a gunshot wound in the abdomen. He was in a serious condition, and an operation was deemed necessary. While the doctor was preparing appellant for the operating room, William Anderson, the complaining witness, was brought in, and identified appellant as the man who attempted to rob him. Respecting the attempted robbery, the complaining witness testified that on May 4, 1925, between midnight and 20 minutes past 12 o'clock he was "held up" at the Sansome Pacific Garage, located at 825 Sansome street, in San Francisco, by three men, one of whom was appellant, McGowan; that he was sitting at a desk in the garage, where he was employed as night man, looking out of the window, and saw three men run up the steps, McGowan being the leading man of the three, and, thinking they were customers wanting gasoline or some supplies, he got up and opened the door, and when he did so he was confronted by McGowan, who pointed a gun at him, and said: "Stick them up, fellow"; that he had his hand on his gun in his coat pocket, and pulled it out and shot; McGowan threw his hands up in the air, and broke the glass in the window; that he stepped in around the doorjamb so as to protect himself; hearing the whole three of them running, he ran out and down the steps, falling over a gun; that he picked up the gun, and ran after them; that the three men got into a car, and drove away; that he shot three shots out of his own gun in the garage, and one outside from his own gun, and one shot outside from the gun he picked up—these two latter shots being fired at the three men as they were driving away.

The defendant offered himself as a witness at the trial, and testified that on the night in question he was shot shortly before 1 o'clock by a man named William Friel, with whom he previously had had trouble; that the shooting occurred in the neighborhood of Tenth and Potrero streets; that, after being shot, he was picked up and conveyed to the hospital; that he did not run away from Mr. Anderson at the garage, as described by Mr. Anderson, on the night in question between 12 and 1 o'clock.

On cross-examination the defendant was asked where he had been before he arrived at Tenth and Potrero streets, and he replied that he had just taken a young lady home. The following questions were asked and answers given:

> "Q. What was the young lady's name? A. I wouldn't care to disclose it, Mr. Murphey.
>
> "Q. What is her address? A. Wouldn't care to disclose that either."

The prosecuting attorney asked the court to instruct the witness to answer the question, and the court so instructed him. At this stage of the proceedings defendant's counsel objected to the question on the ground that it was not cross-examination, and the objection was overruled. Upon defendant's persistent refusal to answer the court made its order striking all of the testimony of the defendant from the record.

[1] Appellant urges five points as error, four of which have to do with the refusal of the court to give certain instructions proposed by the defendant. The other point is that the trial court erred in ordering the testimony of the appellant stricken from the record. On appeal appellant does not urge error in overruling his objection that the questions asked, which he declined to answer, were not proper cross-examination. Indeed, the argument made by appellant assumes them to be such, and in fact they are. Appellant testified that he was not at the Sansome Pacific Garage, at 825 Sansome street, the scene of the attempted robbery, between 12 and 1 o'clock—that is, that he did not run away from the garage, as stated by the prosecuting witness, between 12 and 1 o'clock—and that he was shot by a man named Friel shortly before 1 o'clock in the neighborhood of Tenth and Potrero streets, a considerable distance away. This testi-

mony opened the door for cross-examination as to where he had been and with whom he was during that hour and up to the time he claimed to be shot by Friel. People v. Gallagher, 100 Cal. 473, 35 P. 80; People v. Buckley, 143 Cal. 386, 77 P. 169; People v. Bishop, 134 Cal. 687, 66 P. 976; People v. Rozelle, 78 Cal. 91, 20 P. 36; People v. Turco, 29 Cal. App. 608, 156 P. 1001; People v. Maughs, 8 Cal. App. 117, 96 P. 407; People v. Davis, 1 Cal. App. 8, 81 P. 716, 88 P. 1101.

The question presented that the trial court erred in striking out the testimony of the defendant because of his refusal to answer pertinent questions on cross-examination has not been passed upon in this state, nor in any other jurisdiction so far as we have been able to find. But two criminal cases are reported holding that the testimony of witnesses should be stricken out when cross-examination is denied. In People v. Cole, 43 N. Y. 508, the court held that—

> "it is error to suffer to go to the jury any evidence given by a witness on direct examination for the people, where by sudden illness or by death of such witness, or other cause without the fault of and beyond the control of the prisoner, he is deprived of his right of cross-examination."

In McElhannon v. State, 94 Va. 229, 26 S. E. 505, the Supreme Court of Georgia holds:

> "When, however, a witness offered for the purpose of proving that the accused had been guilty of gaming on cross-examination declined to answer certain pertinent questions, on the ground that so doing would tend to criminate himself, and it appeared that the design of these questions was to show the extent of the witness' knowledge upon the subject, and perhaps also to test the sincerity or accuracy of his testimony, it was the right of the accused to have all of the witness' testimony on this subject ruled out."

There seems to be no authority in this state on the question of the right of the court to strike out the testimony of a witness in a civil action given on his direct examination for refusing to answer proper questions on cross-examination, but in other jurisdictions, where the question has been passed upon, the courts all seem to be in accord with the rule that, where a party is deprived of the cross-examination of a witness by the act of the opposite party or by the refusal to testify or other misconduct of the witness or by any means other than the act of God, the act of the party himself, or some cause to which he assented, the testimony given on the examination in chief should be stricken out. Sturm v. Atlantic Mutual Insurance Co., 63 N. Y. 87; Smith v. Griffith, 3 Hill (N. Y.) 333, 38 Am. Dec. 639; Gallagher v. Gallagher, 92 App. Div. 138, 87 N. Y. S. 343; St. Charles Savings Bk. v. Denker, 275 Mo. 607, 205 S. W. 208; Sperry v. Estate of Moore, 42 Mich. 353, 4 N. W. 18; Howard v. Chamberlin, Boynton Co., 64 Ga. 697; Clements v. Benjamin and another, 12 Johns. (N. Y.) 299; Heath v. Waters, 40 Mich. 471. "Where a witness refuses to answer pertinent questions on cross-examination, his testimony on his direct examination should be stricken out, especially where the witness is a party testifying in his own behalf." 40 Cyc. 2479.

"A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. * * *" Pen. Code, § 1323.

[2] There is no difference under our law between a witness in a civil case and a witness in a criminal case. Both witnesses in civil and criminal cases are subject to the same rules of evidence and cross-examination, and there is likewise no difference between a defendant in a civil case and one in a criminal case, excepting that a defendant charged with crime cannot be compelled to be a witness against himself, and, when he offers himself as a witness, he can be cross-examined only respecting matters about which he has testified on his examination in chief, and the fact that he has offered himself as a witness for but a limited purpose cannot be considered by the jury against him, nor can the fact that he has failed to take the witness stand be considered by the jury as indicative of guilt. When the defendant waives these privileges and offers himself as a witness in his own behalf, he is subject to the same rules of cross-examination as any other witness. People v. Rozelle, supra.

[3] Counsel for appellant cites numerous authorities to support his contention that the court exceeded its authority in striking out the testimony of defendant as a punishment for contempt, and that before any punishment can be inflicted the offending party must be adjudged guilty of contempt. These authorities are not in point. The court did not strike out the testimony as a punishment for contempt, but for the reason that through no fault of the prosecution, but through the deliberate act of the defendant himself the prosecution was deprived of the opportunity of cross-examining the defendant. Such cross-examination was proper, as it would have given the prosecution the opportunity to subpœna the young lady the defendant testified he was with about the time the prosecuting witness testified defendant attempted to rob him, in order that he might be contradicted by her if his statement be untrue; that before his testimony be permitted to go to the jury its truth could be subjected to such tests as the experience of ages has shown are necessary to render reliance on it safe, and, where this has been prevented without the fault of the adverse party, the evidence should be excluded. People v. Cole, supra.

The record shows the language of the court in making the order to be:

"The order of the court could be that this defendant be committed to the custody of the sheriff and be held in contempt of court. That does not get us anywhere in determining this issue here, or as far as ending our trial is concerned. The court, however, could take this action. If the defendant refuses to answer, on proper cross-examination, the court will strike from the record all testimony given by this witness. Such is the order."

[4] Appellant complains of the trial court's refusal to give the two following instructions proposed by the defense:

"(a) *This presumption of the defendant's innocence, this particular defendant is no less entitled to by reason of the fact that he may have been heretofore convicted of a felony.* In other words, he is just as much to be presumed innocent of the commission of the offense here charged against him as would be a person who had never been before convicted of any crime. (b) The only purpose for which you can consider the previous conviction of this defendant is in relation to the defendant as a witness upon the witness stand. One of the methods prescribed for impeaching a witness is to show in a proper manner that he has been convicted of a felony."

After searching the reporter's transcript of the evidence, we are unable to find any reference therein to appellant's prior conviction. It therefore follows that the two foregoing instructions were properly refused. However, it should be observed that that portion of the instruction (a) which we have italicized was given by the trial court.

[5] Appellant also complains of the trial court's refusal to give the following proposed instruction:

"If you have a reasonable doubt as to whether or not the prosecution has offered sufficient proof of an attempt to commit robbery, even though you should believe that the defendant and others drew a pistol on said William Anderson, and therewith assaulted him, you must find the defendant not guilty."

That proposed instruction does not correctly state the law for several reasons, one of them being that the jury are not entitled to consider "proof" which is merely "offered"; they can consider only "evidence" which is "received." Another objection to the proposed instruction is that the jury are not confined to a consideration of the evidence produced by the prosecution; indeed, the jury has a right, and it is its duty, to consider all the evidence received, including that produced by the prosecution, that produced by the defense, and that obtained from the various witnesses upon cross-examination. The trial court, eliminating these objectionable features from the proposed instruction, correctly instructed the jury as follows:

"You are instructed that if, after hearing the evidence, you believe beyond a reasonable doubt that this defendant committed an assault upon the person of the complaining witness, and not in any attempt to commit robbery, and did not attempt to commit robbery, or you have a reasonable doubt upon such matter, you should give the defendant the benefit of that doubt and acquit him."

[6] The other proposed instruction, the refusal to give which is claimed as error, is as follows:

"The court instructs the jury that they, being the sole judges of the facts in the case, must, of course, consider and weigh the testimony here given under oath by the defendant, regardless of the order of the court striking the same out, and, if the evidence of the defendant raises in your minds a reasonable doubt as to his guilt, you must find him not guilty."

It is self-evident that, if the trial court properly ordered appellant's testimony stricken from the record, then the foregoing proposed instruction was properly refused.

In view of our disposition of the errors assigned, there is no merit in the appeal.

The judgment and order appealed from are hereby affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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79 Cal. App. 792

JOHNSON v. SEELYE et al. (Civ. 2819.)

(District Court of Appeal, Second District, Division 1, California. May 22, 1920.)

1. Contracts 🔑28(3)—Evidence in substantial conflict held to sustain finding that there was no agreement to complete water pipe lines by specified date.

Finding that no agreement was made to complete water pipe lines by specified date *held* sustained by evidence; there being substantial conflict.

2. Appeal and error 🔑882(11)—Defendant, waiving evidence of amount claimed, is not in position to complain of its insufficiency.

Where defendant waived evidence of amounts claimed by plaintiff, he is not in position to complain of finding that such sum was due on ground of insufficiency of evidence.

3. Appeal and error 🔑882(17)—In action on agreed price, where defendants waived evidence of amount of claim, that court found amount claimed was reasonable value held not prejudicial error.

In action based on agreed price, that court found amount claimed was reasonable value of work *held* not prejudicial error, in view of defendant's waiver of evidence of amount claimed.

4. Contracts 🔑302—Where leaks were to be expected in concrete water pipe lines, and contractor was ready to repair, such leaks held not basis for complaint.

That leaks developed in concrete water pipe lines *held* not basis for complaint against

contractor that work was improperly done, where leaks were to be expected in such kind of pipe lines, and contractor was ready and willing to repair them.

Appeal from Superior Court, San Bernardino County; H. T. Dewhirst, Judge.

Action by O. Johnson against Orlando Seelye and another for work and materials. Defendants filed a cross-complaint. Judgment for plaintiff, and defendants appeal. Affirmed.

E. H. Jolliffe and Archie D. Mitchell, both of Ontario, for appellants.

J. E. Burnham, of Pomona, for respondent.

SHAW, J. In this action the complaint contains two counts. By the first cause of action plaintiff seeks to recover the sum of $863, alleged to be the reasonable value of a certain line of concrete pipe laid and constructed upon defendants' premises at their special instance and request; and by the second cause of action recovery is sought for the construction of another line of pipe for which defendants, as alleged, agreed to pay plaintiff $73.80. In addition to denying the allegations of the complaint, defendants filed a cross-complaint wherein they alleged the employing of plaintiff to lay both lines of pipe, which were by him to be completed by June 1, 1917; that he failed to comply with his contract in that behalf, as a result of which defendants were damaged in the sum of $2,000; all of which plaintiff, by his answer to the cross-complaint, denied.

The court made findings adverse to defendants, upon which judgment followed for plaintiff, and from which defendants appeal, basing their claim for a reversal upon the ground alone that none of the findings are supported by the evidence.

[1] The contention is without merit. That plaintiff performed the work and laid both lines of pipe appears without conflict of evidence, and the only reason assigned by defendants for not paying therefor, upon demand of plaintiff, was, according to the testimony of defendant Margaret C. Seelye, that they had not received returns from their dried fruit and did not know how much they were damaged by plaintiff's failure to construct the pipe line by June 1st. "That is why," said the defendant, "we did not pay the bill." Defendants did not question the fact that plaintiff had done the work alleged, nor the amount due therefor. Their sole contention was that the pipe lines were to be completed by June 1st. As to this, however, counsel concedes a substantial conflict of evidence thereon; hence it cannot be said the finding that no agreement was made to complete the line by such date is without support. Neither can it be said, upon this record, that defendants' fruit was damaged as the result of an unreasonable delay on the part of plaintiff in constructing the pipe lines.

[2] Objection is made that no evidence was offered in support of the finding as to the sum due from defendants to plaintiff for the work done and performed. While this is true, the production of evidence in support of the issues as to which such finding was adverse to defendants was, in open court, waived by counsel for defendants, who said, "We make no objection as to the amounts claimed," followed by this interrogatory from the court: "Either as to the first cause of action, or the second?" to which defendants' counsel replied: "No, your honor; there may be a small difference, but, as the witnesses say, it is not material." After making such statement, the effect of which was to concede the correctness of the amount claimed to be due in each count of the complaint, plaintiff was not called upon to make further proof of such allegation, and defendants are in no position to question the finding upon the score that the evidence is insufficient to justify the same.

[3] While the second count of the complaint was based upon an agreed price to be paid for the line of pipe described therein, the court in response thereto erroneously found that the amount claimed was the reasonable value of the work. In view of appellants' admissions, however, as to the amount due, no possible prejudice could result from such error.

[4] It appears that some leaks developed in the six-inch pipe line, which, upon notice, plaintiff repaired, and, when another leak developed, signified his willingness to repair the same, and went to defendants' property for such purpose, but found that defendants had disconnected the pipe line from the intake of water, rendering it impossible for him to make the repair. It further appears from the testimony that, in the construction of concrete pipe lines, leakage frequently follows the first use thereof, due to contraction, which has to be repaired, and hence the leaks in this pipe line were not unusual, but were to be expected. Since plaintiff signified his willingness and stood ready to repair the same, defendants, under the circumstances, are in no position to complain of the work being improperly done.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

80 Cal. App. 257

PEOPLE v. LYONS. (Cr. 1377.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1926.)

1. Criminal law 🔑1163(1)—Continuance over defendant's objection after impaneling jury is within discretion of trial judge, and defendant has burden of showing prejudice (Pen. Code, § 1052).

Burden is on defendant to show prejudice by continuance over his objection after impaneling jury; such matter, under Pen. Code, § 1052, resting in sound discretion of judge.

2. Criminal law 🔑594(1)—Continuing trial for infamous crime against nature for five days after impaneling jury to secure prosecuting witness, who had left unexpectedly, held not prejudicial error (Pen. Code, § 1052; Code Civ. Proc. § 595).

Continuing case against defendant, charged with infamous crime against nature, for five days after impaneling jury, to secure attendance of prosecuting witness, a school boy, who attended preliminary examination and had unexpectedly left jurisdiction, *held* not prejudicial error under Pen. Code, § 1052, notwithstanding Code Civ. Proc. § 595.

3. Criminal law 🔑608—Statute does not require that motion for continuance in criminal cases be supported by affidavit (Pen. Code, § 1052; Code Civ. Proc. § 595).

Motion for continuance in criminal case need not be supported by affidavit or made in manner required by Code Civ. Proc. § 595, since Pen. Code, § 1052, does not so provide.

4. Criminal law 🔑608—Where information charging infamous crime against nature, and district attorney's statements indicated that absent witness was complainant, showing was sufficient for continuance after impaneling jury.

Showing *held* sufficient for continuing trial for infamous crime against nature after impaneling jury for absence of witness, where information and statements of district attorney indicated that witness was complainant by whom all allegations would be established.

5. Criminal law 🔑1034—Contention that showing was insufficient for continuance held without merit, where no objection was made on that ground.

Contention that showing was insufficient for continuance after impaneling jury *held* without merit, where record shows no objection on that ground.

6. Sodomy 🔑6—Conviction of infamous crime against nature held sustained by evidence (Pen. Code, § 286).

Evidence *held* to sustain conviction of the infamous crime against nature, denounced by Pen. Code, § 286.

7. Criminal law 🔑507(7)—Complaining witness is accomplice in prosecution for infamous crime against nature, and his testimony alone is insufficient.

In prosecution for infamous crime against nature, complaining witness is accomplice, and his testimony alone will not support conviction.

8. Criminal law 🔑531(3)—Foundation for admission of confession was sufficient, where there was testimony that it was voluntary.

Where there was testimony that no threats, duress, promise of immunity, or hope of reward were held out to obtain defendant's statements, and that they were voluntary, foundation for admitting confession *held* sufficient.

9. Criminal law 🔑511(4)—Evidence corroborating prosecuting witness in prosecution for infamous crime against nature held sufficient to sustain conviction.

In prosecution for infamous crime against nature, evidence *held* to sufficiently corroborate prosecuting witness to sustain conviction, since every intendment is in favor of verdict where evidence is conflicting.

10. Criminal law 🔑1144(13)—Appellate court must resolve every intendment in favor of judgment, where evidence is conflicting.

Where evidence is conflicting, every intendment must be resolved by appellate court in favor of verdict and judgment.

11. Criminal law 🔑829(1)—Refusing instructions covered by given instructions held not error.

Refusing instructions was not error, where given instructions covered issues and embraced rules properly the subject of requested instructions.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Joe Lyons was convicted of the infamous crime against nature as denounced by Pen. Code, § 286, and he appeals. Affirmed.

A. Thomas Whelan, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Lionel Beale Browne, of San Francisco, for the People.

CRAIG, J. Appellant was charged by information with having, on or about the 15th day of June, 1925, committed the infamous crime against nature as denounced by section 286 of the Penal Code, upon one O'Neil Lee, a male person.

It is admitted that the case was set for trial on March 9, 1926, on which date a jury was impaneled and sworn, and the information was read, and the defendant's plea of not guilty stated. The usual midday recess was then taken, and at 2 o'clock p. m., upon reconvening, the trial court was informed by the district attorney that, although a deputy sheriff was provided during the preceding week with a subpœna for all witnesses, he had been unable to serve the prosecuting witness, but that he was advised at Lee's residence that the latter had gone to Los Angeles and would return to San Diego in time for trial; that during the said recess a telegram had been received which stated: "Do not expect us for some time. O'Neil is ill." The district attorney stated that a trial of the case would be impossible without this witness, and assured the court that, if a continuance be granted, an officer would at once proceed to Los Angeles and search for the boy. Counsel for the defendant objected to any extension of time, but, after argument of the matter, the trial was continued until Wednesday, March 10th, at 2 o'clock p. m., and the jury were admonished to refrain from discussing the case or forming an opinion in the matter. On the afternoon of March 10th a deputy sheriff was sworn, and, over the objection of the defendant, that diligent effort had not been made to subpœna the witness during the preceding week, testified that he had visited an address in Los Angeles, but that he had been unable to locate Lee. A motion for further continuance was resisted by the defendant, although it was admitted that his witnesses were not incarcerated, and were all within the jurisdiction of the court. The district attorney informed the court that Lee was the complaining witness, and further said:

> "Now that is the situation we are confronted with, your honor, and it is absolutely imperative that we have the benefit of this boy's testimony before we can proceed to trial. We are confronted with a situation that we did not expect. I thought that he would be here this morning. In fact, word was left for all these boys to be here this afternoon, but of course we cannot lay a sufficient foundation under the circumstances to make a motion that the testimony of this lad, taken at the preliminary examination before a magistrate, be read into the record to the jury. We cannot lay the foundation. So the only alternative we have, your honor, is to move that we be given a brief continuance, and I will undertake to send Mr. Buck up to Los Angeles and Glendale this afternoon and have this boy here tomorrow afternoon, or know the reason why. There are some matters in connection with this going away with this boy that I do not care to refer to at the present time."

[1, 2] The first point urged by the appellant is that the court had no authority to continue the case until five days after impaneling the jury, and that motions for dismissal were erroneously denied. Section 595 of the Code of Civil Procedure, and cases construing that section, are cited. But the continuance of criminal cases is provided for by section 1052 of the Penal Code in the following language:

> "When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause, direct the trial to be postponed to another day."

In People v. Dinsmore, 102 Cal. 381, 36 P. 661, also relied upon by appellant, it appeared that a witness became indisposed while testifying, and that a continuance of sixty-three days was ordered. It was there held that jurors "roaming at large throughout the county and state for a continuous period of sixty-three days, associating with their neighbors and friends and the world at large during all this time, and without the care and protection of the court for this long period, are not the jurors the law contemplates for the trial of a defendant charged with a serious offense," and that the course there adopted could not be allowed to pass into a precedent. In People v. Treadwell, 69 Cal. 226, 239, 10 P. 502, however, it was held that such matters are discretionary with the trial court, and that a continuance at the request of the people to procure the attendance of witnesses was not an abuse of such discretion. And, in People v. Elgar, 39 Cal. App. 78, 178 P. 168, wherein, after the jury had been impaneled, the information read, and the prosecuting witness had testified, a continuance was granted over the objection of the defendant for a period of three weeks, for the same purpose, it was held that such action by the trial court was not error.

In the instant case, as in the one last cited, it may appropriately be said:

> "The matter of ordering such continuance was within the discretion of the trial judge, and upon this appeal the burden rests with the defendant to show that he was prejudiced by the action taken. It nowhere appears in the record as to how or in what manner the action of the court did result to his detriment or tended to prevent him having a full and fair trial upon the issues. It is not claimed that, by reason of the continuance, the defendant was deprived of the presence of any witness, or that any condition supervened which operated to his prejudice."

The question of diligence also is a matter largely to be determined by the trial court from all of the facts and circumstances presented at the time. From the fact that the missing witness in question was a schoolboy in the city of San Diego and had attended the preliminary examination, it may well have appeared to the trial judge that, although no positive steps were taken until the preceding week to forestall the possibility of his leaving the jurisdiction, yet that flight did not sufficiently enter into the realm of probability to demand any preventive measures being taken in that behalf.

[3] Appellant cites People v. Bartley, 12 Cal. App. 773, 776, 108 P. 868, as authority for his argument that such motions for continuance must be supported by affidavit, and be made in the manner required by section 595 of the Code of Civil Procedure. But section 1052 of the Penal Code does not so require, nor does the case relied upon announce any rule in that respect. It is there merely remarked that the trial court did not deny the defendant permission to file an affidavit.

To hold that the granting of so short a delay was, for any of the reasons advanced by the appellant, prejudicial error, would, under the circumstances of this case, amount to a denial of the existence in the trial court of any discretion to grant a continuance in the trial of criminal cases at the request of the people. In the cases cited by appellant, continuances were denied to defendants, and the rulings in that regard were upheld. It cannot be said, however, that, had the trial court in any such instance granted a continuance, its action would have been held to be error.

[4, 5] To the contention that no sufficient showing was made upon which to base an order continuing the trial, it may be replied: First, that, from the reading of the information and statements of the district attorney that Lee was the complaining witness, by whom all of the allegations would be established, the trial judge was generally advised as to what his testimony would be, and the witness in fact did testify thereto. Secondly, we are unable to find in the record any objection to a continuance upon that ground.

[6] The prosecuting witness testified fully and positively to the acts with which the defendant was charged, and two other boys testified that appellant had admitted to them that he had committed the offense.

Much of appellant's brief is devoted to purported discrepancies and inconsistencies in the testimony of witnesses. He testified that he did not commit the crime charged against him. A teacher at the school testified that Lee was present at his classes in the forenoon of June 15th, and the defendant's superintendent testified that Lyons' record indicated that he had worked that day. Lee did not attempt to fix the exact date, however, and all of the evidence was before the jury, from which they were instructed to decide for themselves as to whether or not they believed beyond a reasonable doubt that the defendant was guilty. They having done this, the verdict constitutes a final determination of all such questions.

[7-10] Appellant apparently confuses in his argument the rules governing the admission in evidence of extrajudicial statements, and those applicable to the admission of confessions. It is correctly asserted that the complaining witness was an accomplice (People v. Casey [Cal. App.] 249 P. 525), and that his testimony alone would not be sufficient to support a conviction. But we think that neither the contention that a foundation requisite to the introduction of confessions was not properly laid, nor the claim that the principal corroborating witness is asserted to have been unreliable, can be maintained. The district attorney did elicit testimony that no threats, duress, promise of immunity, or hope of reward was held out to obtain statements by the defendant, and that they were voluntary. The witnesses stated that they had known the defendant for some time and had visited his apartment; that he had volunteered to one of them the statement that he visited the bath house with Lee, and told the other that he committed the acts constituting the offense as charged. Each witness testified that he was unable to fix the exact date of such conversation, and that no one else was present, but this testimony as to the fact sought to be proved was positive, and was not denied except by the defendant, and the jury were instructed upon the credibility of witnesses, and the weight to be given to their testimony. It is not within the province of an appellate court to hold that the jury erroneously decided as to which witnesses told the truth, and, where the evidence is conflicting, every intendment must be resolved in favor of the verdict of the jury, and of the judgment after review by the trial court upon motion for new trial.

[11] The trial court gave instructions which covered the issues of the case and embraced such rules as were properly the subject of requested instructions, which the court refused. There are other points of minor importance discussed in the briefs, but we do not consider them of sufficient magnitude to require further consideration.

No error appearing, the judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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80 Cal. App. 66

In re RICCARDI. (Civ. 4911.)

(District Court of Appeal, First District, Division 2, California. Nov. 29, 1926.)

1. Reference ⚷103(1)—Finding of referee may be attacked as not supported by evidence, only by motion for new trial (Code Civ. Proc. §§ 638–645).

Finding of court may not be attacked as not supported by evidence by exception to it, but only by motion for new trial, and, as same rule applies to referee, findings of referee in application for reinstatement to bar may be attacked as not supported by evidence only by motion for new trial, in view of St. 1851, pp. 79, 80, as codified in Code Civ. Proc. §§ 638–645.

2. Attorney and client ⚷61—In proceedings for reinstatement to bar, proposed finding not responsive to pleadings will be denied.

Proposed finding in proceedings for reinstatement to bar, which would not be in response to issues presented by pleadings, will be denied.

3. Attorney and client ⚷61—On application for reinstatement, court may consider events occurring before disbarment and not then called to its attention.

Events occurring before date of disbarment, which were not brought to attention of court in disbarment proceeding, may be considered on application for reinstatement.

Application of C. V. Riccardi for reinstatement as a member of the bar of the State of California, opposed by Bar Association of

San Francisco. Petitioner moves to amend findings of referee, to add or substitute other findings, and to take further testimony, and respondent moves that findings of referee be accepted and judgment entered against petitioner. Motion of petitioner denied, and motion of respondent granted.

See, also, 64 Cal. App. 791, 222 P. 625.

Charles F. Hanlon, of San Francisco, for petitioner.

A. P. Black, F. Eldred Boland, and Reginald L. Vaughan, all of San Francisco, for respondent Bar Ass'n of San Francisco.

STURTEVANT, J. Heretofore the petitioner filed in this court his application to be restored to the rolls as an attorney and counselor. Later he filed an amended petition and an amendment to that petition. In his petition, the petitioner alleged:

> "That on January 22, 1912, he was by an order of the above-entitled court, duly given and made, admitted to the bar as an attorney and counselor, in all of the courts of this state of California, and on the same day subscribed the roll as such."

The petitioner also alleged that on May 1919, he was indicted for embezzling $1,000, the property of a client; that he was convicted on that charge; that he appealed, and December 16, 1920, the judgment was affirmed (People v. Riccardi, 50 Cal. App. 427, 195 P. 448); and that a hearing was denied by the Supreme Court February 14, 1921. He also alleged facts to the effect:

> That he was wholly innocent of the crime charged, and that on December 23, 1922, the then Governor of this state issued to him a complete pardon.
>
> "* * * That on March 7, 1921, in the Supreme Court of the state, In re Riccardi (this petitioner) Criminal No. 2302, an order was entered in the minutes of the said Supreme Court, reading as follows: 'The above-entitled matter coming on pursuant to the order to show cause heretofore made on February 15, 1921, and it appearing that the accused stands finally convicted of a felony involving moral turpitude, as stated in said order to show cause, it is ordered that the name of the accused be stricken from the roll of attorneys and counselors of this court, and that he be precluded from practicing as such attorney or counselor in all the courts of this State.'
>
> "Petitioner alleges that, since * * * March 7, 1921, when the Supreme Court made the foregoing order, * * * this petitioner did not practice, nor attempt to practice, law. * * *
>
> "* * * Petitioner further states that during the number of years that he has ceased to practice law on account of the aforesaid disbarment against him, his life has been above reproach and he has conducted himself as an honorable man, has been truthful in his statements and assertions with regarding business and capital, profits, etc., has given to every man all the money coming to him to the last dollar, has not taken advantage of any man, or his ignorance or infirmities in any way, and has obtained the respect and confidence of every man, high and low, rich and poor, with whom he has come in contact during said time. * * *
>
> "* * * Your petitioner further alleges that he is a man of good moral character, and possesses the necessary qualifications of learning and ability to act as an attorney and counselor in all the courts in this state, and is still a resident of said state and a citizen of the United States."

The Bar Association filed an answer, containing no denials, but alleging:

> "Alleges that on or about the 22d January, 1912, petitioner was, by order of this honorable court, admitted as an attorney and counselor at law in all the courts of this state. Said order was made upon the representation by petitioner that he was of good moral character. The Bar Association of San Francisco alleges that at said time petitioner was not and is not now of good moral character, and in this respect alleges, upon information and belief, as follows: (1) In the year 1921 the Bar Association of San Francisco brought proceedings in the Supreme Court of the state of California for the disbarment of John J. Sullivan, then judge of the police court of said city and county of San Francisco, state of California. In re Bar Association of San Francisco, 185 Cal. 621, 198 P. 7. In those proceedings petitioner either committed perjury in his testimony or, if his testimony were true, he was guilty of bribery of a public official. In either event, he demonstrates himself to be not of good moral character." (Then follow sixteen specifications of alleged wrongful acts occurring between 1912 and 1921, inclusive.)

In the pleading of the petitioner, numerous good acts, probative matter, are alleged in addition to the matter quoted above. In the pleading of the Bar Association, the allegation of the other sixteen alleged wrongful acts are not direct averments, but the allegations are that he was accused before a bar association, or before a committing magistrate, or by a grand jury, with having done so and so.

It thus appears that the petitioner alleges (1) he is of good moral character; he alleges (2) the probative factors thereof, to wit, that he is honorable, truthful, just, upright, and trustworthy; and then he alleges (3) many specific acts or instances claimed to support each factor mentioned in division 2. The ultimate fact was alleged as in division 1—all else was redundant matter.

Thereafter this court ordered a reference upon the agreement of the parties filed with the clerk, directing the referee, Hon. J. J. Trabucco, "to hear all the testimony and take the evidence in this proceeding, to make findings of fact therein, and to report the same to this court." A hearing was had before the referee and later he filed with the clerk of this court findings of fact and conclusions of law, and at the same time he filed a reporter's transcript consisting of 513 pages, and a month later he filed an additional volume of the transcript, making the entire transcript to consist of 626 pages.

On the 11th day of August, 1926, the petitioner served and filed in this court a notice of motion to have this court amend said findings, to add or substitute other findings, and to take such further testimony as may be proper to make such findings and change the conclusion of law in favor of petitioner and against the contentions of the Bar Association.

On the 26th day of August, 1926, being the return day stated in the notice of motion to amend the findings, etc., the petitioner did, in pursuance of said notice, make his motion as he had stated he would. On the same day, and as part of the same hearing, the Bar Association made a counter motion to the effect that the findings of the referee be accepted and that judgment be entered against the petitioner.

[1] Before proceeding to take up the merits of the motion, it is first necessary to note what papers and documents may be examined by this court for the purpose of determining the motion. In the case of Tyson v. Wells, 2 Cal. 122, 130, the court said:

> "The parties agreed in writing to submit the matter in dispute between them to certain arbitrators, and this agreement was filed among the papers of the case in the court below. In addition, an order of court was granted, by the consent of the parties, referring the suit to the same persons selected by their agreement. Now, whether we view the case as an arbitration at common law, or a reference under the statute, in either case the decision must be the same; because we hold that the statute is in aid of the common-law remedy by arbitration, and in no respect alters its principles.
>
> "In the case of Muldrow v. Norris, 2 Cal. 74 [56 Am. Dec. 313], we held that, under our system of practice, the court might 'set aside awards for fraud, mistake, or accident; and it makes no difference whether the mistake be one of fact or law.' But we further decided, 'in the case of a general finding, it appears to be well settled that courts will not inquire into mistakes by evidence aliunde.' And from the whole tenor of the opinion in that case, it may be regarded as the settled rule, that the court will not disturb the award of an arbitrator, or report of a referee, unless the error which is complained of, whether it be of law or fact, appears on the face of the award. And, in the case of the report of a referee, our statute does not alter or interfere with this rule."

Then in the case of Headley v. Reed, 2 Cal. 322, at page 325, the court said:

> "We decided in Tyson v. Wells, and Skinner, ante 122, that the report of a referee under the statute, had the same legal effect as the award of an arbitrator. It therefore follows that the referee in this suit had no right to bring in and file an additional or amended report; and the case must be reviewed with reference to the original report alone. By that report, it does not appear that exceptions of any validity were taken before the referee, but the report was not made immediately after the close of the testimony, and consequently, by the 191st section of the Practice Act, it is deemed as excepted to. According to the rule settled in Muldrow v. Norris, ante 74, the decision of the referee can only be set aside on account of fraud or gross error of law or fact apparent upon its face. * * * Upon the report of a referee under the statute, if it contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with the report, as far as it concerns the matters referred, and it has no right to entertain any objections whatever. After the rendition of the judgment, the court may award a new trial, and set aside the report for any of the reasons which would impel a court of competent jurisdiction to set aside the award of an arbitrator, and for no other."

Later, in the case of Cappe v. Brizzolara, 19 Cal. 607, the court adverted to some of the other propositions discussed in Tyson v. Wells, and repudiated the doctrine. However, as to the passages quoted above, the same were approved by the court on page 608 in the following language:

> "This is an appeal from an order setting aside the report of a referee and granting a new trial. The order was based upon the insufficiency of the evidence to justify the decision; and, as there was some conflict of testimony, we do not see upon what principle we could properly interfere. There is no doubt that it was competent for the court to grant a new trial on that ground; and its legal discretion in that respect was not affected by the fact that the case was tried before a referee. The provisions of the Practice Act relating to new trials are general in their terms, and vest in the courts the same power, in cases tried by a referee, as in cases tried by the court itself, or by a jury. Every case is placed upon the same footing; and the grounds upon which a new trial may be granted are the same in all cases, irrespective of the manner in which the case was originally tried."

The foregoing cases were based on the provisions contained in the Practice Act. Stats. 1851, pp. 51, 79, 80. But the provisions contained in the Practice Act have been codified and are set forth in the Code of Civil Procedure, sections 638–645. No change in the wording, material to the questions before us, has been made. The statute authorizes a reference to try "any or all of the issues," and the expression "the whole issue" is used in the statute as synonymous with the expression "all of the issues." Section 644 provides:

> "The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court."

Section 645 provides:

> "The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court. When the refer-

ence is to report the facts, the finding reported has the effect of a special verdict."

On first reading the language of the first sentence of that section is not altogether clear. However, its history throws full light on the meaning. Turning to page 843, Statutes of 1865–6, it will be found that the Legislature enacted several sections regulating the practice in civil cases. In section 180, as there enacted, it is provided that the findings of the court may be excepted to and reviewed. In section 187, as there enacted, it is provided that the findings of a referee or commissioner may be excepted to and reviewed "in like manner as if made by the court." In the case of Cowing v. Rogers, 34 Cal. 648, Mr. Justice Rhodes, speaking for the court, at page 652, said:

> "In his motion for a new trial, the plaintiff has not specified wherein the evidence was insufficient to justify or support the findings. After the findings were filed, he filed his objections thereto, in which he specified several of the findings as unsupported by the evidence. This is not the office of exceptions to the findings, under the act of 1861, or of the amendment of 1865–6 to section 180 of the Practice Act. A party, according to these provisions, may object for the want of findings, or on the ground that there is no finding as to a particular fact in issue, and, if the defect is not remedied, may take his exception. But when he thinks any finding is contrary to or unsupported by the evidence, he must make that a ground of his motion for a new trial. He cannot avail himself of the alleged error in any other manner. This has been so often repeated that a citation of authorities is useless." Hayne, New Trial and Appeal, § 247.

It is patent that a party may not attack a finding of the court merely by filing an exception to it when the attack is based on the ground that the finding is not supported by the evidence; but that the proper manner in which to make that attack is on a motion for a new trial. As the power to attack a finding made by a referee is as broad and no broader than the power to attack a finding made by the court, it is clear that the same rule obtains and that a party desiring to make the attack on the ground that the finding is not supported by the evidence may do so by a motion for a new trial and not otherwise.

Assuming, for the purposes of this opinion, that the phrasing of his motion is sufficient to bring him within the purview of the statute, we will now take up the attacks made by the petitioner.

Attacking findings III, IX, X (a), XI, XIII (d), XV (a), XV (b), the petitioner suggests new matter and asks that it be added to each of said findings. The vice of the attack rests in the improper form of all the pleadings. The petitioner and the respondent pleaded many probative facts. The referee was induced to make findings thereon. Each attack under this heading is a request for a finding on additional probative matters.

Attacking findings X (a), X(b), and XVI, the petitioner asks to strike out each of said findings on the ground that there was no evidence to support the finding. If there was no evidence to support any one of said findings, it is enough to state that such fact does not appear on the face of the findings and that the relief sought may be had only by a motion for a new trial.

As to several findings, the petitioner makes an attack claiming that the finding is supported by hearsay only. For the reason stated in the preceding paragraph, we may not sustain the attack on the record which is before us nor except as on a motion for a new trial.

[2] He attacks finding No. XVI in three ways. All are of the same import. He suggests that we add to that finding the following:

> "That since his disbarment said petitioner, C. V. Riccardi, has reformed and has shown a spirit of repentance and has conducted himself throughout in an honorable and upright manner."

That request may not be granted, for the reason that the proposed finding would not be in response to any issue presented by any pleading on file. The pleadings are absolutely silent on the subject.

[3] As to several findings, the petitioner asks that the same be stricken out. The findings so complained of recite certain events that occurred before the date when he was disbarred. The petitioner contends that, as such incidents were not brought to the attention of the court in the disbarment proceeding, they may not be considered at this time. The same contention was made to this court when the pleadings were being settled. At that time the court ruled against the petitioner. At this time, having heard further arguments of counsel on the subject, the court is not at all inclined to change its ruling.

As no legal objection appears in the face of the findings of the referee, the motion of the petitioner is denied, and the motion of the Bar Association is granted. It is further ordered that the Bar Association have judgment for its costs.

We concur: LANGDON, P. J.; NOURSE, J.

80 Cal. App. 91

SUTTON-WATTS v. SARNOW. (Civ. 5293.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1926.)

1. **Appeal and error 🔑1071(6)—Absence of direct finding on issue bearing on waiver held not prejudicial, where question of waiver was raised on appeal.**

Absence of direct finding on plaintiff's alleged ratification of purchase of leasehold interest and furniture *held* not prejudicial to defendant, where it would only have furnished grounds for presentation of question of waiver, and this question was presented under appeal from judgment.

2. **Landlord and tenant 🔑74—Payments of rent by purchaser after notice of rescission of sale of leasehold interest held not ratification of sale.**

Where purchaser of leasehold interest and furniture in apartment house paid rent for two months after giving notice of rescission under fear that she would become more deeply involved, payments, standing alone, did not show ratification of sale.

3. **Contracts 🔑99(3)—Evidence of confirmation after rescission should stand only on clearest evidence.**

Evidence of confirmation after rescission should be watched with utmost strictness and should stand only on clearest evidence.

4. **Landlord and tenant 🔑74—Vendee can remain in possession of leased premises after rescission and refusal to accept return of premises by vendor.**

Where vendor of leasehold interest declined to take possession of leased premises after rescission by vendee, she was justified in continuing in occupation thereof to protect property for all parties.

5. **Cancellation of instruments 🔑59—Judgment rescinding sale of leasehold and furniture, making no provisions for return of property, held erroneous.**

In action to rescind sale of leasehold interest and furniture in apartment house, judgment of rescission, making no provisions for return of defendant's property, *held* erroneous.

6. **Appeal and error 🔑1176(3)—Where judgment was erroneous but findings were supported by substantial evidence, judgment could be reversed, with directions to enter new judgment.**

Where judgment for plaintiff was erroneous as not making provision for return of defendant's property, but findings were supported by substantial evidence and were sufficient to sustain judgment in favor of plaintiff, judgment could be reversed, with directions to enter new judgment.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by C. A. Sutton-Watts against Barbara Sarnow. From a judgment for plaintiff, defendant appeals. Reversed, with directions.

Clark, Law & Clay, of Los Angeles, for appellant.

Harry Lyons, of Los Angeles, for respondent.

KNIGHT, J. An action by plaintiff as vendee to obtain a decree rescinding a sale of the leasehold interest in an apartment house and of the furniture contained therein; also for the recovery of the initial payment made on the purchase price and the cancellation of a promissory note and chattel mortgage given in payment of the balance. Judgment was given in favor of plaintiff, and defendant appeals, urging as grounds for reversal that the trial court erred in failing to find on material issues raised by the answer, and that the judgment is erroneous in that it makes no provision for the return to defendant of the furniture, nor does it allow her certain credits to which she claims she is entitled.

The written consent to the assignment of the lease, which was necessary to be obtained before a valid transfer thereof could be made, was signed by Priscilla Brode as administratrix of the estate of her deceased husband, Adolph Brode, who was the owner of the premises during his lifetime and by whom the lease had been executed, but it appears that up to the time she signed said written consent she had not been appointed administratrix. Respondent claimed, therefore, that the leasehold interest which appellant purported to sell was void, and it was upon that ground that respondent rescinded the sale and was given judgment.

The sale was consummated on August 22, 1921, for a consideration of $6,125, of which amount $2,325 was paid in cash and a promissory note for $3,800, payable in monthly installments of $100 each with accrued interest, secured by a chattel mortgage on the furniture, was given in payment of the balance. Respondent took immediate possession and thereafter paid the monthly installments on said note and mortgage for the months of September, October, and November, at which time she learned of the lack of legal authority on the part of Priscilla Brode to execute the written consent to said assignment, whereupon, and on December 3, 1921, after receiving legal advice, she caused to be served upon appellant a notice of rescission, wherein she demanded the return on the down cash payment made on August 22, 1921, and offered to restore to appellant "the possession of the furniture and furnishings and premises * * * and all personal property and everything of value received under said contract. * * *" Notwithstanding appellant's rejection of the offer, respondent paid to appellant the December, 1921, and the January, 1922, installments on said note and mortgage, because, as she says, she "was afraid she (appellant) would close in on me." In the interim, to wit, on December 31, 1921, respondent commenced this action. It would therefore appear that one installment on the purchase price was paid by respondent after she rescinded the sale and another one was paid after the action was filed.

The evidence further shows that said furniture completely furnished the apartment house, consisting of 21 rooms, and that in September, 1922, at which time this action was tried, respondent was still in possession thereof, having been operating the same continuously since taking possession on August 22, 1921. With reference to the rental value for the use of said furniture, the record discloses that it was stipulated at the trial "that Mr. Edson (the agent who negotiated the sale) shall take all the books and records of the apartment house (during the occupancy thereof by respondent, Mrs. Watts) and shall add up all the expenses and receipts, and deduct the expenses from the receipts, and then allow $100 a month and her room to Mrs. Watts, the balance of that money to go back to Mrs. Sarnow"; and it was further stipulated that Edson's report should be made to counsel, the court in the meantime withholding its decision. The record fails to show whether or not any such report was ever made, but in this connection appellant gave testimony to the effect that the net income from the business while she was operating it was $175 a month. It is also shown that a deposit of $125 made by appellant at the time she accepted the lease as a guarantee for the faithful performance of its conditions, and which was to be applied as the rental for the last month, was never repaid to her by respondent.

Respondent's complaint was in two counts. In the first count appellant was charged with actual fraud in selling a void lease, and in the second it was alleged that the sale was consummated upon the assumption of both parties thereto that said lease was valid and that therefore they were laboring under a mutual mistake. Appellant, in her answer, besides denying the alleged fraud, controverted the allegations as to the invalidity of the lease, and set forth as affirmative defenses that Priscilla Brode, after receiving the appointment as administratrix of the estate of her deceased husband, ratified and confirmed said lease; also that respondent ratified and confirmed said sale by making payments to appellant on said note and chattel mortgage after the discovery of the alleged invalidity of the said lease and the service upon appellant of the notice of rescission; furthermore, that subsequent to the date of said sale respondent continued in possession of said apartment house and said furniture, and that the profits from said apartment house amounted to $250 a month, and that the rental value of the furniture was $200 a month.

The trial court found that said leasehold interest was void for the reasons alleged by respondent, but did not indicate whether the sale thereof by appellant was the result of a fraud or of a mutual mistake. It further found as to the dates and amounts of the payments made by respondent to appellant; also as to the service of the notice of rescission, the refusal of appellant to comply therewith, and that the furniture at the time of the sale was of the value of $2,000 and no more, but, it made no findings as to any of the affirmative defenses pleaded by appellant, nor did it make any general finding negativing the allegations of appellant's answer or any general finding that all of the allegations of respondent's complaint were true.

The judgment, which in terms followed the conclusions of law set forth in the trial court's decision, was as follows:

> "It is ordered and adjudged that the said contract entered into about the 22nd day of August, 1921, by and between the plaintiff and the defendant herein, be declared rescinded and void. (2) That the promissory note and chattel mortgage recorded in book No. 442, page No. 333, of official records of Los Angeles county, be delivered to plaintiff and canceled and discharged. (3) It is further ordered and adjudged that plaintiff have, recover of and from the defendant, Barbara Sarnow, judgment in the sum of two thousand six hundred and thirty ($2,630) dollars, and for costs of suit taxed at * * *."

[1] Conceding, as appellant contends, that she was entitled to a finding upon the affirmative defense of respondent's alleged ratification of the sale, we are of the opinion that the failure to find thereon has not been prejudicial. Such a finding, if made, would necessarily have been in the negative, for the reason that the judgment was in favor of respondent, which consistently carried with it the implied finding that respondent had not ratified the sale; and it is not to be presumed that the trial court would have stultified its judgment with the presence of an affirmative finding that respondent had ratified the sale. Assuming, therefore, that the finding on the issue mentioned, if made, would have been in the negative, it could have served appellant but one useful purpose, and that is, it would have furnished grounds for the presentation of the question of waiver, and this question appellant has already presented under the appeal from the judgment; consequently the absence of a direct, adverse finding on said issue has deprived appellant of no substantial right, nor, so far as can be seen, has it operated to her disadvantage.

[2-4] Treating the judgment as such adverse finding, we think it fairly supported by the evidence. Respondent's intention to rescind was clearly manifested by the prompt service of notice to that effect, which was followed and confirmed by the commencement of suit, and we think that the payments mentioned, standing alone, cannot be reasonably construed as a revocation of the legal course already adopted by her to rescind the sale,

nor did the fact that they were made mislead appellant or operate to respondent's benefit, but, as remarked by the trial court, were doubtless made by respondent under the fear that if she defaulted in that respect she would become more deeply involved. Evidence of confirmation "ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place." Green v. Duvergey, 146 Cal. 379, 80 P. 234. All of the cases cited and relied upon by appellant were predicated upon some advantage accruing to the injured party as a result of the waiver. Here the payment of upwards of $240 in addition to the amounts already paid by respondent was of no benefit to her. Clearly, it did not help her to retain possession of the apartment house, because, aside from said payments, in view of appellant having declined to retake possession, she was justified in continuing in the occupation thereof for the purpose of protecting the property for all parties. Shermaster v. California Bldg., etc., Co., 40 Cal. App. 661, 181 P. 409.

[5] Regarding the amount of credits appellant was entitled to, we think it can be reasonably concluded from the amount for which the judgment was rendered, when considered in the light of the evidence, that all just credits were considered and allowed. The evidence shows that the total payment made by respondent to appellant, together with legal interest thereon, amounted to approximately $3,092, whereas the judgment directed the repayment to her of only $2,630, showing that credits were allowed appellant in approximately the sum of $462, which amount we may infer the trial court concluded was sufficient to cover the rental value of the furniture and other items justly due appellant.

The form of judgment rendered, however, was erroneous, in that it made no provisions for the return of appellant's property. In Conlin v. Studebaker Bros., 175 Cal. 395, 165 P. 1009, it is held that in decreeing the rescission of a contract of sale the judgment by its terms should place the parties in statu quo and require the plaintiff, as a condition to the relief awarded him, to restore to defendant everything of value which he has received under the contract. The subject of the sale there was an automobile which the court found had been misrepresented to plaintiff, and the court said:

> "But there is no provision in the judgment for the return to the defendants, or either of them, of the automobile itself. So far as the judgment goes, the plaintiff gets back the purchase price paid by him for the automobile and keeps the automobile too. Such a judgment cannot stand. In decreeing the rescission of a contract the court 'requires equity at the hands of the complaining party as well as from the defendant, and * * * will place the parties in statu quo by requiring the plaintiff to restore to the defendant everything of value which the plaintiff has received under the contract.' 18 Ency. Pl. & Pr. 858; Sanchez v. McMahon, 35 Cal. 218; Kelley v. Owens, 120 Cal. 502, 47 P. 369, 52 P. 797. It is no answer to this objection to say that the plaintiff, in his complaint and at the trial, asserted his willingness to make a return of the purchased property. It appeared from the evidence that it remained in his possession, and the defendants were entitled to some security for its return beyond the mere expression of plaintiff's willingness to restore it. The judgment should have made the return of the consideration conditional upon the placing of the automobile in the possession of the defendants."

The same situation exists here. So far as appears from the record, the furniture was still in the possession of respondent at the time of the rendition of the judgment, the incumbrance thereon in appellant's favor being by the terms of the judgment canceled, and therefore, as stated in the case last cited, appellant was entitled to some security for its return beyond the mere expression of respondent's willingness to return it.

[6] Inasmuch as the present findings are supported by substantial evidence and are legally sufficient in form and substance to sustain a judgment in favor of respondent, such as the trial court endeavored to render, we think it necessary only to reverse the judgment, with directions to enter a new judgment which shall include the provision mentioned in Conlin v. Studebaker Bros., supra. It is so ordered, appellant to recover costs of appeal.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

80 Cal. App. 122

FIRPO v. PACIFIC MUT. LIFE INS. CO. (Civ. 5678.)

(District Court of Appeal, First District, Division 2, California. Dec. 1, 1926.)

1. Appeal and error 🔑907(2)—Appellate court may assume that facts supporting verdict were proved by competent evidence, where party appealing on typewritten record prints no evidence in briefs (Code Civ. Proc. § 953a).

Where one appealing on typewritten record under Code Civ. Proc. § 953a, prints none of evidence in opening brief and complaint only in appendix, appellate court may assume that facts cited by respondent in support of verdict were proved by competent evidence.

2. Money received 🔑17(3)—Common count puts in issue fraud or misrepresentation through which money was received, though fraud and resulting damage are not specially pleaded.

Common count for money had and received puts in issue fraud and misrepresentation through which money was received, though fraud and resulting damage are not specially pleaded; the action being one in assumpsit on implied contract to repay money received.

3. Action 🔑28—One may elect to sue for damages from fraud or waive tort and sue for money paid.

Party may elect to sue for damages resulting from fraud or to waive tort and sue for money paid.

4. Pleading 🔑18—Complaint in assumpsit for money had and received is not subject to general demurrer or special demurrer for uncertainty.

Complaints in assumpsit for money had and received are not subject to general demurrer or special demurrer for uncertainty, as common count pleads every material issue in general terms, and any uncertainty as to particular items may be remedied by demanding bill of particulars.

5. Money received 🔑1—Action for "money had and received" is equitable in nature and rests on obligation to pay money, which defendant in equity and good conscience should pay.

Action for "money had and received" is in nature of equitable one, resting on obligation created by law or legal fiction that defendant, having money which in equity and good conscience he should pay to plaintiff, is deemed to have promised to pay it.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Money had and received.]

6. Money received 🔑8—Common-law action lies to recover money obtained by fraud, misrepresentation, duress, undue influence, and mistake of fact; "money had and received."

Common-law action for "money had and received" will lie to recover money obtained by fraud, misrepresentation, duress, undue influence, and mistake of fact.

7. Appeal and error 🔑172(3)—Appellant, not asking relief from trial court, cannot urge surprise by charge of misrepresentation by its agent.

Defendant corporation, asking no relief from trial court, cannot argue, on appeal from judgment against it for money had and received, that it was taken by surprise when called on at trial to meet charge of misrepresentation by its agent.

8. Insurance 🔑198(4)—Premium is returnable when contract is voidable for insurer's fraud or misrepresentation (Civ. Code, § 2619).

Under Civ. Code, § 2619, insured is entitled to return of premium, when contract is voidable because of insurer's fraud or misrepresentation.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by E. Firpo against the Pacific Mutual Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. Eldred Boland and Knight, Boland & Christin, all of San Francisco, for appellant.

Raymond Perry, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for $943.76 on a common count for money had and received. The cause was tried before the court sitting with a jury and a verdict for the plaintiff in the sum prayed was returned. From the judgment following the verdict, the defendant has appealed on a typewritten record under section 953a, Code of Civil Procedure.

Plaintiff based his action upon the claim that his assignors had paid the sum in suit to the defendant as premiums upon a policy of life insurance in the principal sum of $15,000; that his assignors were induced to make the payments through the misrepresentations of defendant's agent that the premiums were payable monthly instead of annually, as claimed by defendant; that the moneys were actually paid monthly for a period of more than one year into a savings bank, which transmitted them to the defendant; that no policy of insurance was delivered to the assignors until some fourteen months after the date of the transaction, when the defendant mailed to them a policy dated as of the date of the transaction, and notified the assignors of plaintiff that the policy was canceled because of their failure to pay the annual premium for the second year.

[1] The appellant apparently does not controvert any of these facts, as it has not printed any of the evidence in its opening brief and has printed the complaint and nothing more in the appendix. In view of the rule that, where an appeal is taken under section 953a, Code of Civil Procedure, the appellant must print the portion of the record upon

which he relies, we may assume that the facts cited by the respondent in support of the verdict were proved by competent evidence.

[2, 3] So far as we are able to understand appellant's position from the briefs filed, it seems to be that the complaint, being in the form of a common count for money had and received, was insufficient in law to raise the issue of fraud or misrepresentation, and that the trial judge improperly instructed the jury on that issue. The position of the respondent is that no policy of insurance was ever delivered to his assignors, and that there was therefore no consideration for the monthly payments of premium, and that, because of the agent's misrepresentations as to the time of payment of the premiums, the minds of the parties did not meet, and that the moneys were therefore paid under a mistake of fact. In reply, the appellant insists that the policy was delivered to the bank for the benefit of the insured, but it does not controvert the evidence that the misrepresentations were made, as claimed, and does not claim that any knowledge or information was conveyed to the insured of the fact that the policy stated on its face that the premiums were payable annually.

Upon the record presented, there is but one question open to discussion—Does a common count for money had and received put in issue fraud or misrepresentation on the part of the defendant through which the money sued for was received by the defendant? The appellant insists that this cannot be, because, in an action for fraud, the fraud as well as the damage resulting therefrom must be specially pleaded. The obvious answer is that this is not an action for fraud or for damages, but is one in assumpsit upon an implied contract to repay the money received by the appellant. The rule is elementary that a party may elect to sue for damages resulting from the fraud, or to waive the tort and sue for the money paid.

[4] Whatever uncertainty may have arisen from the earlier decisions has been set at rest by the able opinion of Mr. Justice Sloss in Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923, where it was held that these complaints in assumpsit were not subject to a general demurrer nor to a special demurrer for uncertainty. The reason for the rule is that the common count pleads every material issue in general terms, and that, if there is any uncertainty as to particular items, the defendant has his remedy by demanding a bill of particulars.

[5] "The basis of the action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff." 17 Cal. Jur. p. 602. The action is in the nature of an equitable one (Fontaine v. Lacassie, 36 Cal. App. 175, 178, 171 P. 812), and rests upon the obligation created by law, or by legal fiction, that, where the defendant has money which in equity and good conscience he ought to pay to the plaintiff, he is deemed to have promised to pay it. Fitzhugh v. University Realty Co., 46 Cal. App. 198, 200, 188 P. 1023.

[6, 7] The rule has stood without contest that the common-law action for money had and received will lie to recover money obtained by fraud, misrepresentation, duress, undue influence, and mistake of fact. 17 Cal. Jur. pp. 616, 617. The appellant does not question the rule of these cases, but argues that it was taken by surprise when it was called on at the trial to meet the charge of misrepresentation by its agent. The procedure in the trial courts gives ample protection to a party under such circumstances, but it does not appear that the appellant asked for any relief from the trial court.

[8] The point is advanced without argument that the trial court erred in instructing the jury that an insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer. No reason is given why the appellant claims that the instruction is error. It correctly states the law as announced in section 2619 of the Civil Code.

Judgment affirmed.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 98

ENLOW v. IRWIN et al. (Civ. 5296.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1926.)

1. Frauds, statute of ⚿113(2)—Memorandum of agreement for lease to satisfy statute must contain all essential and material facts of lease which is to be executed.

To satisfy statute, memorandum of agreement for lease must contain all essential and material facts of lease which is to be executed thereafter according to its terms, and particularly must contain a definite agreement as to extent and boundary of property leased, definite and agreed term, and definite and agreed price of rental and time and manner of its payment.

2. Frauds, statute of ⚿106(2)—Agreement for lease should define beginning of term of tenancy to satisfy statute.

Agreement for lease should define when term of tenancy shall begin in order to satisfy statute of frauds.

3. Frauds, statute of ⚿106(2)—Agreement for lease to satisfy statute must be certain as to kind and character of improvements to be made, or susceptible of being made so by oral evidence.

Where improvements are to be made or conditions relating to tenancy are to be inserted in lease, agreement for lease, to satisfy statute, must either in itself be certain as to kind and character thereof, or susceptible of being made certain by oral evidence showing a prior or contemporaneous understanding of facts in that regard.

4. Frauds, statute of 🔑56(6)—Agreement for leasing of room in hotel to be constructed for term of 10 years must be in writing to satisfy statute (Civ. Code, § 1624, subd. 5).

Agreement for leasing of room in hotel to be constructed for a term of 10 years being leasing of real property, *held* required to be in writing, under Civ. Code, § 1624, subd. 5.

5. Frauds, statute of 🔑106(2)—Agreement for leasing of room in hotel, indefinite as to beginning of term, extent of property, and conditions of leasing, held not to satisfy statute (Civ. Code, § 1624, subd. 5).

Agreement for leasing of room in hotel to be constructed for term of 10 years, in which neither beginning of term, extent of property leased, or conditions of tenancy were ever definitely agreed upon, *held* not stated with sufficient certainty to satisfy requirements of Civ. Code, § 1624, subd. 5.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Marie Louise Enlow against W. M. Irwin and another, doing business under the firm name of "Fullerton Realty Company," a copartnership, and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Launer & Collins, of Fullerton, for appellants.

Roland Thompson and Charles D. Swanner, both of Santa Ana, for respondent.

KNIGHT, J. The action herein was to recover the sum of $500 and interest paid by plaintiff pursuant to negotiations had with defendant R. E. Durbin for a lease of real property. The cause was submitted to the trial court on an agreed statement of facts, and judgment was given in plaintiff's favor. The defendants appeal.

The negotiations between plaintiff and Durbin were evidenced by an instrument in writing, signed by them, and reading as follows:

"Received this day from Marie Louise Enlow the sum five hundred and 00/100 dollars, being a deposit in escrow with Fullerton Realty Company of Fullerton, California, as part payment in the nature of advance rent on lease of the following described property: A room approximately 16x36 feet in the new proposed Fullerton Hotel to be built by the Community Hotel Company on the northwest corner of Wilshire and Spadra streets, said room to be described as follows: The first room on north wing next to hotel lobby, arrangements of interior to be decided on when lease is made. Said lease to be executed for a period of ten years at a monthly rental of one hundred and 00/100 dollars per month, payable in advance. The said five hundred and 00/100 dollars, receipt of which is hereby acknowledged, is to remain in escrow until such time as lease, properly made out and signed, is turned over to the said Marie Louise Enlow, at which time the said five hundred 00/100 dollars will be turned over to R. E. Durbin to be held by him as security for the performance of all of the conditions of said lease, and to apply as the last five months' rental of said lease, it being understood that should the said Marie Louise Enlow fail to comply with all of the conditions of said lease, the said lease will be canceled by R. E. Durbin and the said five hundred 00/100 dollars remain in his possession as damages. This agreement executed this 19th day of October, 1921, is to bind ourselves, our heirs, executors, administrators and assigns. R. E. Durbin, lessor, Marie Louise Enlow, lessee. Interest to be paid lessee on deposit at the rate of 6 per cent. per annum. R. E. Durbin."

On or about November 1, 1921, and on several occasions thereafter, respondent demanded the return of the money she had paid under said instrument, but her demands were refused, and on July 31, 1922, she commenced this action to recover the same. The construction of the hotel building mentioned in said instrument was begun about February, 1922, and finished and the building ready for occupancy on January 15, 1923. Ignoring respondent's demands for the return of said money, Durbin on July 14, 1922, wrote her to the effect that he was at that time prepared to "make" the ten-year lease mentioned in said instrument, and for her to let him know when it would be agreeable to her "to complete the lease," and in October, 1922, tendered respondent the accrued interest on the $500, also a form of lease for her to sign. She refused to accept the interest money or to execute the lease, and on January 19, 1923, Durbin tendered another form of lease for her to execute, but it was likewise rejected, and no lease was ever signed, nor did she ever take possession of the property.

The parties are agreed that the instrument signed by them and hereinabove quoted was not a lease, but was merely an agreement to enter into a lease, and the sole question presented for determination is whether, as such, it is legally enforceable.

[1-3] In Rohan v. Proctor, 61 Cal. App. 447, 214 P. 986, in dealing with the subject now under consideration, it is said that in order to satisfy the statute of frauds, a memorandum of agreement for a lease which is required to be in writing must contain all of the essential and material parts of the lease which is to be executed thereafter, according to its terms, and particularly must contain three essentials: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental and the time and manner of its payment. Jones on Landlord and Tenant, § 137a; Dodd v. Pasch, 5 Cal. App. 686, 91 P.

166; Levin v. Saroff, 54 Cal. App. 285, 201 P. 961. And as to the second of the above essentials, the agreement for lease should define when the term of the tenancy shall begin (Taylor on Landlord and Tenant [9th Ed.] § 70); furthermore, where improvements are to be made or conditions relating to the tenancy are to be inserted in the lease, the agreement for the lease must either in itself be certain as to the kind and character thereof or it must be susceptible of being made certain by oral evidence showing a prior or contemporaneous understanding of the parties in that regard, and if the parties have come to no such understanding at the time the agreement for the lease is made, the uncertainty of the agreement in that regard is fatal, since it is an uncertainty in a respect essential to its validity which no amount of oral evidence as to a later understanding can remove. The effect of such evidence under the circumstances stated, if received, would be merely to create an additional oral agreement, touching a vital and omitted essential of the writing, and thus render the entire contract between the parties oral, and hence of necessity in violation of the statute of frauds. See, also, Wineburgh v. Gay, 27 Cal. App. 603, 150 P. 1003.

[4, 5] The agreement in question here was one that the statute of frauds required to be in writing, the subject-matter thereof being for the leasing of real property for a term of ten years (subdivision 5, § 1624, Civ. Code), and, measured by the foregoing rules, it is at once apparent that said agreement is fatally defective in at least three particulars: First, the beginning of the term is not made certain. With respect thereto we are not unmindful of the fact that at the time the agreement was signed the building mentioned therein was not even in the course of construction, and that many authorities hold that a lease is not invalid by the circumstance that the term is to begin upon the completion of a building. Jones on Landlord and Tenant, § 113, and cases therein cited. The agreement here, however, nowhere provided that the term should begin upon the completion of the building or at any other time, and, consequently, the commencement of the tenancy might have been deferred indefinitely, by either of the parties, after the completion of the building. Secondly, the agreement provides that the room to be leased was to be "the first room on the north wing next to the hotel lobby, *arrangements of the interior to be decided on when the lease is made.*" (Italics ours.) The italicized clause shows clearly that such arrangements had not been made at the time the agreement was signed, but were deferred for future consideration and agreement. Thirdly, said agreement shows that the lease to be thereafter executed was to contain certain conditions relating to the tenancy, for the faithful performance of which the lessor was to retain the said sum of $500 until nearly the end of the 10-year term; but there is nothing contained in said agreement indicating the nature, number, or extent of those conditions or that any of them were ever agreed upon or even discussed between the parties prior to or contemporaneously with the execution of said agreement; and the fact that forms of leases containing different conditions were afterwards submitted for execution and rejected, long after the agreement herein was executed, conclusively shows that the conditions of the tenancy were never agreed upon at any time. The forms of leases so tendered and rejected contained conditions covering 6 typewritten pages of the reporter's transcript and relating to more than 16 different subjects. Some of them, if agreed to, would have had the effect of restricting respondent's use of the premises and also her right to recover damages for defective wiring, plumbing, and building equipment; others would have established liability on her part for alterations, heat, and upkeep, and would have fixed the amount of the water and light bills she would be required to pay. Conditions were also inserted curtailing her right to assign, hypothecate, or transfer her leasehold interest, and in case of suit for forfeiture would have permitted the allowance of attorneys' fees; and, lastly, her tenancy was made subject to all the conditions of the lease to be executed between Durbin and the owners of the property.

In view of the foregoing, it is evident that neither at the time of the execution of the agreement in question nor at any other time was there a meeting of minds or mutual assent of the parties which is necessary to constitute a valid contract, and, furthermore, that the terms of the agreement were not stated in writing with sufficient certainty to satisfy the requirements of the statute of frauds. The judgment is therefore affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

80 Cal. App. 126

Ex parte O'CONNELL. (Cr. 1358.)

(District Court of Appeal, First District, Division 2, California. Dec. 2, 1926.)

1. Divorce ⟹87—Court could not enjoin husband pendente lite from entering house and annoying wife, where order to show cause noticed application on wife's complaint for divorce only, which did not charge mistreatment (Code Civ. Proc. § 527).

Where order to show cause for not restraining husband from entering dwelling house and annoying wife noticed application on latter's complaint for divorce only, which mentioned no property and did not charge husband with any misuse of property involved or mistreatment of wife, court had no jurisdiction to issue injunction pendente lite, under Code Civ. Proc. § 527.

2. Divorce ⟹254—Interlocutory decree not appealed from, awarding property to husband, finally determined property rights.

Interlocutory divorce decree awarding property to husband became final and conclusive determination of parties' property rights, where not appealed from.

3. Divorce ⟹87—Denial of final decree for husband, after dismissing wife's complaint, held final determination, as respects injunction.

Denial of husband's motion for final divorce decree on his cross-complaint on ground that parties had become reconciled and were living together, after order, not appealed from, dismissing wife's complaint for want of prosecution, *held* final determination of divorce proceeding as respects parties' marital status, as respects right to injunction.

4. Divorce ⟹87—Court could not enjoin husband pendente lite from entering house and annoying wife, after finally dismissing her divorce suit, disposing of property, and denying final decree for husband (Code Civ. Proc. § 527).

Under Code Civ. Proc. § 527, court had no jurisdiction to grant injunction pendente lite, restraining husband from entering dwelling house and annoying wife, after final judgments dismissing wife's divorce suit, disposing of parties' property rights by interlocutory decree for husband, and denying final decree on husband's cross-complaint; no appeal having been taken from interlocutory decree.

Application by Daniel O'Connell for a writ of habeas corpus to the sheriff of the city and county of San Francisco. Writ granted, and applicant discharged.

See, also, 242 P. 741.

Daniel O'Connell, of San Francisco, in pro. per.

Keyes & Erskine, of San Francisco, for respondent.

NOURSE, J. This is a proceeding in habeas corpus. The petitioner was sentenced to a term in the county jail for contempt in failing to obey a temporary mandatory injunction ordering him to vacate his home which he had occupied with his wife for more than ten years past. The application is contested by petitioner's wife, at whose instance the contempt order was made, and on the hearing both parties put in evidence records of legal proceedings had between the parties extending over a long period of time. The facts herein stated are taken from this record and are not disputed.

The parties were married on February 20, 1912, and lived together as husband and wife in the home property here in controversy until September 7, 1920, when the petitioner was taken to the federal prison at McNeill's Island to serve a sentence under a judgment of the federal court. On the 9th of August, 1917, about the time this judgment was entered, the petitioner conveyed the property to his wife in trust, for the purpose of securing a bail bond for his release, pending appeal. On February 28, 1922, while the petitioner was still confined in the federal prison, his wife commenced an action for divorce upon the sole ground of his conviction, and made no mention in her complaint of the property, and did not ask for any relief so far as the property was concerned.

The petitioner answered this complaint and filed a cross-complaint, setting up all the facts relating to the transfer and ownership of the property and alleging cruelty on the part of the wife. He prayed for a divorce on that ground and for an award of the property. On his return from McNeill's Island in May, 1923, the petitioner and his wife continued to live in their home property, but whether they resumed the relation of husband and wife is a matter in dispute. On June 2, 1924, after due notice and hearing, the wife's complaint for a divorce was dismissed, and this petitioner was awarded an interlocutory decree of divorce on his cross-complaint. At that time the trial court found that the transfers of the property to petitioner's wife were without consideration and decreed that the entire estate therein should be granted to this petitioner. Notice of entry of this decree was duly served on June 5, 1924, and, no appeal or other proceeding to set it aside having been taken, it became a final and conclusive determination of the property rights of the parties. Abbott v. Superior Court, 69 Cal. App. 660, 664, 232 P. 154; Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 658, 238 P. 93. On May 20, 1924, the wife of petitioner, without notice, procured an order of court setting aside this interlocutory decree, but on June 30 following this order was vacated on the ground that it had been in excess of the jurisdiction of the court. Upon the expiration of the period of one year after the entry of the interlocutory decree, the petitioner herein applied to the court for entry of a final decree of divorce, but this was denied on July 23, 1925, on the ground that the parties had cohabited as husband and wife since the entry of the interlocutory decree. From this order the petition on September 1, 1925, took an appeal which does not appear to have been determined. Before the appeal was taken, but after the entry of the order of July 23, 1925, an order to show cause was issued in the divorce proceeding, citing the defendant therein (the petitioner herein) to appear and show cause why a temporary injunction pendente lite should not be issued restraining said defendant from entering and living in the dwelling house "referred to in the complaint in this action," from making any repairs or improvements upon said dwelling house, and from annoying or harrassing the plaintiff in any way. The order to show cause was issued upon the complaint of the plaintiff on file in the divorce case and constituted the notice of motion for an injunction which was subsequently heard. On September 10, 1925, the order to show cause and application for an injunction was heard and a temporary injunction was ordered issued enjoining the defendant during the pendency of the action from doing any of the acts mentioned in the order to show cause. On September 14, 1925, a paper designated "temporary injunction" was filed, signed by the judge of the court. Appeals were taken from this order, from the temporary injunction, and from the order refusing to vacate this injunction.

Pending this appeal, the petitioner's wife procured an order citing the petitioner for contempt for failing to obey this injunction, and he was committed. From the commitment the petitioner sued out a writ of habeas corpus to the First division of this court, where the contempt proceedings were held void, and the petitioner was released from custody for the very obvious reason that the trial court was without jurisdiction to punish the petitioner for contempt of a mandatory injunction which was stayed by appeal. In re O'Connell (Cal. App.) 242 P. 741.

Thereafter the wife moved in the Supreme Court to dismiss the appeal from the injunction of September 14, 1925, and this motion was granted without opposition. The petitioner was then cited again for contempt and was committed on September 8, 1926, for violating the terms of the "injunction issued out of this court on the 10th day of September, 1925."

[1] At the hearing in the trial court, as well as in the presentation of this application for a writ of habeas corpus, the petitioner has urged that the entire contempt proceedings are void because the trial court had no jurisdiction to issue the injunction and that, in any event, the proceedings are stayed because there is still pending in the Supreme Court a perfected appeal from the order of September 10, 1925, granting the injunction, and from the order refusing to dissolve the injunction as issued. On the second point the argument is that the motion to dismiss the appeal designated the appeal from the injunction signed by the trial judge and filed September 14, 1925; that this was not an appealable order and appellant did not contest the motion for that reason; and that the two separate appeals from the order for an injunction dated September 10, and from the order refusing to dissolve the injunction, are still pending and stay all proceedings in contempt. It is not necessary to pass upon this question because we are satisfied that the trial court was wholly without jurisdiction to issue the injunction in the first instance, and that with the fall of that order the contempt proceedings must fall.

Section 527, Code of Civil Procedure, authorizes an injunction pendente lite "at any time before judgment upon a verified complaint, or upon affidavits if the complaint * * * or the affidavits" show sufficient ground therefor. The order to show cause for the injunction noticed the application upon the plaintiff's complaint for divorce only. This complaint did not specify or mention any property of any character and did not charge defendant (this petitioner) with any misuse of the property involved or with any mistreatment of the plaintiff. There was, therefore, no foundation for the application in the first instance, and the defendant's demurrer should have been sustained.

[2] Prior to the issuance of the order to show cause, an interlocutory judgment in divorce, which specifically awarded this property to this petitioner, was entered. This interlocutory judgment was not appealed from and became a final and conclusive adjudication of the property rights of the parties. Bacigalupi v. Bacigalupi, 72 Cal. App. 654, 658, 238 P. 93; Pereira v. Pereira, 156 Cal. 1, 9, 103 P. 488, 23 L. R. A. (N. S.) 880, 134 Am. St. Rep. 107; Estate of Bollinger, 170 Cal. 380, 383, 149 P. 995.

[3] More than one year prior to the issuance of the temporary injunction an order had been entered dismissing plaintiff's complaint for divorce for want of prosecution. No appeal was taken from that order. On July 23, 1925, petitioner's motion for a final decree of divorce on his cross-complaint was denied upon the grounds (as found by the trial court) that the parties had become reconciled and were living together as husband and wife. This was a final determination of the divorce proceeding in so far as the marital status of the parties was concerned.

[4] When, therefore, the court, on September 10 following, issued its temporary injunction "pendente lite" there was nothing pending in the action. This injunction was issued after final judgment dismissing plaintiff's action for divorce, after final judgment disposing of the property rights of the parties, and after final judgment denying a final decree of divorce of the marital status based

upon petitioner's cross-complaint. The order for a temporary injunction was directly contrary to the express provisions of section 527, Code of Civil Procedure, and was beyond the court's jurisdiction. This is not a case where an injunction is necessary to preserve the status quo pending an appeal such as City of Pasadena v. Superior Court, 157 Cal. 781, 788, 109 P. 620, 21 Ann. Cas. 1355, and Tulare Irr. Dist. v. Superior Court, 197 Cal. 649, 242 P. 725. This is so because no appeal was taken from the interlocutory decree—the only judgment or order disposing of or affecting the property in suit. There was, therefore, no subject-matter involved in any litigation before either the trial or appellate court to which an injunction "pendente lite" might relate.

The writ is granted, and the prisoner is discharged.

I concur: STURTEVANT, J.

80 Cal. App. 104

BURCKARD v. SMITH et al. (Civ. 5325.)

(District Court of Appeal, First District, Division 1, California. Dec. 1, 1926.)

1. Sales 🔑398—Court's findings held sufficient to entitle plaintiff to judgment for mistaken overpayment on purchase price of peas.

In action for overpayment on purchase price of peas, court's findings that defendant made no other sales of peas to buyer, did not believe that credit established covered additional sales, or credit full amount received to buyer's account, and did not disburse amount of overpayment before learning of mistake in amount of credit, or sue for amount due on account of additional sales, less amount of such overpayment, *held* sufficient to entitle plaintiff to judgment.

2. Payment 🔑85(1)—Payment under mistake of fact, however negligent, may be recovered, unless unjust because of change in payee's position.

Money paid under mistake of fact, however negligently made, may be recovered back unless payment caused such a change in position of other party that it would be unjust to require him to refund.

3. Sales 🔑397—Seller sued for overpayment had burden of proving that he sued buyer for amount due on other sales, less amount of overpayment as alleged.

In action for overpayment on purchase price of peas, sold by defendant to corporation in foreign country, burden was on defendant to prove that he filed action in such country, as alleged, to recover amount due on account of other sales of peas, less amount of such overpayment.

4. Sales 🔑397—Seller's testimony, in suit for overpayment, held mere conclusion, insufficient to negative finding that he brought no suit against buyer for amount due on other sales, less amount of overpayment.

In action for overpayment on purchase price of peas, sold to corporation in Spain, defendant's testimony that he commenced suit against corporation in that country for amount due on account of other sales of peas to it, less amount of such overpayment, and signed original of affidavit in Spanish, which he could not read, *held* mere conclusion, insufficient to negative court's finding that he filed no such action.

5. Sales 🔑397—Whether seller properly credited amount received held immaterial on issue whether he disbursed overpayment before learning of mistake.

Whether defendant, in suit for overpayment on purchase price of peas, gave proper credit on his books for amount received, *held* immaterial on issue whether he disbursed amount of overpayment before learning of mistake in amount of bank credit established.

6. Sales 🔑397—Finding that seller did not disburse amount of overpayment before learning of mistake held not erroneous.

In action for overpayment on price of peas, finding that defendant did not disburse amount of overpayment before learning of mistake in amount of bank credit established *held* not erroneous because of defendant's testimony that he credited amount on his books and disbursed it before receiving notice from bank to return it, where he merely gave his agent book credit for half of amount as commissions, and contract under which he claimed to have purchased other peas for buyer was repudiated by latter because of material alterations by defendant not appearing in copy first produced in court.

7. Sales 🔑397—Finding that amount of overpayment on purchase price was property of bank, as assignee of which plaintiff sued, held not erroneous.

In action for overpayment made on purchase price of peas, through mistake in amount of credit established with bank, as assignee of which plaintiff sued, finding that amount sued for was money and property of such bank and not of bank establishing credit, *held* not erroneous, where correspondence between banks warranted inference that mistake was fault of assignor, which assumed responsibility and adjusted accounts with other bank accordingly.

8. Appeal and error 🔑1071(1)—Finding that amount of overpayment on purchase price was property of bank, as assignee of which plaintiff sued, held not prejudicial to defendant.

In action for overpayment on purchase price by mistake in amount of credit established by foreign bank with domestic bank, as assignee of which plaintiff sued, finding that amount of overpayment was property of latter, not of foreign bank, *held* not prejudicial to defendant, who admitted overpayment and asserted, and had passed on, all defenses and counterclaims available against foreign bank, whose correspondence, wherein assignor was charged with mistake, showed impossibility of duplicating recovery against defendant.

9. Sales ⚷397—Letter from foreign bank to domestic bank, showing latter's mistake in amount of credit established, and its ownership of money sued for by its assignee as overpayment on purchase price, held admissible.

In action for overpayment on purchase price of peas, letter from foreign bank to domestic bank, as assignee of which plaintiff sued, showing mistake in amount of credit, which defendant admitted, and domestic bank's ownership of money sued for, which was material issue, *held* admissible.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by L. E. Burckard against G. A. Smith, doing business under the firm name and style of the Universal Sales Company, and G. A. Smith, individually. Judgment for plaintiff, and defendants appeal. Affirmed.

Minor Moore, of Los Angeles, for appellants.

H. J. Angell, and W. W. Wallace, both of Los Angeles, for respondent.

KNIGHT, J. Plaintiff, as assignee of the Irving National Bank of New York, recovered a judgment against defendant for the payment of the sum of $2,000, alleged to be due on account of an overpayment made to defendant on the purchase price of merchandise sold by defendant to a corporation in Spain. The defendant appeals.

It appears that during the summer of 1919 appellant sold 500 sacks of chick peas (garbanzos) to El Triunfo, a corporation of Bilboa, Spain; payment therefor being made through credit established by a Madrid bank with the Irving National Bank of New York, the money being actually paid to appellant in Los Angeles by a bank in that city. A mistake was made in arranging the credit with the New York bank, and, instead of establishing the amount thereof in the sum of $11,500, as was intended, the New York bank gave credit for $13,500. As a result thereof, appellant was overpaid $2,000, for which amount he has been sued. As between said banks, the responsibility for the mistake appears to have been assumed by the one in New York; it being allowed a debit by the Madrid bank of only $11,500, and, so far as the evidence shows, their accounts with each other were adjusted accordingly.

Appellant concedes the fact that there was an overpayment to him of $2,000 on the sale of the 500 sacks of peas, but he endeavors to justify the retention of the overpayment mainly upon the ground that he was paid the full amount of said credit as the result of the negligent act of said banks and that he accepted the same, believing he was entitled thereto, and that, prior to the time he learned that a mistake had been made and he was called upon to rectify the same, he had in good faith disbursed said money, and that, under the circumstances, it would be unjust to require him to refund. In this respect it was alleged in the answer that during the summer of 1919 he made sales of peas to El Triunfo in addition to the 500 sacks mentioned, and that, when notified by the New York bank of the credit in his favor for $13,500, he did not know the amount of the purchase price for the 500 sacks, but, believing that the payment of the $13,500 was to apply on account of all peas sold, he collected the full amount thereof and gave credit on his books therefor; that later he was informed by his agent in Spain that the correct amount of the purchase price of the 500 sacks amounted to only $11,500, and he immediately instructed said agent to credit the additional sum of $2,000 received by him on such additional sales; that thereafter, and before he learned that a mistake had been made in arranging the amount of the credit, he disbursed the entire sum of said $2,000, one-half thereof being paid to his agent in Spain as commissions and the remainder used in purchasing additional peas under a subsequent contract with El Triunfo. It was further alleged that after instructing his said agent to allow El Triunfo a credit of $2,000 on the sale of peas other than those constituting the 500-sack shipment, and, before he was notified that a mistake had been made in arranging said credit with the New York bank, he instituted an action in the courts of Spain against El Triunfo for the sum of $4,000, which represented the amount due him on account of the sale of the additional peas, and that in such action he allowed credit for the $2,000 which was overpaid on said 500-sack consignment, and that now, if he is compelled to refund, he will, in addition to the loss already mentioned, be required to forfeit the sum of $2,000 thus pleaded as a credit in the action in the courts of Spain because the statute of limitations bars an amendment withdrawing such credit from the pleadings.

[1, 2] The trial court found, among other things, that appellant made no sales of peas to El Triunfo other than the 500 sacks mentioned, and that, although he was unaware at the time he received the sum of $13,500 of the amount of the purchase price for said 500 sacks, he did not believe that the credit thus established covered additional sales, nor did he credit the full amount received to the account of El Triunfo; furthermore, the court found that it was not true that appellant disbursed the amount of the overpayment before he learned of the mistake that had been made regarding the amount of the credit, nor was it true that he had instituted any proceedings in the courts of Spain. It is evident that the findings above noted, when considered in connection with the affirmative findings made as to the allegations of the complaint, were sufficient to entitle respondent to judgment.

"The rule governing such transactions received extended consideration in Crocker-Woolworth Bank v. Nevada Bank, 139 Cal. 564 [73 P. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169]. There, amongst other quotations and citations of authority, the following language from the National Bank of Commerce v. National Mechanics' Association, 55 N. Y. 213 [14 Am. Rep. 232] is repeated: 'It is now settled, both in England and in this state, that money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund.' And the matter is summed up by this court in the following language: 'An examination of the cases will show that in all well considered adjudications recognition, tacit or express, is given to these principles. Their ultimate analysis amounts to this: That plaintiff, even if negligent, may recover if his act has not changed the position of an innocent defendant to his detriment.'" National Bank of California v. Miner, 167 Cal. 532, 140 P. 27.

[3, 4] Appellant contends, however, that the finding in negation of the allegations that he filed an action in the Spanish courts is contrary to the evidence. Bearing in mind that the burden was upon appellant to prove the fact mentioned, we think he utterly failed to do so. The testimony relating to this subject was given by appellant, and in its entirety it was as follows:

"I commenced a suit in the courts of Spain against El Triunfo. I signed the original of this affidavit, which is in Spanish and sent it to Spain."

The contents of the document referred to by the witness was not introduced in evidence; it was written in Spanish, and he did not know its contents, because he could not read the Spanish language; and, so far as the record discloses, the document may have related to a subject entirely foreign to the matter at issue. His bare statement that he had commenced suit in Spain was merely his conclusion; and, even if the testimony quoted was sufficient upon which to base an affirmative finding of fact, the evidence failed to show that the statute of limitations under the Spanish law barred an amendment to his pleadings, as he claimed.

[5, 6] Appellant further testified as follows:

"After I received the $13,500 from this draft, I gave credit to El Triunfo on my books for that amount. * * * Upon receipt of the $13,500, I disbursed it. I did not have any of it at the time I received notice from this bank that they wanted it returned to them. Besides paying a portion of it to Villanueva [appellant's agent in Spain] for his services, I paid other portions of it for the purchase of garbanzos" (meaning garbanzos for El Triunfo, under the later contract).

In view of this testimony, appellant claims that the negative findings upon the matters referred to therein are erroneous. The question of whether appellant gave proper credit on his books for the amount he received appears to be entirely immaterial. As to the matter of the disbursement of the $2,000, it does not appear that appellant remitted any part of the same to Villanueva. He merely gave him book credit for the sum of $1,000; and, in regard to the payment of other portions of the overpayment in making purchases of garbanzos, the evidence shows that the later contract, under which he claims to have made the purchases, was not binding upon El Triunfo and in fact had been repudiated by said company because, after receiving it from El Triunfo duly signed, and before attaching his signature thereto, appellant altered its contents in material respects; and, moreover, the manner in which a copy of said contract was first produced in court in which said alterations were not made to appear was sufficient to justify the trial court in receiving the entire testimony of appellant with distrust.

[7, 8] The trial court also found:

"That said sum of $2,000 (paid by the New York bank to appellant) was the money and property of said Irving National Bank of New York."

The sufficiency of the evidence to support this finding is also assailed, and, in connection therewith, appellant contends upon the assumption that said money was not the property of the New York bank, but belonged to the bank in Madrid, that the action herein, being based upon the assignment from the New York bank, has not been brought in the name of the real party in interest. We find no merit in either point. The fair inference from the correspondence between the two banks is that the fault for the mistake lay with the New York bank in not giving heed to the statements made in the later correspondence from the bank in Madrid, which clearly indicated that the limit of the credit was to be $11,500, and, as already stated, the New York bank appears to have assumed the responsibility for the mistake, and the accounts between the two banks have been adjusted accordingly. Moreover, we think the question of the determination of the title to the money is not one that is of vital importance to the appellant. He admits having been overpaid; in this action he has asserted and had passed upon all of the defenses and counterclaims which were available to him against the Madrid bank, and it is evident from the correspondence of the latter bank, wherein the New York bank was charged with the mistake, a duplicate recovery for the amount herein sued for could not be possibly maintained against appellant. It would therefore seem plain that his rights are not affected by the findings complained of.

[9] The letter from the bank in Madrid to the New York bank, dated February 28, 1920, was clearly admissible in evidence. Its contents show that a mistake had been made in the amount of the credit, a fact which appellant admits, and also that the money sued for herein was the property of respondent's assignor, which was a material issue in the case.

The remaining points urged by appellant are either already answered by what has been said or else they are entirely foreign to the facts involved herein and therefore need not be noticed.

The judgment is affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

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80 Cal. App. 185

JAMES v. JAMES. (Civ. 3140.)

(District Court of Appeal, Third District, California. Dec. 9, 1926.)

1. Vendor and purchaser 🔑242—One claiming under deed subsequent to unrecorded deed must show valuable consideration and receipt of deed without knowledge of prior deed.

One basing claim to real estate on deed executed and recorded subsequent to execution and delivery of unrecorded deed has burden of showing deed was received without actual notice of prior unrecorded deed and that he has parted with valuable consideration as purchase price.

2. Evidence 🔑383(7)—Recitals in deed are insufficient to establish consideration as against grantee of prior unrecorded deed.

Recitals in deed as to consideration paid are but declarations of grantor, and are insufficient to establish consideration as against grantee of prior unrecorded deed.

3. Husband and wife 🔑47(3)—Husband's conveyance to wife is not defeated by wife's failure to make will in accordance with alleged oral agreement.

Husband's conveyance to wife will not be defeated on theory of failure of consideration because of wife's failure to execute will in accordance with alleged oral agreement at time of executing deed, in absence of showing of fraud on part of wife.

4. Deeds 🔑19—Law rescinding contract for failure of consideration held inapplicable to conveyance of land, where actual performance of future promise is waived (Civ. Code, § 1689).

Civ. Code, § 1689, providing for rescission of contracts on failure of consideration, does not apply to conveyance of land executed in reliance on future promise, where vendor waives actual performance as condition of vesting title.

5. Deeds 🔑19—Grantor's only remedy for breach of personal covenant is action for damages.

Grantor's only remedy for breach of personal covenant is action for damages, and grantee's failure to perform does not constitute defense to action to establish property rights conveyed by deed.

6. Deeds 🔑19—Grantee's failure to perform promise after execution of contract by vendor is not sufficient ground to set aside deed.

Where contract or agreement on part of vendor is fully executed, mere promise and failure to perform on part of grantee thereafter is not sufficient ground for setting aside deed.

7. Husband and wife 🔑47(3)—Wife's failure to execute will in accordance with oral promise after unconditional conveyance by husband held insufficient to rescind deed (Civ. Code, § 1056).

Under Civ. Code, § 1056, failure of wife after unconditional conveyance by husband to execute will in accordance with oral agreement *held* insufficient to furnish basis for rescission of deed.

8. Frauds, statute of 🔑131(1)—Instrument transferring real property may not be restricted or enlarged by oral stipulation.

Any attempt to restrict or enlarge scope or effect of instruments transferring real property by an oral stipulation is prohibited by statute.

9. Quieting title 🔑10(1)—Plaintiff in action to quiet title must recover on strength of own title.

Plaintiff in action to quiet title must recover on strength of own title and not on weakness of title claimed by adversary.

10. Evidence 🔑383(7)—Deed in possession of grantee is admissible in evidence as prima facie proof (Civ. Code, § 1055).

Under Civ. Code, § 1055, deed when duly executed and acknowledged, in possession of grantee and produced by him, is admissible in evidence as prima facie proof without anything further.

11. Evidence 🔑230(1)—Husband's statements at time of making deed to wife indicating divesting himself of title are admissible as against interest.

Testimony of husband's statements just before and after execution and delivery of deed to wife, indicating that he had divested himself of title, are admissible as against interest.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action to quiet title by Alice T. James against Howard T. James and Hortense James, dismissed as to defendant last named upon her death. Judgment for defendant, and plaintiff appeals. Reversed.

Walter B. Kibbey, of Los Angeles, for appellant.

Charles L. Evans and Whitney Smith, both of Los Angeles, for respondent.

PLUMMER, J. Action to quiet title to certain lots of land situate, lying and being in the city of Los Angeles, county of Los Angeles, county of Los Angeles, state of California. The action was originally begun against Howard T. James and Hortense James, his wife. Hortense James having died, the action was dismissed as to her.

The complaint is in the usual form of a pleading in an action to quiet title; alleges that the plaintiff is and ever since the month of August, 1922, has been the owner of the lots of land described in the complaint; alleges that the defendant claims some interest therein, and that the interest of the defendant is without right, etc. Judgment was prayed that the plaintiff's title to said premises be quieted. The answer of the defendant denies the ownership of the plaintiff, and, by way of affirmative defense, alleges ownership of one-half interest in and to the described premises. This portion of the defendant's answer, after alleging that the plaintiff and Thomas F. James were, during all the times mentioned in the pleadings, husband and wife and owners, as joint tenants, of property described in plaintiff's complaint, is in the following language:

> "That on said 22d day of August, 1922, the said Thomas F. James made his certain deed of conveyance to the plaintiff herein for the undivided one-half interest of the said Thomas F. James in and to said real property; that said deed was placed in the hands of the said plaintiff with the understanding and agreement and upon the statement made by the said plaintiff that she would immediately make and execute her will wherein and whereby her said husband was to be the sole beneficiary, should he survive her, and in the event the said husband did not survive the said plaintiff, all of the property belonging to the plaintiff at the time of her death was to be willed, by the will hereinbefore alleged unto Arthur C. James, a two-fifths interest and Howard T. James (this defendant) a three-fifths interest; that by the said will the said plaintiff was to nominate and appoint the said Thomas F. James executor, should he be living, and in the event of his death before the death of the plaintiff the said Howard T. James, this defendant, was to be nominated and appointed executor.
>
> "This defendant alleges that the said plaintiff did not make and execute a will in accordance with the agreement between her and the said Thomas F. James at the time of the making of the deed hereinbefore mentioned; that she never made and executed such a will; that the consideration for the deed from the said Thomas F. James to the said Alice T. James has wholly failed; that there is no consideration for the said deed from the said Thomas F. James to the said Alice T. James, and that the deed from the said Thomas F. James to the said Alice T. James was never delivered to the said Alice T. James except upon the conditions and for the consideration in this special defense alleged, and that it was not the intention of the said Thomas F. James that the said deed should be delivered to the said Alice T. James, and that it was not intended by the said Thomas F. James that the title to and undivided one-half interest in said real property should pass to the said Alice T. James except upon the fulfillment by her of the conditions hereinbefore alleged."

The answer then further alleges that said deed of Thomas F. James to Alice T. James was not recorded until some months after said month of August, 1922; that in the meantime the said Thomas F. James learned that said Alice T. James had not made any will, and thereupon made, executed, and delivered a good and sufficient bargain and sale deed for all of his interest in said premises to the defendant, Howard T. James. This deed bears date of September 22, 1922, and was recorded on the same day.

At the conclusion of the trial the court made and filed its findings of facts, only one of which needs to be set forth herein:

> "IV. The court further finds that on or about the 22d day of August, 1922, the plaintiff and Thomas F. James, who at said time was the husband of the said Alice T. James, were the owners as joint tenants of that certain real property described in plaintiff's complaint; that on said 22d day of August, 1922, the said Thomas F. James made his certain deed of conveyance to the plaintiff herein for the undivided one-half interest of the said Thomas F. James in and to said real property; that said deed was placed in the hands of the said plaintiff with the understanding and agreement and upon the statement made by the said plaintiff that she would immediately make and execute her will wherein and whereby her said husband was to be the sole beneficiary, should he survive her, and in the event the said husband did not survive the said plaintiff, all of the property belonging to the plaintiff at the time of her death was to be willed, by the will hereinbefore alleged, unto Arthur C. James, a two-fifths interest, and Howard T. James (this defendant) a three-fifths interest; that by the said will the said plaintiff was to nominate and appoint the said Thomas F. James executor, should he be living, and in the event of his death before the death of the plaintiff the said Howard T. James, this defendant, was to be nominated and appointed executor; that the said plaintiff did not make and execute a will in accordance with the agreement between her and the said Thomas F. James at the time of the making of the deed hereinbefore mentioned; that she never made and executed such a will; that the consideration for the deed from the said Thomas F. James to the said Alice T. James has wholly failed; that there is no consideration for the said deed from the said Thomas F. James to the said Alice T. James, and that the deed from the said Thomas F. James to the said Alice T. James was never delivered to the said Alice T. James, and that it was not the intention of the said Thomas F. James that the said deed should be delivered to the said Alice T. James, and that it was not intended by the said Thomas F. James that the title to an undivided one-half

interest in said real property should pass to the said Alice T. James except upon the fulfillment by her of the conditions hereinbefore found to have been imposed; that the said deed from the said Thomas F. James to the said Alice T. James was not recorded until some months after the said month of August, 1922, and that in the meantime, when the said Thomas F. James learned that the said Alice T. James had not made the will in accordance with her agreement made at the time of the making by the said Thomas F. James to the said Alice T. James of the deed bearing date of the 22d day of August, 1922, he made, executed, and delivered unto the defendant Howard T. James a good and sufficient grant, bargain, and sale deed for all of the interest that the said Thomas F. James owned or had or possessed in the real property described in this action; that the said deed from the said Thomas F. James to the defendant Howard T. James was duly recorded in the office of the county recorder (of the county of Los Angeles)? of the state of California immediately after its execution and delivery; and that the said deed from the said Thomas F. James to the said defendant was recorded prior to the recordation of the deed from the said Thomas F. James to the said Alice T. James; that at the time of delivery of the deed to defendant and the recordation thereof, defendant did not have any knowledge of the deed to plaintiff dated August 22, 1922."

Conclusions of law based upon this finding were drawn in favor of the defendant and judgment entered accordingly.

The testimony upon which finding No. 4 is based, as set forth in the transcript, shows the following facts: That prior to the 16th day of August, 1922, the plaintiff and Thomas F. James acquired the property described in plaintiff's complaint by a deed conveying the same to them as joint tenants; that on the 16th day of August, 1922, the plaintiff and said Thomas F. James went to the office of Charles L. Evans, an attorney at law, and then and there a deed was executed by the said Thomas F. James, purporting to convey all of his interest in the described premises to his wife, the plaintiff, Alice T. James. This deed contains, among other things, the following paragraph:

> "This conveyance is made, given and accepted by the parties hereto for the purpose of vesting the foregoing described real property in the grantee herein as her sole and separate property without any limits or restrictions whatsoever."

The testimony of the plaintiff to the transaction is as follows:

> "I received the deed on August 16th in the presence of Mr. Evans and my husband on the day the deed was handed to me. There was a conversation between Mr. Evans, my husband, and myself. Mr. Evans remarked that Mr. James had told him about things at the house and had this transfer made up, transferring his interest to me. After this Mr. Evans asked me what would be my disposition of the property in case of my death. I told him I did not know what to say and asked, 'What does Mr. James want?' And he remarked that he wanted it left to his boys, and I said, 'All right.' There was something said in this conversation about my making a will, but there was no date set. I was to make a will in favor of Howard and his brother. After the deed was handed to me, Mr. Evans told me not to record the deed until I was told to or that the property was in danger of being involved. It was not said that I should not record the deed until after the will was made. That was at the time the deed was executed on August 16th in the office of Mr. Evans. There was nothing said by any of us as to the drawing of a will. I took the deed away on the 16th of August and had it recorded on the 11th day of October, 1922. I don't remember having any conversation with my husband regarding the will between August 16th and October 11, 1922. Before I went to Mr. Evans' office I had a conversation with my husband, who came in—he had been sprinkling the lawn and came in from the garden and asked me if I could go over town with him, and he said before Mrs. Parks that he was going to—that he was sprinkling the lawn for the last time; when he came back it would be all mine and I would have to arrange for the sprinkling after that. That was on August 16, 1922. There was no mention of a will in that conversation. Mr. James came back with me from Mr. Evans' office. I heard him tell Mrs. Parks that he had deeded it to me and I was the sole owner of the property. Mr. James then went to the mine at Searchlight or Crescent as it was called after that. * * * On August 22d or August 21st, I received a letter from Mr. James: (We here quote the only part thereof material to this case.) 'You will now admit, won't you, Alice, that I have proven when it came to the hard test to be a true friend and that notwithstanding squabbles, I transferred to you all I had, including personal financial standing in Los Angeles,' " etc.

The testimony of Mr. Evans, called as a witness on behalf of the defendant, concerning the transaction, is in substance, as follows:

> "About the middle of August, 1922, Mr. and Mrs. James came to my office. On the day or two before the 16th day of August, 1922, Mr. James talked with me about the possibility of having some difficulty at his mine, or in the mine in which he was interested. On the 16th day of August, they both came to my office, and the deed which has been introduced in evidence was drawn or had been drawn. There was some conversation between Mrs. James, her husband, and myself as to this deed and the reason for it. Mr. James said there was likelihood of some difficulty at the mine. He wanted to protect his wife and his two boys. Before the deed was given to her, or all in the same conversation, he said: 'Now, you are to make a will to the two boys, Arthur and Howard,' and she said: 'Yes.' There was some discussion as to the division of the property. She said that she would not—that this deed would not be recorded until after the will was made. She gave me at that time data for the will to be drawn for her, and she said she would come down in a few days, and that the will should be drawn, and that she would execute it, leaving all the property of which she died possessed

to Howard James three-fifths and to Arthur James two-fifths." (This witness then states that the deed which was given to her at that time was not to be recorded until after it had developed whether or not there would be any claims that the husband might be liable for.) "I asked her age at the time and her place of residence. If Mr. James, her husband, were living, he was to be the executor of the estate without bonds. She did not waive a bond in Howard's case. The deed was turned over, and the conversation was all one transaction. The deed was the only instrument executed at that time. The only thing said as to when the deed should be recorded was that it should not be recorded until after it was determined whether there were any claims. That was all that was said about it. I never made a will for Mrs. James. I took her telephone number and did not call her up. The deed was given to Mrs. James in my office."

Howard T. James, the defendant, testified as follows:

"I am one of the defendants in this action, and Thomas F. James is my father; I have seen the document handed me before, and that is my father's signature. My father gave it to me, and I took it up and had it recorded on the day it was given to me, on the 22d day of September, 1922. (Here was exhibited, identified, and admitted in evidence the deed to the defendant from Thomas F. James, purporting to convey to the defendant all the right, title and interest of the party of the first part in and to the premises described in plaintiff's complaint.) I knew nothing about the deed from my father to his wife at the time I took this deed."

Lillian Parks, a witness called on behalf of the plaintiff, was called to testify as to the conversation with Mr. James on the day of the execution of the deed by Mr. James to the plaintiff. After stating that she had had such conversation, the court sustained an objection thereto on the ground that it was not rebuttal, stating that it might have been admissible in chief as declarations against interest, but that as Mr. James did not testify, there was nothing in the testimony to be rebutted.

The finding of the trial court which we have set forth is to the effect that there was no delivery of the deed except as conditional upon the plaintiff executing a will devising and bequeathing the described property to Howard T. James and his brother, Arthur James, and, also, that there was a failure of consideration for the deed executed and delivered by Thomas F. James to Alice T. James. There is no testimony in the record nor finding by the court to the effect that Howard T. James ever paid any consideration, valuable or otherwise, for the execution and delivery to him of the instrument dated September 22, 1922, purporting to convey all the right, title, and interest of Thomas F. James to the defendant, Howard T James.

[1, 2] The defendant in this case, basing his claim upon a deed executed and recorded subsequent to the execution and delivery of an unrecorded deed, takes upon himself the burden of showing that the deed accepted by him was received without actual knowledge of the prior unrecorded deed, and, also, that he has, in fact, parted with a valuable consideration as the purchase price of the property. In Black Eagle Oil Co. v. Belcher, 22 Cal. App. 258, 133 P. 1153, the law in this particular is set forth in the opinion as follows:

"'To entitle a party to protection as such purchaser, he must prove the payment of the purchase money in good faith and without notice, actual or constructive, prior to and down to the time of its payment, for if he had notice at any moment of time before the payment of the money, he is not a bona fide purchaser.' Boone v. Chiles, 10 Pet. (U. S.) 210, 9 L. Ed. 388; Scott v. Umbarger, 41 Cal. 419; Eversdon v. Mayhew, 65 Cal. 163, 3 P. 641. Nor can the recitals contained in the deed as to the consideration paid be accepted as prima facie proof of such payment. 'Such recitals are but the declarations of the grantor.'"

The respondent relies upon and the court apparently accepted as sufficient the recital in the instrument executed and delivered by Thomas F. James to the defendant, Howard T. James, purporting to convey the property described in the complaint, wherein it is stated that the said Thomas F. James for a consideration of $10, "to him in hand paid, the receipt whereof is hereby acknowledged, does hereby grant to Howard T. James" all right, title, and interest of the grantor in and to the premises in controversy. The insufficiency of such testimony to establish consideration is explicitly held in the case of Long v. Dollarhide, 24 Cal. 218. There the court said, where reliance was had upon the recitals in a deed to establish consideration:

"The burden of proving this rested upon him [grantee], and the recitals in the deed are not, as he contends, prima facie proof of a valuable consideration. Such recitals are but the declarations of the grantor, and it has never been held that the declarations of a vendor or assignor, made after the sale or assignment, can be received to defeat the title of the vendee or assignee. A party seeking to bring himself within the statute cannot rely upon the recitals of his deed, but must prove the payment of the purchase money aliunde."

In 9 California Jurisprudence, § 45, p. 145, we find the following:

"Where the payment of a valuable consideration becomes a material question, the recital in a deed of a valuable consideration paid by the grantee is only evidence of such payment as against the grantor, or against those claiming under the grantor by a subsequent conveyance; but it is evidence of the payment of a valuable consideration only as against those claiming under the grantor by conveyance subsequent to the same. It is, therefore, not evidence as against strangers, nor as against the owner of a prior equity, nor as against one claiming under a prior deed from the same grantor. * * * One claiming as a bona fide purchaser for a valuable consideration under a second deed, but recorded first in point of time, must affirmatively prove the payment by other evidence than the deed itself."

In Kenniff v. Caulfield, 140 Cal. 45, 73 P. 803, the Supreme Court had before it the same question, and states the rule of law as follows:

> "In order to defeat the claim of plaintiff under the prior deed, it was incumbent upon the defendant to prove, that he was a bona fide purchaser of the premises in dispute; that he had paid a valuable consideration therefor, and without notice of plaintiff's claim. The burden in that respect was upon him. To entitle a party to protection as such a purchaser, he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment, for, if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a bona fide purchaser [citing cases]."

To the same effect is Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61. These cases establish beyond controversy that the defendant in this case has failed to establish his right to the premises in controversy as a bona fide purchaser, or to place himself in a position to question the consideration of the prior deed executed by the common grantor to the plaintiff, Alice T. James. It may also be here said that the transcript shows that the purported conveyance executed by Thomas F. James contains the following recital: "This deed is given and accepted without any taxable consideration."

[3-5] Though not exactly in chronological order, we will here consider the finding and alleged failure of consideration relative to the deed under which the plaintiff claims. Neither the allegations of the affirmative defense in the answer nor the findings of the court contain any mention of or intimation that the plaintiff, Alice T. James, was or had been guilty of any fraudulent representations or fraudulent act relative to the conveyance executed to her by her husband. The only fact appearing in the testimony in relation thereto is that no will has ever been executed by Alice T. James and that the plaintiff stated that she would execute such a will. It may also be mentioned herein that the testimony of the plaintiff is to the effect that she had not altered or changed her intentions in relation thereto up to the time of the attempted conveyance by Thomas F. James to the defendant herein. It seems clear that under such circumstances and the testimony contained in the transcript which we have set forth, that no case has been made out on the theory of a failure of consideration. In 9 California Jurisprudence, § 42, p. 141, it is said:

> "A deed without fraud in its inception conveys the title, and is not void on account of failure of consideration, either in whole or in part. And inasmuch as acts done subsequent to the execution of a deed cannot affect its integrity, a subsequent failure of consideration, or breach of a personal covenant not amounting to a condition, will not avoid the deed. Section 1689 of the Civil Code, providing for the rescission of contracts for a failure of consideration through the fault of the party as to whom rescission is made, does not apply to a conveyance of land executed in reliance upon a future promise, where the vendor waives actual performance as a condition of vesting the title. The grantor's only remedy for the breach of a personal covenant is an action for damages. And the failure of a grantee to perform such a covenant does not constitute a defense to an action in which the grantee is seeking to establish property rights conveyed by the deed."

It may be here stated that the defense of failure of consideration subsequent to the execution of a deed presupposes delivery. Otherwise, there would be no conveyance and nothing upon which to predicate a failure of consideration, prerequisite to judgment of rescission.

[6] In the case at bar there was nothing left to be done or performed with relation to the instrument of conveyance by the grantor. If anything was to be done or performed by the grantee it was to be done or performed subsequent to the time when the deed of conveyance was manually transmitted by the grantor to the possession of the grantee. No act was provided to be then and there performed. The allegation in the answer and the finding of the court are to the effect that the will was to be immediately executed, but the testimony and the actions of the parties do not support either the allegation or the findings in such particular. The deed of conveyance was delivered by the grantor to the grantee upon the simple oral promise, if promise it may be called, that she would execute the desired will, no time or date for the execution thereof being stated, which, of course, would mean within a reasonable time, provided such promise were of any force or effect whatever. Where the contract or agreement on the part of the vendor is wholly executed, the mere promise and failure to perform on the part of the grantee thereafter is not sufficient ground for setting aside a deed. In Lawrence v. Gayetty, 78 Cal. 126, 20 P. 382, 12 Am. St. Rep. 29, the Supreme Court thus disposes of such an alleged ground for rescission:

> "Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment, the section referred to has no application to a case like this, where the vendor has waived actual performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed. If the mere promise and the failure to perform is not sufficient to set aside a deed on the ground of fraud, as we have shown,

the fact that the same acts are characterized in the pleading as a failure of consideration cannot give them additional force, and thereby bring about the same result. The case of Hartman v. Reed, 50 Cal. 485, is in point against the respondent."

In Schott v. Schott, 168 Cal. 342, 143 P. 595, the Supreme Court reaffirms the decision of Lawrence v. Gayetty, supra, cites other cases, and adds:

> "Under such circumstances, in the absence of fraud, actual or constructive, defendant would have no right to rescind, or to have the deed set aside."

To the same effect are the cases of White v. Hendley, 35 Cal. App. 267, 169 P. 710, and Duckworth v. Watsonville Water Co., 170 Cal. 425, 150 P. 58.

[7, 8] The cases referring to conditions which may furnish a basis for rescission are all based upon conditions set forth in the instrument of conveyance. In the case at bar, there was no condition expressed in the instrument, and, in law, it was not delivered conditionally. There was at best only an oral promise on the part of the grantee of something to be done by her at a subsequent time. Under such circumstances section 1056 of the Civil Code applies. The section reads:

> "A grant cannot be delivered to the grantee conditionally. Delivery to him, or to his agent as such, is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made."

In 9 California Jurisprudence, § 60, p. 165, following a quotation of the section above set forth, we find the text reading thus:

> "This principle is well fortified by judicial decisions. Hence, if an instrument is delivered to the grantee as the present deed of the grantor it becomes freed from any condition not expressed in the deed itself, and operates by vesting title immediately without any reference to the performance of the conditions, although such result may be contrary to the express stipulation of the parties. Apart from the elementary rule interdicting the modification or varying of the vital terms of a writing by parol, any attempt to restrict or enlarge the scope or effect of an instrument transferring real property by an oral stipulation is prohibited by the statute of frauds. Hence, whether a deed, when delivered, shall take effect absolutely, or upon the performance of some condition not expressed therein, cannot be determined by parol evidence. Any condition qualifying the delivery must be inserted in the deed itself, or else the deed must not be delivered to the grantee."

In Lewis v. Brown, 22 Cal. App. 38, 133 P. 331, this court, speaking through Mr. Justice Hart, thus sets forth the law:

> "'If,' as is well said, in Richmond v. Morford, 4 Wash. 337, 30 P. 241 (31 P. 513), 'the grantor does not intend that his deed shall not take effect until some (oral) condition is performed or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery.'"

See, also, to the same effect, 18 California Jurisprudence, 211, § 116, where the law is fully set forth on this point and many authorities cited. It is apparent, therefore, that the delivery of the deed in the case at bar vested a present title in the grantee without any condition whatever affecting its integrity as an instrument of conveyance of real estate.

[9, 10] The respondent urges that the plaintiff must recover upon the strength of her own title and not upon the weakness of the title claimed by her adversary. This is true, and the cases set forth in respondent's brief clearly support the principle contended for, but they are not applicable here for the simple reason that what we have hereinbefore set forth, taken from the findings and the record in this case, clearly establishes that the findings and judgment of the trial court should have been in favor of the plaintiff. For this reason and because it is necessary to order a new trial herein, we will consider two errors of the trial court upon the admission of testimony. The plaintiff sought to establish a prima facie case by producing the deed executed to her by her husband, duly acknowledged, signed, etc. Upon objection of the defendant, admission of the deed was denied until testimony was given of the circumstances under which the deed was delivered and placed in possession of the appellant. Section 1055 of the Civil Code reads: "A grant duly executed is presumed to have been delivered at its date." A deed, when duly executed and acknowledged, in the possession of the grantee and produced by him, is admissible in evidence as prima facie proof without anything further. 9 Cal. Jur. 193, § 80; Towne v. Towne, 6 Cal. App. 697, 92 P. 1050. The error of the court, however, in this case was immaterial, as the deed in question was subsequently admitted in evidence.

[11] The next objection which seems necessary to consider is that in relation to excluding testimony as to statements made by the grantor of the plaintiff just before and after the execution and delivery of the conveyance by him to her. It is well settled that all such statements which would indicate that the grantor named in the instrument had divested himself of title are admissible as against interest, although partaking of the nature of hearsay testimony. Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann. Cas. 1916E, 703, and copious notes on pages 713 and 714 thereof. Other errors are assigned in the admission and exclusion of evidence, but are

not of sufficient importance to require consideration herein. The judgment is reversed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

80 Cal. App. 138

PEOPLE v. BOCCHIO. (Cr. 949.) *

(District Court of Appeal, Third District, California. Dec. 2, 1926.)

1. Criminal law 🔑1167(4)—Correction of clerical errors in indictment for obtaining money under false pretenses held not prejudicial.

Where, in indictment for obtaining money under false pretenses, punctuation was changed, and word "defendants" was substituted for word "defendant," defendant suffered no prejudice; such amendments being mere corrections of clerical errors.

2. Criminal law 🔑1167(4)—Elimination of all reference to real property in indictment for obtaining money by false pretenses.

Where indictment for obtaining money under false pretenses was amended to exclude all reference to real property alleged to have been obtained, such amendment *held* not prejudicial.

3. Criminal law 🔑302(1)—Discharge of one of two defendants so that he might testify for state held not error (Pen. Code, § 1099).

Discharge of one of two defendants, indicted for obtaining money by false pretenses, so that he might be a witness for the state, *held* not error, in view of Pen. Code, § 1099.

4. Criminal law 🔑1167(3)—Denial of motion to strike averments of false representation concerning annual dividends and price increase of stock sold held not prejudicial.

Denial of defendant's motion to strike out averment of indictment for false pretenses in sale of stock, that defendant had falsely represented that stock would pay certain income in dividends annually, and that its price would advance in short time, *held* not prejudicial; proof of matters covered by such averment being admissible without specific pleading.

5. Criminal law 🔑112(5)—Defendant held properly tried for false pretenses in sale of stock in county where negotiations occurred, though stock was delivered in another county (Pen. Code, § 781).

Where defendant was indicted and tried for false pretenses in sale of stock in county where he had carried on negotiations of sale, court of such county had jurisdiction, though stock sold was delivered in another county; Pen. Code, § 781, giving jurisdiction to either county in which part of consummation of offense occurred, and section 777 not being conflicting.

6. False pretenses 🔑4—Mere obtaining property without false pretense is not a crime.

Mere obtaining of property does not constitute crime, but false pretense is necessary element thereof.

7. False pretenses 🔑43(1)—Prospectus containing false representations as to stock sold through false pretenses held admissible.

In prosecution for obtaining money under false pretenses by sale of stock prospectus containing false representations as to stock value, *held* admissible to show representations made by defendant as to value of property.

8. Criminal law 🔑1169(11)—Admitting cumulative testimony as to defendant's acts in another stock transaction held not prejudicial.

In prosecution for obtaining money under false pretenses by sale of stock, admitting testimony, as to defendant's acts in another stock transaction *held* not prejudicial, where such testimony was merely cumulative of that already in evidence.

9. Criminal law 🔑511(4)—Defendant's conviction for obtaining money by false pretenses held justified by evidence corroborating accomplice (Pen. Code, § 1110).

In prosecution for obtaining money under false pretenses by sale of stock, evidence *held* to sustain conviction as against contention that corroboration of defendant's accomplice, testifying for state, was not had under Pen. Code, § 1110.

10. Criminal law 🔑763, 764(1)—Court's statement on question by juror that prospectus could be considered as representation held not to invade province of jury.

In prosecution for obtaining money under false pretenses in sale of stock, court's statement that prospectus in evidence could be considered as representation *held* not erroneous as invading province of jury.

11. Criminal law 🔑736(1)—What evidence jury may consider is usually for court; weight and effect being for jury.

Question of what evidence jury may consider is question of law, usually decided by court in ruling on admissibility; weight and effect of evidence being for jury.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Harry C. Bocchio was convicted of obtaining property by false pretenses, and he appeals. Affirmed.

Peter A. Breen, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant has appealed from the judgment herein and the order denying his motion for a new trial.

The defendant and Eric Von Hoetzendorff were jointly charged by the indictment herein with the crime of obtaining property by false pretenses. Appellant contends that the court erred in permitting the district attorney to amend the indictment. The parts of the indictment material to the question thus raised are as follows:

★Hearing denied by Supreme Court January 31, 1927.

"The said defendants, and each of them on or about the 10th day of May, 1923, in the county of Mendocino, state of California, and before the filing of this indictment: *That said defendants, and each of them*, with intent to defraud Andrew Hoefer of his property hereinafter set forth [then follow allegations of certain false representations]; that said Andrew Hoefer * * * was by reason of such false pretenses and representations * * * induced to and he did convey and transfer to said Harry C. Bocchio, certain real property * * * and also assigned and delivered to said Harry C. Bocchio ten 7½ per cent. gold bonds of Central Creameries Company; * * * that said real property and said bonds were so secured and obtained by said defendant unlawfully, knowingly and designedly to defraud said Andrew Hoefer; that the market value of the capital stock of said Monta Vista Estates at the time said representations were so made by defendant * * * was not * * * in excess of $6 per share.

[1-3] The indictment was amended by striking out the words herein italicized and the colon preceding them and by substituting the word "defendants" for the word "defendant" in each of the last two places where the latter word appears in the parts quoted. In a subsequent part of the indictment it is alleged "that said defendants when they so made said representations," etc. It is clear that the amendments were of mere clerical errors, and that the defendant suffered no prejudice therefrom. The indictment was further amended by striking out all reference to the real property alleged to have been obtained by defendants and by reducing the alleged value of the property obtained by defendants from $22,000 to $10,000, the latter sum having been originally alleged to be the value of the bonds referred to in the indictment. Before the defendants had gone into their case, on motion of the district attorney, under the provisions of section 1099 of the Penal Code, the court discharged the defendant Hoetzendorff in order that he might be a witness for the people. No error appears in any of the foregoing proceedings.

[4] The false representations alleged in the indictment are:

"That the market value of the capital stock of said Monta Vista Estates * * * was then the sum of $40 dollars per share; and that the stock of said corporation had for a long time prior thereto been selling for the sum of $40 per share; and that the actual value thereof was far in excess of said sum; *and that said stock would pay income of from 15 to 20 per cent. in dividends annually, and that by reason of that fact the price of said stock would advance in a short time thereafter, probably within 30 days.*"

The defendant moved the court to strike out the parts of such allegation which are herein italicized and the subsequent allegation of the falsity thereof. The motion was denied. It does not appear in what manner the appellant was injured by the ruling. Proof of the alleged expressions of opinion would have been admissible without pleading them, and such proof was made at the trial. In cases such as this, the evidence is not limited to the precise representations alleged, but other statements, made at the same time and tending to throw light upon those charged and upon the intention with which they were made, are admissible. People v. Donaldson, 36 Cal. App. 63, 66, 171 P. 442; People v. Rodgers, 35 Cal. App. 123, 126, 169 P. 399; People v. Brecker, 20 Cal. App. 205, 214, 127 P. 666. Since such expressions of opinion were properly before the jury as evidence, without reference to the averment thereof, it does not appear that the appellant's rights could have been prejudiced by the allegation thereof in the indictment. It is not to be presumed that the verdict was based upon such expression of opinion, because the court instructed the jury that:

"A fraudulent pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true (as) is adapted to induce a person to whom it is made to part with something of value."

The jury could not have believed that the alleged expression of opinion as to future profits was a "representation of an existing or past fact."

Monta Vista Estates is a corporation. At the time of the alleged commission of the crime charged, it was the owner of certain properties in Santa Clara county, incumbered with a bonded indebtedness of $200,000. At some time not stated the appellant purchased 1,666 shares of the capital stock for $10,000, or at the price of about $6 a share. Andrew Hoefer is a well-to-do farmer of German birth, residing in Mendocino county. Eric Von Hoetzendorff also is of German birth, a polished gentleman, who has traveled much, and who would be a baron "if the old order had continued" in Germany. Appellant employed Hoetzendorff to sell Monta Vista Estates stock, and it was understood between them that the latter was to endeavor to sell some of the stock to Hoefer at $40 a share. In the early part of May, 1923, Hoetzendorff succeeded in exchanging 300 shares of the stock for certain real property belonging to Hoefer. A few days thereafter appellant and Hoetzendorff visited Hoefer at the latter's home for the purpose of inducing him to purchase additional stock, and it was during that visit that the alleged false representations were made by appellant. Hoefer testified that appellant made the alleged representations. He also testified that, in connection therewith, appellant gave him a purported prospectus of the Monta Vista Estates and other papers, all of which were admitted in evidence. Among other statements contained in the prospectus is the following, relating to the corporation's bond issue of $200,000:

"These bonds have been certified by the state bank commissioner as legal investment for savings banks."

The other papers gave a detailed statement of the "approximate gross yearly revenue" of the corporation, based in part upon statements of fact and in part upon estimates, and a detailed statement of the "appraisal of the properties," stating:

> "These figures are based on the market value of the properties, and not at what they would bring at a forced sale. On the other hand, they are lower than the cost of duplicating them today."

Hoetzendorff testified:

> "I got the prospectus from Mr. Bocchio in his office. * * * Mr. Bocchio told me he prepared it."

He also testified that he told Hoefer that, "according to the booklet, the bonds of the Monta Vista were legal bank investments." The evidence shows that the bonds had not been certified as a legal investment for savings banks. There is also evidence to the effect that the properties of the corporation were of less value than was stated in the said appraisal. Emma C. Heckenleichtner testified that she purchased 250 shares of Monta Vista Estates stock from appellant in April, 1923, at $20 a share; that thereafter appellant gave her 40 additional shares of the stock in settlement for stock of another corporation which she had intrusted to him for sale and which he had sold without accounting to her for the proceeds, and that, prior to such settlement, in May, 1923, he wrote her that the Monta Vista Estates stock, "in the New York Exchange, was selling for $40 a share." May 19, 1923, appellant and Hoetzendorff executed a written agreement to the effect that the latter was to sell stock of the Monta Vista Estates and that the amounts received therefor above $9 a share were to be divided between them. March 29, 1923, appellant made a written proposition to J. F. Whitehorn to sell some of the former's Monta Vista Estates stock at $12 a share net. May 21, 1923, he directed Whitehorn to "sell for my account and risk, 1,000 shares of the capital stock of the Monta Vista Estates * * * at a net price of $10 per share." June 22, 1923, he wrote Whitehorn:

> "In regards to the Monta Vista Estates, Inc., I am still in a position to purchase such stock as I desire at the price of $6 per share, and I am willing to do this for you at any time that you send me the money."

Appellant was not an officer of the corporation or in any manner connected therewith, except as the owner of 1,666 shares of its stock. The corporation did not prepare or issue the prospectus, and "it was no literature connected" therewith. The defendant did not testify at the trial, and the evidence to the effect that he made the alleged representations stands uncontradicted. In exchange for 311 shares of stock of Monta Vista Estates, Hoefer assigned and delivered to defendant 10 gold bonds of Central Creameries Company, which the defendant thereafter sold for $10,050. Hoefer caused these bonds to be sent to a bank in San Francisco, which bank, under his directions, there delivered them to defendant and received the shares of stock from him for Hoefer.

[5, 6] Appellant contends that, since the bonds were delivered to defendant in San Francisco, the offense, if any, was committed in that place, and that therefore the superior court of Mendocino county "had no jurisdiction of the offense charged"; that "the false pretenses themselves are not unlawful and do not of themselves constitute a crime; * * * the crime is the taking of the money." It may be said as truly, however, that the mere obtaining of the property does not constitute a crime, but the false pretense is a necessary element thereof. While there is some conflict in the decisions, it has generally been held that, "where a false pretense is uttered in A, and the money obtained in B, the venue may be laid either in A or B." Wharton's Criminal Law (11th Ed.) § 1473. This rule follows logically from the fact that a complete crime, in such a case, has not been committed in either place, but partly in one and partly in the other. The rule is statutory in this state.

> "When a public offense is committed in part in one county and in part in another, or the acts or the effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." Penal Code, § 781.

There is no conflict between this section and section 777, which provides that, "except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed," and then states an exception to the rule. Section 777 doubtless relates to offenses committed wholly within a county, and, if the offense is committed partly in two or more counties, a reasonable construction of the section would be that jurisdiction is limited to such counties.

[7] It is contended that "the court erred in admitting the prospectus in evidence." The false representations were made for the purpose of convincing Hoefer that the stock of the corporation was valuable and a desirable investment. In view of the well-known restrictions upon investments by savings banks, the statement in the prospectus that the bonds of the corporation "have been certified by the state bank commissioner as legal investment for savings banks" would tend to create the belief that the property of the corporation by which the bonds were secured had a value greatly in excess of the amount of the bonds. Any representations by defendant as to the value of the property, tending to support his statement that the stock was worth $40 a share, were clearly admissible in evidence.

[8] John Heckenleichtner, the husband of the witness, Emma C. Heckenleichtner, testified without objection that the defendant admitted having sold certain bonds, hereinbefore mentioned, belonging to the Heckenleichtners, and had not accounted for the proceeds, but he reported "that the brokerage company went broke * * * and the stock got lost"; and that thereafter the defendant said to the witness:

> "I have sold that stock. * * * I know I done wrong by not telling you I have sold that stock and telling you it got lost."

The witness was then permitted to testify, over defendant's objection:

> "He did not give me back my money; he gave us 40 shares of the Monta Vista Estates for those stocks that were supposed to get lost."

Mrs. Heckenleichtner had previously testified, without objection, that the defendant had made a false report relative to the sale of the stock in question and had thereafter delivered 40 shares of Monta Vista Estates stock in place thereof. The evidence to which objection was made, therefore, related exclusively to matters already in evidence, and cannot be held to have prejudiced defendant's rights.

[9] Appellant contends that the evidence is insufficient to justify the conviction, and that there is no such corroboration of Hoefer's testimony as is required by section 1110 of the Penal Code. The defendant's letters, some of them written shortly before and others shortly after the sale of stock to Hoefer, amply show that the stock was worth greatly less than $40 a share. The statements contained in the prospectus and other papers delivered to Hoefer tend to corroborate his testimony that the false pretenses were made. The testimony of Mrs. Heckenleichtner that the defendant wrote her, about the time of the alleged false representations, that "the stock in the New York Exchange was selling for $40 a share" also corroborates the testimony of Hoefer. People v. Helmlinger, 69 Cal. App. 139, 230 P. 675; People v. Whiteside, 58 Cal. App. 33, 208 P. 132; People v. Wymer, 53 Cal. App. 204, 199 P. 815; People v. Mace, 71 Cal. App. 10, 234 P. 841. The corroboration was sufficient.

Appellant urges that the district attorney was guilty of prejudicial misconduct in his argument to the jury. It does not appear, however, that the bounds of legitimate argument were transcended.

[10, 11] In answer to a question by one of the jurors as to whether the prospectus could be considered "as a representation in this case, even though it is not signed," the court replied that it could be so considered. Appellant contends that this "was an instruction upon a question of fact, and also upon a question of fact not within the issues of the case." What evidence the jury may consider is a question of law, usually decided by the court in ruling upon its admissibility, but its weight and effect are for the jury's determination. The answer of the court here in question in no manner invaded the province of the jury. The false statement in the prospectus that the bonds of the corporation had been "certified by the state bank commissioner as legal investment for savings banks" and to which statement the question of the jurors referred, was proper to be considered by the jury in determining whether Hoefer's testimony was corroborated. An examination of the whole case leads to the conclusion that the defendant was fairly tried and justly convicted.

The judgment and the order are affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

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80 Cal. App. 200

PEOPLE v. McKEE. (Cr. 1355.)

(District Court of Appeal, Second District, Division 2, California. Dec. 9, 1926.)

1. Criminal law 🔑200(1) — Automobilist, charged with manslaughter and failure to comply with statute after accident, held not placed in double jeopardy (Motor Vehicle Act, § 141).

One, charged with manslaughter and violation of Motor Vehicle Act (St. 1923, p. 562) § 141, by failure to stop and give required information and assistance after accident, *held* not twice placed in jeopardy for same offense; violation of such act not being included in, or related to, offense of manslaughter.

2. Automobiles 🔑346—Driver of automobile killing pedestrian held not relieved from duty to stop (Motor Vehicle Act, § 141).

That pedestrian struck by automobile was instantly killed *held* not to show that no assistance was possible, nor, if so, to relieve driver from duty, under Motor Vehicle Act (St. 1923, p. 562) § 141, to stop and stand ready to give required information and assistance.

3. Criminal law 🔑823(10)—Instruction to convict of manslaughter, if automobile was driven unlawfully, held not erroneous, in view of other instruction as to defendant being the driver.

Instruction to convict of manslaughter, if deceased was killed by automobile driven in unlawful manner, *held* not error, as not requiring finding that defendant was driver, in view of instruction, given at defendant's request, that prosecution must prove that "defendant, and no other person," committed crime.

4. Automobiles 🔑357—Instruction to convict of manslaughter, if automobile driver was "under influence of intoxicating liquor," held not error.

Instruction to convict of manslaughter, if deceased was killed by automobile driven in unlawful manner, to wit, while driver was "under the influence of intoxicating liquor," *held* not error; quoted words, as used in statute, meaning, as in common usage only that degree of influence which looses self-restraint and causes operation of car differently than ordinarily cautious and prudent person would.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Under the Influence of Liquor.]

5. Criminal law 🔑1144(16)—Instruction as to automobilist under "influence" of liquor killing person held not error; jury presumed to give proper meaning to "influence"; "under influence of intoxicating liquor."

Instruction to convict of manslaughter, if deceased was killed by automobile driven in unlawful manner, to wit, while driver was "under the influence of intoxicating liquor," *held* not prejudicial error; it being assumed, at least in absence of request for more specific instruction, that jury understood common usage of quoted words as meaning only such influence as looses self-restraint and causes operation of car differently than ordinarily cautious person would.

6. Criminal law 🔑823(10)—Instruction held not error, as permitting conviction of manslaughter, though automobilist's intoxication was not proximate cause of accident, in view of other instructions.

Instruction to convict of manslaughter, if deceased was killed by automobile driven in unlawful manner, to wit, while driver was "under the influence of intoxicating liquor," *held* not error as permitting conviction though intoxication was not proximate cause of accident in view of other instructions that gross or culpable negligence or operation of car with reckless disregard for others' safety must have been cause of death and that death must have proximately resulted from such operation.

7. Automobiles 🔑320—Contributory negligence is no defense to charge of manslaughter by automobile.

Contributory negligence of deceased is no defense to charge of manslaughter by automobile.

8. Automobiles 🔑344—Automobile must be operated at reasonable speed not endangering life irrespective of legal speed limit.

Vehicle must be operated at careful and prudent speed, no greater than reasonable and proper, having due regard to traffic, surface and width of highway, and not endangering life, limb, or property, though legal speed limit is greater.

9. Criminal law 🔑1172(1)—One driving automobile over 35 miles an hour while approaching street intersection to left of center held not prejudiced by instruction not defining unlawful rate of speed.

One driving automobile, which killed pedestrian, at over 35 miles an hour while approaching street intersection to left of center of road in attempt to pass other vehicles, *held* not prejudiced by failure of instruction in manslaughter trial to define "unlawful rate of speed."

10. Criminal law 🔑1172(1)—Instruction on not stopping after striking pedestrian, omitting automobilist's knowledge, was not prejudicial, where he must have known, if sober, held not prejudicial, where knowledge was obvious (Motor Vehicle Act, § 141).

In trial for violating Motor Vehicle Act (St. 1923, p. 562) § 141, by failure to stop and give required information and assistance after accident, instructions, defining offense without stating that defendant must have had knowledge of striking pedestrian, *held* not prejudicial to him.

11. Criminal law 🔑829(1)—Refusal of instructions covered by instructions given, at least sufficiently to avoid prejudice, is not prejudicial error.

Refusal of instructions covered by instructions given, at least to extent necessary to guard against prejudice, is not prejudicial error.

12. Criminal law 🔑1173(1)—Refusal to instruct that defendant was entitled to jurors' individual opinions held not prejudicial error.

Refusal to instruct that defendant was entitled to individual opinions of jurors *held* not prejudicial error, though such instruction should be given.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

William R. McKee was convicted of manslaughter, and of violation of Motor Vehicle Act, § 141, by failure to stop, give name and address, and render necessary assistance after accident, and he appeals. Affirmed.

Fred H. Thompson, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. This appeal is from a judgment of conviction of the defendant upon a charge of manslaughter and also a violation of section 141 of the Motor Vehicle Act (Stats. 1923, p. 517) requiring a person upon the happening of an accident to stop, give his name and address to the person struck, and render such assistance as is necessary.

The facts show that after an all-night affair at a bungalow near Seal Beach, where the defendant drank some liquor, he was driving home on Compton avenue at Forty-Seventh street in Los Angeles city at about the hour of 6:40 a. m. on November 4, 1925; that upon arriving at the intersection he was driving a little to the left of the center of the road in an effort to pass two other automobiles in front of which Mrs. Fleming had just passed, and in so doing struck and instantly killed her; the speed of the defendant's car was estimated by plaintiff's witnesses at somewhere between 40 and 50 miles an hour, by one of the defendant's witnesses as between 35 and 40, concerning which fact the defendant said, "I might have been going faster than 35;" a partly filled bottle of synthetic gin was found in the car; and later in the morning the defendant was unable to talk coherently. It was overwhelmingly established and not denied that the defendant did not stop after striking the woman; his defense in this particular being that he did not know he had hit the woman, although several of the witnesses testified that he did, and that immediately thereafter he swerved, started to slow down, and then proceeded to increase his speed.

[1] The first point urged by appellant is that the defendant was twice placed in jeopardy for the same offense, maintaining as the foundation for this argument that the transaction upon which the two offenses are based is but a single one. Violation of section 141 of the Motor Vehicle Act is not included within or in fact related to the offense of manslaughter. There is a sort of illicit relationship between burglary and larceny, and yet they are not so wedded that a conviction cannot be had for both, although both of them grow out of the same continuous set of acts. People v. Devlin, 143 Cal. 128, 76 P. 900; People v. Snyder (Cal. App.) 239 P. 705; People v. Case et al. (Cal. App.) 246 P. 1083; and People v. Brain (Cal. App.) 241 P. 913. It cannot therefore be successfully argued that the defendant here was twice put in jeopardy. The acts constituting the second offense did not really commence until after the woman had been struck, at which time the first offense had been completed. This same circumstance is involved and considered in the connection between burglary and larceny, or robbery. People v. Brain, supra.

[2] The second contention advanced by the defendant is that the evidence is not sufficient to support the verdict on the second count—that of failing to stop and render all necessary aid to Mrs. Fleming after she was struck. The insufficiency, he says, consists of this: That the evidence establishes that she was instantly killed, and therefore no assistance was possible. The testimony does establish that Mrs. Fleming was dead at least by the time the bystanders reached her. We cannot admit, however, even for the purpose of argument, that there was no assistance to be rendered. Certainly decency and common respect dictate that mutilated humans should not be allowed to lie around in the street as mute evidence of the destruction wrought by speed. There was at least such assistance to be rendered as would comply with the respect due from one human to another who has passed beyond the veil of materiality. Let us, however, temporarily grant the argument; nevertheless, as was pointed out in People v. Huber, 64 Cal. App. 352, 221 P. 695, it was the defendant's duty under any view of the situation to stop his machine and stand ready to comply with the various provisions of the law, regardless of whether or not the person struck was sufficiently injured to require assistance or so seriously injured that assistance was no longer necessary to her material well-being. He made no attempt to comply and he certainly cannot be heard to say that he is guilty of no offense because the woman was killed instead of injured. Justice would indeed be "blind" and deaf and dumb to heed such specious arguments.

[3] Appellant next assigns as error the following instruction:

> "If you are satisfied to a moral certainty, and beyond a reasonable doubt, that the deceased came to her death by being struck by an automobile driven upon a public highway at the time charged in this information, and that said machine was being driven in an unlawful manner, to wit, while the driver was under the influence of intoxicating liquor, or while the machine was being operated at an unlawful rate of speed, or while said machine was being driven upon a public highway at such a rate of speed as to endanger life, limb, or property of any person, you should find the defendant guilty of manslaughter."

He says that it permitted the jury to convict "if Mrs. Fleming was killed by being struck by 'an automobile' driven in an unlawful manner without being required to find that defendant was the driver." A complete answer to this is that part of another instruction requested by the defendant and given by the court wherein the jury were told that it was necessary for the prosecution to prove beyond a reasonable doubt "that the defendant, and no other person, committed the crime charged."

[4, 5] He also assails this instruction for its use of the words "under the influence of intoxicating liquors." These are the words used in the act, and as so used we think they have a well-understood meaning. They are followed by the provision that "an habitual user of narcotic drugs shall not drive a motor vehicle." This provision indicates, it seems to us, that "under the influence of intoxicating liquors" means what common usage has ascribed to the word, to wit: Not that he should be intoxicated to the extent that his faculties are completely impaired, but only that degree of influence which looses the bonds of self-restraint and causes him to operate his car in a manner different from that in which it would be operated by an ordinarily cautious and prudent person. People v. Dingle, 56 Cal. App. 445, 205 P. 705. Be that as it may, however, it must be assumed, at least in the absence of a request by the defendant for a more specific instruction, that the jury understood this common usage. We cannot believe that any prejudicial error resulted from permitting the jury to accept the common understanding of the words. People v. Ekstromer, 71 Cal. App. 239, 235 P. 69.

[6, 7] Appellant's next assault upon this instruction is based upon his contention that the jury were permitted by it to find the defendant guilty, though the intoxication was

The other papers gave a detailed statement of the "approximate gross yearly revenue" of the corporation, based in part upon statements of fact and in part upon estimates, and a detailed statement of the "appraisal of the properties," stating:

> "These figures are based on the market value of the properties, and not at what they would bring at a forced sale. On the other hand, they are lower than the cost of duplicating them today."

Hoetzendorff testified:

> "I got the prospectus from Mr. Bocchio in his office. * * * Mr. Bocchio told me he prepared it."

He also testified that he told Hoefer that, "according to the booklet, the bonds of the Monta Vista were legal bank investments." The evidence shows that the bonds had not been certified as a legal investment for savings banks. There is also evidence to the effect that the properties of the corporation were of less value than was stated in the said appraisal. Emma C. Heckenleichtner testified that she purchased 250 shares of Monta Vista Estates stock from appellant in April, 1923, at $20 a share; that thereafter appellant gave her 40 additional shares of the stock in settlement for stock of another corporation which she had intrusted to him for sale and which he had sold without accounting to her for the proceeds, and that, prior to such settlement, in May, 1923, he wrote her that the Monta Vista Estates stock, "in the New York Exchange, was selling for $40 a share." May 19, 1923, appellant and Hoetzendorff executed a written agreement to the effect that the latter was to sell stock of the Monta Vista Estates and that the amounts received therefor above $9 a share were to be divided between them. March 29, 1923, appellant made a written proposition to J. F. Whitehorn to sell some of the former's Monta Vista Estates stock at $12 a share net. May 21, 1923, he directed Whitehorn to "sell for my account and risk, 1,000 shares of the capital stock of the Monta Vista Estates * * * at a net price of $10 per share." June 22, 1923, he wrote Whitehorn:

> "In regards to the Monta Vista Estates, Inc., I am still in a position to purchase such stock as I desire at the price of $6 per share, and I am willing to do this for you at any time that you send me the money."

Appellant was not an officer of the corporation or in any manner connected therewith, except as the owner of 1,666 shares of its stock. The corporation did not prepare or issue the prospectus, and "it was no literature connected" therewith. The defendant did not testify at the trial, and the evidence to the effect that he made the alleged representations stands uncontradicted. In exchange for 311 shares of stock of Monta Vista Estates, Hoefer assigned and delivered to defendant 10 gold bonds of Central Creameries Company, which the defendant thereafter sold for $10,050. Hoefer caused these bonds to be sent to a bank in San Francisco, which bank, under his directions, there delivered them to defendant and received the shares of stock from him for Hoefer.

[5, 6] Appellant contends that, since the bonds were delivered to defendant in San Francisco, the offense, if any, was committed in that place, and that therefore the superior court of Mendocino county "had no jurisdiction of the offense charged"; that "the false pretenses themselves are not unlawful and do not of themselves constitute a crime; * * * the crime is the taking of the money." It may be said as truly, however, that the mere obtaining of the property does not constitute a crime, but the false pretense is a necessary element thereof. While there is some conflict in the decisions, it has generally been held that, "where a false pretense is uttered in A, and the money obtained in B, the venue may be laid either in A or B." Wharton's Criminal Law (11th Ed.) § 1473. This rule follows logically from the fact that a complete crime, in such a case, has not been committed in either place, but partly in one and partly in the other. The rule is statutory in this state.

> "When a public offense is committed in part in one county and in part in another, or the acts or the effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either county." Penal Code, § 781.

There is no conflict between this section and section 777, which provides that, "except as herein otherwise provided, the jurisdiction of every public offense is in the county wherein it is committed," and then states an exception to the rule. Section 777 doubtless relates to offenses committed wholly within a county, and, if the offense is committed partly in two or more counties, a reasonable construction of the section would be that jurisdiction is limited to such counties.

[7] It is contended that "the court erred in admitting the prospectus in evidence." The false representations were made for the purpose of convincing Hoefer that the stock of the corporation was valuable and a desirable investment. In view of the well-known restrictions upon investments by savings banks, the statement in the prospectus that the bonds of the corporation "have been certified by the state bank commissioner as legal investment for savings banks" would tend to create the belief that the property of the corporation by which the bonds were secured had a value greatly in excess of the amount of the bonds. Any representations by defendant as to the value of the property, tending to support his statement that the stock was worth $40 a share, were clearly admissible in evidence.

[8] John Heckenleichtner, the husband of the witness, Emma C. Heckenleichtner, testified without objection that the defendant admitted having sold certain bonds, hereinbefore mentioned, belonging to the Heckenleichtners, and had not accounted for the proceeds, but he reported "that the brokerage company went broke * * * and the stock got lost"; and that thereafter the defendant said to the witness:

> "I have sold that stock. * * * I know I done wrong by not telling you I have sold that stock and telling you it got lost."

The witness was then permitted to testify, over defendant's objection:

> "He did not give me back my money; he gave us 40 shares of the Monta Vista Estates for those stocks that were supposed to get lost."

Mrs. Heckenleichtner had previously testified, without objection, that the defendant had made a false report relative to the sale of the stock in question and had thereafter delivered 40 shares of Monta Vista Estates stock in place thereof. The evidence to which objection was made, therefore, related exclusively to matters already in evidence, and cannot be held to have prejudiced defendant's rights.

[9] Appellant contends that the evidence is insufficient to justify the conviction, and that there is no such corroboration of Hoefer's testimony as is required by section 1110 of the Penal Code. The defendant's letters, some of them written shortly before and others shortly after the sale of stock to Hoefer, amply show that the stock was worth greatly less than $40 a share. The statements contained in the prospectus and other papers delivered to Hoefer tend to corroborate his testimony that the false pretenses were made. The testimony of Mrs. Heckenleichtner that the defendant wrote her, about the time of the alleged false representations, that "the stock in the New York Exchange was selling for $40 a share" also corroborates the testimony of Hoefer. People v. Helmlinger, 69 Cal. App. 139, 230 P. 675; People v. Whiteside, 58 Cal. App. 33, 208 P. 132; People v. Wymer, 53 Cal. App. 204, 199 P. 815; People v. Mace, 71 Cal. App. 10, 234 P. 841. The corroboration was sufficient.

Appellant urges that the district attorney was guilty of prejudicial misconduct in his argument to the jury. It does not appear, however, that the bounds of legitimate argument were transcended.

[10, 11] In answer to a question by one of the jurors as to whether the prospectus could be considered "as a representation in this case, even though it is not signed," the court replied that it could be so considered. Appellant contends that this "was an instruction upon a question of fact, and also upon a question of fact not within the issues of the case." What evidence the jury may consider is a question of law, usually decided by the court in ruling upon its admissibility, but its weight and effect are for the jury's determination. The answer of the court here in question in no manner invaded the province of the jury. The false statement in the prospectus that the bonds of the corporation had been "certified by the state bank commissioner as legal investment for savings banks" and to which statement the question of the jurors referred, was proper to be considered by the jury in determining whether Hoefer's testimony was corroborated. An examination of the whole case leads to the conclusion that the defendant was fairly tried and justly convicted.

The judgment and the order are affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

80 Cal. App. 200

PEOPLE v. McKEE. (Cr. 1355.)

(District Court of Appeal, Second District, Division 2, California. Dec. 9, 1926.)

1. Criminal law 🔑200(1) — Automobilist, charged with manslaughter and failure to comply with statute after accident, held not placed in double jeopardy (Motor Vehicle Act, § 141).

One, charged with manslaughter and violation of Motor Vehicle Act (St. 1923, p. 562) § 141, by failure to stop and give required information and assistance after accident, *held* not twice placed in jeopardy for same offense; violation of such act not being included in, or related to, offense of manslaughter.

2. Automobiles 🔑346—Driver of automobile killing pedestrian held not relieved from duty to stop (Motor Vehicle Act, § 141).

That pedestrian struck by automobile was instantly killed *held* not to show that no assistance was possible, nor, if so, to relieve driver from duty, under Motor Vehicle Act (St. 1923, p. 562) § 141, to stop and stand ready to give required information and assistance.

3. Criminal law 🔑823(10)—Instruction to convict of manslaughter, if automobile was driven unlawfully, held not erroneous, in view of other instruction as to defendant being the driver.

Instruction to convict of manslaughter, if deceased was killed by automobile driven in unlawful manner, *held* not error, as not requiring finding that defendant was driver, in view of instruction, given at defendant's request, that prosecution must prove that "defendant, and no other person," committed crime.

4. Automobiles 🔑357—Instruction to convict of manslaughter, if automobile driver was "under influence of intoxicating liquor," held not error.

Instruction to convict of manslaughter, if deceased was killed by automobile driven in union high school district is indebted to petitioner in the sum of $250 for services as a teacher therein during the months of September and October, 1926; that said district has not sufficient money to its credit in the county treasury to pay such indebtedness; that on the 10th of September, 1926, the county superintendent of schools gave respondent county treasurer "an estimate of the amount of the school money that would then next be paid into said county treasury, stating the amounts to be apportioned to each school district in the county, including said Orland joint union high school district, and that a copy of said estimate, so far as it relates to said Orland joint union high school district, is hereunto annexed and marked Exhibit 'A' and made a part hereof"; that there was then and is now standing to the credit, in the county treasury, of certain named school districts and certain designated school funds specified amounts aggregating $6,922.60, "not immediately needed to pay any claims against the same, respectively"; that the respondent refuses "to transfer to said Orland joint union high school district any of the funds referred to * * * or any part of such funds." The exhibit attached to the petition shows only such parts of the estimate of the county superintendent of schools as relate to the Orland joint union high school. The prayer is for a writ of mandate requiring the respondent "to transfer to said Orland joint union high school district from any of the funds referred to, * * * not immediately needed to pay the claims against them respectively, and not heretofore transferred to any other school fund, an amount sufficient to pay the claim and demand of petitioner, but so that said amount shall not exceed 90 per cent. of the amount estimated by the superintendent of schools that will next be paid into the treasury of said county to the credit of said Orland joint union high school district." The respondent demurred to the petition on general and special grounds and filed an answer thereto. From the evidence introduced at the hearing, it appears that the allegations of the petition are true. Neither the petition nor the evidence, however, shows the estimated amounts to be received by other school districts in the county or whether they also are without sufficient money to pay the demands against them. Section 1858 of the Political Code provides:

> "Whenever in any school year, prior to the receipt by the school districts of any county, or city and county of this state, of their state, county, or city and county, or special or high school fund, the school districts of that county, or city and county shall not have sufficient money to their credit to pay the lawful demands against them, the county or city and county superintendent shall give the treasurer of said county or city and county, an estimate of the amount of school money that will next be paid into the county or city and county treasury, stating the amount to be appropriated to each district. Upon the receipt of such estimate it shall be the duty of the treasurer of said county, or city and county, to transfer from any fund not immediately needed to pay the claims against it, to the proper school fund an amount [not to exceed ninety per cent. of the amount] estimated by the superintendent, and he shall immediately notify the superintendent of the amount so transferred. The funds so transferred to the school fund shall be retransferred by the treasurer to the fund from which they were taken, from the first money paid into the school fund after the transfer."

[1] Respondent contends that such provision for a transfer of funds is violative of the constitutional limitations hereinafter considered. It is clear that such a transfer is not the lending or giving of "the credit of the state, or of any county, * * * or other political corporation or subdivision of the state," within the meaning of those terms as used in article 4, § 31, of the Constitution. Veterans' Welfare Board v. Riley, 188 Cal. 607, 616, 206 P. 631.

[2-4] Neither is the section violative of article 4, § 25, forbidding the passage of local or special laws where a general law can be made applicable, nor of article 1, section 11, providing that "all laws of a general nature shall have a uniform operation." Respondent contends that the section is special and discriminatory because no similar provision is made for levy districts, "cemetery districts, reclamation districts, and many others."

> "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it." Matter of Application of Miller, 162 Cal. 687, 698, 124 P. 427, 430.

[5-7] There are marked distinctions between school districts and other districts of the character of those named by respondent. The maintenance of public schools is a purely governmental function. The expenses thereof are usually quite evenly distributed over a period of from eight to ten months of the year, that for the first three or four months of each fiscal year becoming due before any moneys are available from taxes collected during that year. The amounts to be received from county taxes and from the state are certain and readily ascertainable, being fixed by article 9, section 6, of the Constitution. The other districts referred to by respondent, in their purposes and management, partake more or less of the nature of private enterprises, their expenditures are not usually so evenly distributed throughout the year as those of school districts, and the amounts to be received by them are much more uncertain.

"The legislative judgment as to what is a sufficient distinction cannot be overthrown by the courts, unless it is, beyond rational doubt, erroneous." Matter of Application of Stephan, 170 Cal. 48, 50, 148 P. 196, Ann. Cas. 1916E, 617.

Respondent contends that:

> "The section is repugnant to section 16, article 1, of the Constitution, in that it impairs the obligation of a continuing contract existing as a matter of law between the treasurer's office and all the various districts whose funds are deposited in the county treasury."

[8, 9] There is no contractual relation between the county treasurer and the school districts of the county, but he holds the school moneys in his custody in obedience to the mandate of the law.

> "The school moneys never lose their character of public moneys belonging to the state. * * * The fact that they have been apportioned to the several school districts does not give to those districts any proprietary right therein. * * * If any portion of the moneys thus apportioned is not used during the school year, it is made, by section 1621, the duty of the county superintendent to reapportion the balance as other moneys are apportioned." Kennedy v. Miller, 97 Cal. 429, 435, 32 P. 558, 560; Gridley School District v. Stout, 134 Cal. 592, 66 P. 785. "The management of the public schools is a state affair, and school districts at most are but a state agency for that purpose." Board of Education v. Davidson, 190 Cal. 162, 168, 210 P. 961. They "are essentially nothing but trustees of the state, holding the property and devoting it to the uses which the state itself directs." Pass School Dist. v. Hollywood Dist., 156 Cal. 416, 419, 105 P. 122, 124 (26 L. R. A. [N. S.] 485, 20 Ann. Cas. 87).

Subject only to constitutional limitations, "the power of the legislature over school districts is plenary." Worthington S. Dist. v. Eureka S. Dist., 173 Cal. 154, 156, 150 P. 437; Macmillan Co. v. Clarke, 184 Cal. 491, 498, 194 P. 1030, 17 A. L. R. 288.

Section 1543 (a) of the Political Code provides that, whenever there is presented to the county superintendent of schools any claim or demand against a school district which has not sufficient money to pay the same, he shall indorse thereon the words "Not approved for want of funds," and that such demand shall thereafter bear interest at the rate of 6 per cent. per annum until there are sufficient funds to the credit of the district to pay the amount thereof. In connection with what has been previously stated, it thus appears that a school district must annually carry over a surplus equal to from 30 to 40 per cent. of the amount of its yearly expenditures or pay interest for several months on a like amount, unless the foregoing provisions of section 1858 can be upheld. Under like circumstances, no private business would carry over an idle surplus of such magnitude in one fund or pay interest on its indebtedness while it held an equal amount in other funds not immediately needed to pay demands against them. It would require cogent reasons to justify a court in holding that the Legislature is without power to provide that the business of the state shall be conducted upon businesslike principles.

[10] To make a temporary transfer of school moneys from one fund to another, or from one district to another, is not to divert such moneys from the purposes for which they were provided. As said by the Supreme Court of Washington, in discussing a similar question:

> "The word 'diverted' is used in the sense of turning permanently from its purpose, the equivalent of appropriation for some other use. A temporary transfer from the general fund to another fund with an assured income is not an appropriation or diversion. * * * The city controls both funds, and it is under the legal obligation to see that the general fund is seasonably reimbursed from the source of supply to the special one. Of course, the city authorities must exercise common business sense in making such transfer. * * * A city should not transfer its general fund moneys as temporary loans to other funds that have not assured and certain sources of income, the collection of which is under the control of the city itself." Griffin v. City of Tacoma, 49 Wash. 524, 95 P. 1107.

[11] The provisions of section 1858, quoted herein, leave much to be desired in the way of clearness and certainty. There may be some doubt as to whether it was intended that the treasurer should transfer to the general county school fund an amount not exceeding 90 per cent. of the total amount of the estimated receipts of all the schools of the county, such amount to be apportioned by the superintendent to the several districts, or make the transfer directly to the credit of the respective districts. Neither the petition nor the evidence shows the needs of districts other than Orland joint union high school district, or even of that district except as to the amount due petitioner, nor are the contents of the county superintendent's estimate shown, except as the same relate to the district named. It cannot be determined, therefore, what part of the alleged available moneys may be justly transferred to that district. No district has a preferential right to a transfer of money from the limited funds available as against other districts equally in need of money. If it was the respondent's duty, upon receipt of the superintendent's estimate, to make a transfer of moneys from the available funds to the account of one district, it was equally his duty to make a transfer to all that were in like need. Since the facts presented are insufficient to show the amount which it is the duty of respondent to transfer to the Orland joint union high school district, the relief prayed for by petitioner cannot be granted.

The petition is denied, and the writ is discharged.

80 Cal. App. 252

PEOPLE v. MITCHELL et al. (Cr. 1371.)

(District Court of Appeal, Second District, Division 2, California. Dec. 13, 1926.)

1. Criminal law 🔑494—Expert testimony as to values of stolen wheels and battery held to sustain conviction of grand larceny without introducing stolen parts (Code Civ. Proc. § 1954).

Expert testimony as to value of stolen wheels and battery *held* sufficient proof of value to sustain conviction of grand larceny without their introduction in evidence, under Code Civ. Proc. § 1954.

2. Criminal law 🔑532(1)—Request to examine as to whether confessions were voluntary, after their admission without objection, held properly denied.

When no objection to testimony of confessions was interposed, subsequent request to examine witness as to whether statements of defendants were voluntary was too late, and properly denied.

3. Criminal law 🔑532(2)—Where state's witness had testified that confessions were voluntary, court had discretion to then exclude evidence to show involuntary character.

Refusing permission to then place defendants on witness stand to show involuntary character of confessions *held* not error, where state's witness had fully testified to voluntary character, since trial judge, who must determine sufficiency of foundation, had discretion as to order of proof.

4. Criminal law 🔑863(2)—Ruling that whether all stolen tires were in same condition as one in room, but not in evidence, could not be gone into, was proper.

Where jury inquired whether all stolen tires were in same condition as one in room, but not in evidence, ruling that matter could not be gone into was proper, since jury might not consider matters not in evidence.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

S. E. Mitchell and another were convicted of grand larceny, and they appeal. Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John W. Maltman, and H. H. Linney, Deputy Attys. Gen., for the People.

CRAIG, J. The appellants were convicted of grand larceny upon an information which charged them with having, on or about December 28, 1925, stolen and carried away automobile wheels and other accessories of the value of $300, the personal property of one J. P. Furr.

It appeared that Furr left his automobile in a shed in Telegraph canyon at about 11 o'clock p. m. of the date mentioned; that there were then on the car four green disc wheels, with tires and tubes, and a Willard battery, besides a complete extra wheel on the rear of the car; that Furr returned to the shed on the following morning at about 8 o'clock, whereupon he discovered the machine resting upon ties. The four wheels on the axles, together with the tires and tubes, and the battery, were missing, but the spare wheel was in place. He testified that on December 29th he found at the city hall at La Habra four wheels and a battery which resembled those which he had lost. The wheels fitted his car, and matched the extra tire, but Furr would not swear positively that they were the identical wheels that were removed on the preceding night, though as near as he could tell they and the battery were the same.

Officers at La Habra testified that they arrested the defendants at that place on the morning of the 29th, at about 3 o'clock; that they then had the wheels and battery in another automobile; that one of them at first said that he had obtained them from his brother in the oil fields, but later, on different occasions and to various persons, the defendants stated that they had taken them from a Hupmobile; one officer asked them if they had stolen anything more than the wheels, to which Mitchell replied in the affirmative, and Nilson said, "No, we got a battery, too." It was further testified that when they were asked why they took them, they replied, "We don't know why. We had the opportunity and did do it." The officers located Furr's Hupmobile, and conveyed the defendants to the shed, where certain admissions were made. Some of these were excluded by the trial court.

[1] The defendants did not take the stand, but certain witnesses testified in their behalf as to their reputation for honesty and veracity and estimated that the stolen property was worth about $168. An insurance adjuster for the Automobile Club of Southern California testified at the instance of the people that, allowing for depreciation, the wheels, tires, tubes, and battery were of a value of $300 to $325.

It is first contended that the evidence was insufficient, that the property alleged to have been stolen was not offered in evidence, but that in its absence witnesses were erroneously permitted to testify to its value; and from this it is argued that the verdict and judgment are contrary to law. Expert testimony, given by the insurance adjuster, who qualified as to experience and ability to judge as to values of such property, was sufficient. It was not indispensable that the wheels and battery be introduced and their values left to the judgment, or perhaps the guesswork, of laymen jurors. The existence, situation, and character of such objects may be established by witnesses. Code Civ. Proc. § 1954.

[2,3] The people's witness Martin testified to conversations, practically amounting to

confessions, of the defendants when taken to the shed heretofore mentioned. No objection to this testimony was interposed. Thereafter counsel for appellants asked permission to examine this witness on his voir dire as to whether or not such statements were voluntary. The trial court held that the request was too late, and properly denied it. It appears that the witness Ellis, who next testified, was present during these conversations, and he swore both on direct and voir dire examination that the statements in question were made freely and voluntarily, without threat, force, fear, inducement, or promise of reward being used toward the defendants. After Ellis had testified fully as to the vountary character of the statements, as above related, defendants' counsel insisted that he be permitted to place them on the stand before the witness should be allowed to testify to such statements, and offered to prove by rebuttal evidence that the same were not voluntary. This motion was denied, and the witness recited all that was said at the time. Since it is the duty of the trial judge to consider in passing upon the admissibility of an alleged confession whether or not for that purpose a sufficient foundation has been laid as to its free and voluntary character, the order of proof upon that question is within its discretion. A prima facie showing having been made that the statements were free and voluntary, testimony offered to the contrary would only have created a conflict in the evidence to be weighed later by the jury under proper instructions. The people having laid a foundation in the testimony of the witness showing affirmatively that the confession about to be proved was freely and voluntarily made, it was within the sound discretion of the court to say whether it would interrupt the regular course of the trial and hear the defendants' witnesses, or proceed as it did in this instance. People v. Haney, 46 Cal. App. 317, 189 P. 338. Of course the door was still wide open for the introduction as a part of the defendants' case of such proof as they might desire to offer in this behalf, but no attempt was thereafter made to show by any witness that their alleged statements were not voluntary, or that they were in fact not true. Appellants' contention in this respect that the evidence was incompetent and prejudicial is, therefore, untenable. People v. Connelly, 195 Cal. 584, 234 P. 374.

[4] During their deliberations the jury returned to the courtroom, and requested further information about the tires. A juror remarked that, since the statement had been made that a tire which was in the room (which was not offered in evidence) had been taken from the back of the machine, and that the four stolen tires were not in as good condition as that one, that they would like to know if they were all in the same condition. To this request the court replied, "That is something we cannot go into." We think the ruling was proper. The jury would not have been justified in considering matters not in evidence.

In appellants' briefs much space is devoted to an extended argument as to what the evidence tended to show, and it is repeatedly asserted that the facts created a doubt in the minds of the jurors which they failed to resolve in favor of the defendants. This whole matter is so clearly within the sole province of the jury as to preclude its further consideration upon appeal.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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80 Cal. App. 263

TURLOCK MERCHANTS & GROWERS, Inc., v. SMITH. (Civ. 3171.) *

(District Court of Appeal, Third District, California. Dec. 13, 1926.)

1. Sales ⚷87(1)—There is rebuttable presumption that perishable goods, sold for agreed price f. o. b. shipping point, are to be inspected there by buyer.

There is presumption that perishable goods, sold for agreed price f. o. b. shipping point, are to be inspected by buyer at such point, but such presumption may be rebutted by showing that inspection at destination was intended.

2. Sales ⚷168(2)—Buyer held entitled to reasonable time for inspection of goods after arrival at destination.

Where articles are to be delivered to common carrier by vendor, to be shipped to vendee at distant point, and no provision is made for inspection and acceptance before or at time of shipment, buyer is entitled to reasonable time after arrival at destination to inspect goods, and accept or reject them.

3. Customs and usages ⚷13 — Evidence of trade custom relative to place of inspection held admissible, in view of presumption of contract with reference thereto.

Where amount due seller of cantaloupes from selling agent was in dispute, buyers having rejected shipments after inspection at destination, exclusion of evidence of trade custom relative to place of inspection of perishable goods shipped f. o. b. point of shipment *held* error, since it is presumed that parties contracted with reference to it, if it existed.

4. Sales ⚷359(1)—Evidence held not to require finding that seller of cantaloupes and selling agent had agreed as to balance due between them.

Evidence *held* not to require finding that seller of cantaloupes and his selling agent had reached agreement as to balance due on account between them.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court February 10, 1927.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action for goods sold by Turlock Merchants & Growers, Inc., against J. H. Smith, in which defendant filed a cross-complaint. Judgment for defendant, and plaintiff appeals. Reversed.

W. N. Graybiel, of Turlock, for appellant.

Samuel V. Cornell, of Turlock, for respondent.

FINCH, P. J. The complaint alleges that the defendant is indebted to the plaintiff "on an open book account for goods, wares, and merchandise, and money expended for said defendant of the reasonable value" of $637.17. The answer denies the alleged indebtedness. The defendant filed a cross-complaint, in which he alleges that the parties entered into an agreement whereby the defendant appointed the plaintiff "his sole and exclusive agent for selling and distributing all cantaloupes owned or controlled by said defendant * * * for the season of 1921," the defendant to pay the plaintiff for such services at the rate of "ten cents for each flat crate and fifteen cents for each standard crate of cantaloupes sold or distributed * * * in pursuance of said contract"; that the plaintiff, under the terms of the contract, sold cantaloupes belonging to defendant "for the total sum of $18,120.58," and has not paid defendant "any part thereof except the sum of $15,492.72," leaving a balance due defendant of $2,627.86. As a second cause of action it is alleged that the plaintiff is indebted to defendant on account of moneys had and received for the benefit of the plaintiff in the sum of $2,627.86. As a third cause of action it is alleged that, in violation of the terms of the contract, the plaintiff sold certain carloads of defendant's cantaloupes "to be delivered at points other than the said town of Denair, * * * and has deducted from moneys coming to its hands for the use and benefit of the defendant * * * as the proceeds from the sales of said cantaloupes the total sum of * * * $2,627.86 which said plaintiff * * * claims to have thus * * * expended for transportation charges" on the cantaloupes sold for delivery at points other than Denair. It is apparent that the three counts are but statements in different forms of a single cause of action.

The plaintiff demurred to the cross-complaint on general and special grounds, and, upon the overruling of the demurrer, filed its answer to the cross-complaint, denying the allegations of the first and second alleged causes of action. The answer to defendant's third cause of action "denies that plaintiff sold for defendant certain carloads of cantaloupes otherwise than f. o. b. Denair, except as requested, and directed so to do by said defendant," and denies all other allegations of such third cause of action.

The court found that the parties entered into a contract as alleged, and the same is set forth at length in the findings. The contract is substantially in the usual form of agreements between co-operative marketing associations and their members, except as to the following terms, which were inserted at the special request of defendant:

> "It is further agreed that where grower can load straight cars within hours of one working day he may use Peacock label and all such cars will be sold f. o. b. Denair at grower's request, seller agreeing to sell to best advantage and look after collection from buyer."

The court found that the foregoing part of the contract "was intended by the parties to mean, and it was their agreement and understanding, that all such cars should be sold and delivered to the purchaser at Denair, Cal., and that none of such cars should be sold for delivery at any other point or place"; that the defendant delivered to the plaintiff certain carloads of cantaloupes to be sold in pursuance of the terms stated; that on the 15th of November, 1921, the plaintiff delivered to the defendant "an itemized statement covering the business relations" between the parties from the time of the execution of the contract to the delivery of the statement. Then follows an analysis of the itemized statement, the court charging the plaintiff with the difference between the market value of the cantaloupes delivered to the plaintiff and the amount credited to defendant in the statement. The court found that, after receiving such statement, the defendant "for the first time learned that the foregoing cars had been sold and delivered at a point other than Denair, Cal., and that the losses under the market value of said cars, as stated upon the sales slip theretofore delivered to him, were occasioned by transportation charges for delivering said cars to the point or place of delivery." The court did not find the amount for which plaintiff actually sold the cantaloupes in question or the amount expended as transportation charges.

The evidence sufficiently shows the market value of the cantaloupes at Denair to be as follows: Car No. 14618, $404.10; 2369, $384.60; 11075, $459.85; 6021, $618.90. At the times the cantaloupes were shipped, the plaintiff reported to defendant that they had been sold for the foregoing respective amounts. In the itemized statement of November 15, 1921, the plaintiff charged the defendant with net losses on the first three cars as follows: No. 14618, $74.01; 2369, $633.99; 11075, $74.95, and credited him with only $347.54 on car No. 6021. The court struck out all charges for losses and expenses, and charged plaintiff with the full market value of such cantaloupes, and found that plaintiff was indebted to defendant, at the time the statement was rendered, in the sum of $2,436.36 more than the statement indicated.

[1] The evidence shows that the plaintiff

charged the defendant with a total of $1,198.15 on account of freight paid by plaintiff, but no other evidence has been discovered which supports the finding that "the losses under the market value of said cars * * * were occasioned by transportation charges." The plaintiff sold the cantaloupes to buyers in distant cities; car 6021 going to Portland, Or.; 14618 to Des Moines, Iowa; 2369 to Salt Lake City, Utah; and 11075 to Chicago, Ill. The general manager of the plaintiff testified that the cantaloupes were "sold f. o. b. Denair. * * * The sales are made by a medium of telegraphic communications. * * * Then we ship to ourselves, at this buyer's destination, invoicing the buyer and drawing on him for the amount agreed upon and send out the papers through the bank for him to receive and take delivery of the goods. * * * If you sell a car of produce f. o. b. origin, that means that the buyer assumes the freight. * * * I did the very best I could to sell his fruit at Denair. Market conditions and other factors made late sales a hard proposition. A lot of people that made purchases went back on their word later on. Cars were there, and it was a perishable product. They were there, refused, and we had to do the best we could with them." What became of the four carloads of cantaloupes after they were shipped from Denair does not appear, except that they were rejected by the purchasers. Plaintiff attempted to prove the grounds upon which they were rejected, but the court sustained defendant's objection to such proof; the objection being that "it is irrelevant and not pertinent to any issue in this case, unless they tell it here that that car was rejected at Denair." The only theory upon which the ruling can be upheld is that the contract required unconditional acceptance by the purchaser at Denair and that it was a violation of the contract to sell the cantaloupes f. o. b. Denair, subject to inspection at destination. The special terms in the contract were inserted because the defendant objected to the shipment of his cantaloupes on consignment, the plaintiff's usual method of disposing of produce under its control. When produce is shipped on consignment, the owner thereof may sustain a heavy loss because of a falling market, however high the quality of his produce. Whenever it is sold for an agreed price f. o. b. a given place, the rise or fall of the market is of no concern to the seller, but, upon inspection of the produce prior to the acceptance thereof, the purchaser may reject the same and refuse to pay therefor, if not of the character or quality agreed upon. M. A. Newmark & Co. v. Smith, 26 Cal. App. 339, 146 P. 1064. In the absence of anything to show a contrary intention, it may be presumed that in such a case inspection is to be made at the point of shipment, but the presumption is not conclusive, and it may appear from all the circumstances surrounding the transaction that the parties contemplated an inspection at the point of destination. Whitaker v. Dunlap-Morgan Co., 44 Cal. App. 140, 186 P. 181; Gianelli v. Globe Grain & Milling Co., 48 Cal. App. 103, 110, 191 P. 720; Puritas Coffee, etc., Co. v. De Martini, 56 Cal. App. 628, 636, 200 P. 96. It appears from the evidence that the defendant has had several years' experience in raising and shipping cantaloupes, and he is doubtless familiar with the customary methods of selling and shipping them. At the time the contract was executed, he probably knew that the local market for cantaloupes was limited, and that, in order to make advantageous sales, it would be necessary to ship the most of them to buyers at distant points, who probably would not have representatives at the small town of Denair to inspect the shipments.

[2] In Eaton v. Blackburn, 52 Or. 300, 96 P. 870, 20 L. R. A. (N. S.) 53, 132 Am. St. Rep. 705, 16 Ann. Cas. 1198, the plaintiff sold the defendant a quantity of hay to be delivered f. o. b. at point of shipment. The court said:

> "Where articles are to be delivered to a common carrier by the vendor, to be forwarded to the vendee at a distant point, and no provision is made for inspection and acceptance before or at the time of shipment, the vendee is entitled, under the law, to a reasonable time, after the goods arrive at their destination, in which to exercise the right of inspection, and to accept or reject them, if they do not comply with the contract."

In Deveso v. Chandler, 210 App Div. 684, 206 N. Y. S. 604, after stating the rule as above, the court said:

> "But in any event there was here evidence of a usage known to both parties, whereby, under the facts involved, payment was to be made after inspection on board cars on their arrival in Buffalo. * * * We think such evidence was admissible."

[3] The plaintiff herein attempted to prove a trade custom relative to the place of inspection in the sale and shipment of perishable products, such as cantaloupes, sold f. o. b. point of shipment, but the court sustained the defendant's objections thereto. If there was a custom, known to both parties, giving purchasers the right, under the circumstances stated, to inspect shipments at the point of destination, then it must be presumed, in the absence of covenant or evidence to the contrary, that the parties contracted with reference to that custom, and that such custom became a part of the contract. Gianelli v. Globe Grain & Milling Co., supra; Deveso v. Chandler, supra. The court permitted a witness to give his interpretation of the special terms of the contract, correctly stating, however, that the interpretation thereof was for the court, but refused to permit any evidence tending to prove the custom which

plaintiff sought to show. The evidence should have been admitted.

[4] The evidence is not such as to require a finding that the parties had reached an agreement as to the balance due on the account between them.

The judgment is reversed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

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80 Cal. App. 248

PEOPLE v. OWEN. (Cr. 1407.)

(District Court of Appeal, Second District, Division 1, California. Dec. 13, 1926.)

1. Criminal law 🔑355—Evidence showing that conduct, apparently caused by intoxication, occurred on other occasions from different causes, held competent to disprove intoxication.

Where intoxication is claimed to have been cause of certain conduct, it is competent to show like occurrences on other occasions which indicate that cause for such conduct was other than intoxication, as insanity or habitual eccentricity.

2. Automobiles 🔑354—Automobile driver, accused of intoxication, may show habitual eccentricity caused his actions.

In prosecution for driving automobile while intoxicated, where state's evidence was wholly circumstantial, defendant could show that ordinary conduct was habitually eccentric or verged on insanity, in order to prove actions testified to were not caused by intoxication.

3. Criminal law 🔑1170(1)—Excluding evidence of eccentric character of defendant, charged with driving car while intoxicated, held ground for reversal.

In prosecution for driving while intoxicated, refusal of trial court to permit introduction of evidence showing defendant's ordinary sober conduct was habitually eccentric, in order to prove actions testified to were not caused by intoxication, *held* reversible, as depriving defendant of substantial right.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Bert Owen, true name Bertram E. Owens, was convicted of driving an automobile while intoxicated, and he appeals. Reversed.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

HOUSER, J. Defendant was convicted of the offense of driving an automobile upon a public highway at a time when he was under the influence of intoxicating liquor. He appeals from the judgment and from an order denying his motion for a new trial.

On the trial of the action, no one testified to having seen defendant take a drink of intoxicating liquor or to have observed the smell of such liquor on his breath at or near the time when the alleged offense was committed; but the evidence upon which the prosecution relied for a conviction consisted of testimony relating to the peculiar conduct of, and statements made by, defendant at or near the time in question.

Evidence offered on behalf of defendant in explanation of such conduct and statements was denied admission by the trial court, and prejudicial error is predicated thereon.

From the record it appears that at the outset of the defense the rejected evidence was offered for the purpose, not of proving the insanity of defendant from the standpoint of his not knowing or appreciating right from wrong, but solely with the view of presenting to the jury evidence of the customary habits and eccentricities of the defendant at a time or times when he was not under the influence of intoxicating liquor, to the end that the jury might determine the fact whether the conduct of defendant and the statements made by him at the time in question arose from what as to defendant was a usual state of mind, or whether such actions on the part of defendant were attributable to the fact that he was under the influence of intoxicating liquor. At a later period in the course of the trial, certain other questions were propounded to witnesses on behalf of defendant for the avowed purpose of showing his insanity, not to the extent of presenting a legal excuse for the commission of the offense (which in fact was denied), but for the purpose of showing the ordinary abnormalities of defendant, both in his speech and in his general conduct, at times when he was in a sober condition as distinguished from an intoxicated condition.

In announcing the general rule applicable to situations analogous to the facts here presented, Mr. Wigmore, in section 228, vol. 1, of his work on Evidence, makes the statement that:

> "On the general principle of relevancy (ante, § 34), any piece of conduct offered as indicating insanity may be explained away as equally or more consistent with some other hypothesis. That which appears to be an irrational act or utterance may, in the light of certain facts, be rational, or may be the result of some other abnormal mental condition than insanity (such as fever or intoxication). These explanatory facts are thus always admissible, providing only that they have in some degree an explanatory significance."

The same thought is perhaps expressed in section 862 of volume 22 of Corpus Juris, where it is said:

> "It has been considered that, where a certain cause is claimed to have produced a particular result, it is competent to show other oc-

currences on other occasions which indicate that there was another cause for the result. * * *"

In the case of People v. Miles, 143 N. Y. 383, 38 N. E. 456, the defendant was charged with murder. One of his defenses was that he was insane when the crime was committed. Touching the reverse of the situation here presented, the prosecution introduced evidence tending to show that certain acts of the defendant, which were claimed as indicating insanity on his part, were in fact due to his intoxicated condition. On appeal, error was predicated upon the action of the trial court in admitting such evidence. The New York Court of Appeals, in considering the question, said:

> "One of the defenses interposed on the trial was that of insanity. To sustain it, proof was given of the conduct of the defendant at Evans Mills on an occasion when he was trying to settle his business difficulties with Mrs. Ward, and it was claimed on his behalf that his words and actions on that occasion were so strange and inexplicable as to indicate insanity. To rebut that inference and answer the manifest tendency and purpose of the proof, the prosecution were allowed to show that on that day and that occasion the defendant was intoxicated, and that his excited and ugly conduct was explainable by that fact. The evidence was clearly admissible."

[1] Reasoning from the principle announced by Mr. Wigmore, to the effect that any act or utterance which may appear to indicate irrationality may in fact be shown to be the result of intoxication, it should follow that, where it is contended that a given act is the product of intoxication, proffered evidence to the effect that such act or conduct may be attributed either to insanity or to an eccentricity should be admitted. Paraphrasing the citation from Corpus Juris, supra, where intoxication is claimed to have been the cause of certain conduct, it is competent to show other occurrences on other occasions which indicate that there was a different cause for such conduct. The rule as illustrated in the case of People v. Miles, 143 N. Y. 383, 38 N. E. 456, which permits one side to show that the given act claimed to be the offspring of insanity was in fact superinduced by intoxication, ought to admit of the reverse of the proposition and permit the introduction of evidence to show that, where certain conduct is claimed as indicating intoxication, evidence may be induced for the purpose of showing that such conduct was attributable either to a natural, normal, and customary eccentricity or trait of character, or that it was due to insanity.

[2] The primary purpose sought in the trial of an action is the ascertainment of the truth. Any fact which will materially tend to enable a jury to determine the ultimate truth should ordinarily be submitted to the jury for its consideration. It appears to be conceded that defendant's conduct and speech at the time in question were not the product of a normal mind. The only real question in the case was whether defendant was intoxicated. The evidence adduced by the prosecution showed that he had said and done things which would indicate that he was drunk. Necessarily his defense, if any, must have rested either upon a denial of the facts testified to by witnesses introduced by the prosecution, or upon some explanation of his peculiar conduct and statements. If defendant had been insane, or if perchance, immediately preceding the time at which defendant was charged with the commission of the offense, he had suffered a severe physical injury and shock to his brain and general nervous system which rendered him irresponsible for his actions, or if an anæsthetic induced by a surgical operation had been administered to defendant immediately before the time in question, and from which anæsthetic defendant had not completely recovered, or if defendant had been "doped" by persons seeking to do him harm—it scarcely could be doubted that evidence thus tending to account for the strangeness of the conduct of and statements made by defendant would be admissible. The principle rests upon defendant's right to make a proper explanation of his conduct. Assuming that at the time charged in the information defendant's conduct was peculiar, it would seem clear that, without endeavoring to show the direct cause thereof, he had the right to establish the fact that his ordinary sober conduct was habitually eccentric, and thus disprove the possible conclusion that his questioned conduct was the result of an intoxicated condition.

[3] It is apparent that the refusal of the trial court to permit the introduction of the evidence relating to the alleged cause of defendant's peculiar conduct at the time charged in the information resulted in the deprivation of a substantial right to defendant.

It becomes unnecessary to notice other alleged errors occurring at the trial, as specified by appellant.

The judgment and the order denying the defendant a new trial are reversed.

We concur: CONREY, P. J.; YORK, J.

80 Cal. App. 81

PEOPLE v. McNETT et al. (Cr. 869.)

(District Court of Appeal, Third District, California. Nov. 30, 1926.)

1. **Criminal law ⚷1165(1)—Corroborative evidence in prosecution for attempted robbery held not so clear and convincing as to render serious errors occurring at trial harmless (Pen. Code, § 1111).**

Corroborative evidence of accomplice in prosecution for attempt to commit robbery *held* not so clear and convincing as to render serious errors occurring at trial harmless, in view of Pen. Code, § 1111.

2. **Criminal law ⚷1169(11)—Admission of evidence of other crimes by defendant held prejudicial error.**

In prosecution for attempt to commit robbery, evidence of statement of defendant, wherein appeared in detail what occurred in court in another county, and in which reference was made to other crimes by defendant, *held* prejudicial error.

3. **Criminal law ⚷369(2)—Admissions of other crimes by defendant to prove attempted robbery held error.**

Admissions of other crimes, in prosecution for attempt to commit robbery, *held* error, since defendant could not be convicted of one crime on proof of other independent crimes.

4. **Criminal law ⚷655(2)—Statement of court with reference to stool pigeons, where defendant claimed to have been assisting sheriff, held prejudicial.**

Where defendant, in prosecution for attempt to commit robbery, claimed that he had been instructed by sheriff to give information to frustrate crimes, and had done so in this case, court's statement with reference to stool pigeons *held* prejudicial to defendant, since jury might have drawn inference that defendant's conduct was necessarily criminal.

5. **Criminal law ⚷1184—Erroneous sentence can be corrected and is not ground for reversal.**

Pronouncement of erroneous sentence for definite term of years instead of for indeterminate period is not sufficient ground for reversal, but is an informality which can be corrected by having sentence again pronounced.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Clyde McNett and another were convicted of an attempt to commit robbery, and named defendant appeals. Reversed.

Clifford A. Russell, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

NEEDHAM, Justice pro tem. The appellant, Clyde McNett, was jointly charged with one Adna J. Davis by an information with the crime of attempt to commit robbery, and was convicted by a jury, and was by the court sentenced to serve a term of 20 years in the state prison at Folsom. The codefendant, Davis, had, previous to the trial of McNett, pleaded guilty.

McNett has appealed from the order denying his motion for a new trial and from the judgment and sentence of imprisonment.

In a general way, the facts as shown by the evidence disclosed that on the night of September 15, 1924, an attempt was made to hold up a roadhouse in Sacramento county, known as the Plantation Inn. Information that the holdup would be attempted had been received by the sheriff's office, and five deputies from that office were sent to the scene and were there at the time the attempted robbery took place. Two of the deputy sheriffs, Brady and Murphy, were stationed inside of the building with P. W. Pedelty, manager of the inn; the other three deputies, Robbins, Bryant, and Garibaldi, being at the time in the oil station near the Plantation Inn. At about the hour of midnight, according to the testimony, an automobile drove up to the place and two armed men, Hart and Schierhoff, ran to the inn, where an exchange of shots took place, which resulted in the death of both of these invaders. The defendant Davis admitted that he drove the car and that he escaped in his car after being fired upon by the officers at the oil station. Up to this point there is no conflict in the testimony. The defendant Davis, who gave testimony for the people after his plea of guilty, and thus acknowledged himself to be an accomplice, testified that the appellant, McNett, was in the automobile at the time it was driven to the inn, and that McNett left the car at the same time as Hart and Schierhoff. Davis also testified that Hart, Schierhoff, and McNett met at the home of McNett on that evening, where McNett secured a gun which he gave to Schierhoff, and that McNett accompanied Davis and the two other bandits to a point beyond the Plantation Inn, where the appellant, McNett, planned the details of the holdup and with the others journeyed to the Plantation Inn for the purpose of robbing the inn.

Thereafter the district attorney introduced a statement made by McNett, appellant, shortly after the attempted robbery, in the office of the district attorney, which was taken down in shorthand and transcribed. This statement was voluntarily made and was very lengthy, containing some 77 pages of typewriting. In this statement McNett denied that he was present at the holdup at the Plantation Inn, but he admitted that he had discussed the question of holding up the inn with Hart and Schierhoff on the day of the attempted holdup, and on that same night that he had met Davis at the home of Schierhoff and accompanied Hart, Davis, and

Schierhoff and two other men to his own home, where he stated he got out and bade them good night, whereupon he telephoned to the sheriff's office, "Tell Robbins, the boys are on their way out." The statement of the appellant was to the effect that he had agreed with Deputy Sheriff Robbins that he would pretend that he would act in conjunction with Hart and Schierhoff and other criminals, who were under suspicion of having been implicated in several robberies and holdups that had occurred in Sacramento county, and would give such information as he obtained to Officer Robbins, so that such crimes might be frustrated. It appears that the appellant had been twice convicted of a felony before, and that at the time of the attempted robbery of the Plantation Inn, on September 15, 1924, the appellant was under probation for a crime committed in Contra Costa county. The voluntary statement made by the appellant, and which, as stated, was exceedingly long, and which was read to the jury, contained a statement of the appellant to the effect that, when granted probation, it was understood that he was to co-operate with the officers in uncovering crime by pretending to be still a criminal and thus gain the confidence of the criminal element, and inform the officers of any contemplated crimes. The appellant admitted, however, that he had been contradicted in this particular by the officials who had granted him probation, and appellant, McNett, was put through a long and thorough questioning by the district attorney and all his statements and actions and all surrounding circumstances were thus put before the jury in the reading of this statement. The jury thus had before them, in contrast with the testimony of Davis, the story of McNett as given in the voluntary statement to the district attorney.

In support of the appeal of appellant, it is contended: (1) That the evidence does not support the verdict. (2) That the court erred in denying his motion for an instructed verdict after the completion of the people's case. (3) That the court erred in its instructions to the jury. (4) That the court erred in its rulings on admissibility of evidence. (5) That the court had no power to impose a definite term of years.

We will first consider the ground that the evidence does not support the verdict. The testimony of Davis, the accomplice, in most particulars seems clear enough. However, he was sharply contradicted in very important particulars by the three deputy sheriffs Robbins, Bryant, and Garibaldi, who were stationed at the oil station near the Plantation Inn, the scene of the attempted robbery. Davis testified that the appellant, McNett, was in the automobile at the time the machine drew up to a place near the oil station, and that he got out of the machine at the same time Hart and Schierhoff did; the three officers just named testifying positively that only two men got out of the machine. Davis, the accomplice, also testified that he got out of the automobile after the firing commenced, but it was not a natural thing for Davis to get out of the automobile after being fired upon, and he was contradicted in this by the three officers named. We thus find that the testimony of an accomplice is contradicted in very vital matters by three officers of the law, who were stationed at the place at the time for the purpose of apprehending those whom they had received advance information were to commit the crime. It would seem that there could be no possible motive for these officers to misrepresent the facts; on the contrary, there is every reason for the belief that the officers stated the truth, and were in a position to observe and to tell accurately just what in fact did happen and who were present. It is true that the witness Mrs. Hartley and her son, Ivan Hartley, testified that Robbins had told them that there was a fourth man in the machine, but Robbins denied making this statement. Conceding that the statements of Robbins were inconsistent, it can hardly be considered in any sense as evidence against the appellant, McNett, and could be considered only as tending to discredit the testimony of Robbins, and it would seem that its greatest effect would be to eliminate the testimony of Robbins. If we consider the testimony of Robbins as eliminated, we have a verdict supported only by the testimony of an accomplice, corroborated, if at all, by such unfavorable inferences as can be drawn, but which do not necessarily arise from the statement of McNett. It seems that the accomplice Davis was not apprehended after the commission of the crime, but that subsequently he voluntarily gave himself up and entered a plea of guilty. The inference is plain that Davis undoubtedly was assisting the prosecution in the hope of being given a lighter sentence, and it also appears in the record that at the time he gave his testimony he had pending an application for probation. For these reasons it would seem that the testimony of the accomplice Davis cannot be considered as very strong or convincing.

We have heretofore referred to the statement made by the appellant, McNett, to the district attorney shortly after the commission of the crime. It is too long to be quoted herein, consisting, as we have stated, of some 77 pages of typewriting.

McNett's statement that he was a feigned accomplice, acting in co-operation with Deputy Sheriff Robbins, is not without corroboration. It appeared irresistibly from the evidence that the sheriff's office had advance information of the intended robbery; otherwise there would have been no occasion to station five officers, two in the Plantation

Inn and three at the oil station. McNett stated: That he "was working for the sheriff's office to apprehend." That he called Robbins up about 2 p. m. of the day of the crime and told him "that these men were planning on robbing the Plantation Inn that night." That he first told the officers of such plan two or three days before that. That Robbins instructed him what to do in apparent co-operation with these men. That about 10 p. m. of the day of the crime he called up Ellis Jones, the sheriff, and said to him: "'Tell Robbins the boys are on their way out;' and he says, 'Who is this'? I says, 'A friend of Robbins, * * * Jack,' that is the name that Robbins had me call him up under for * * * several months; * * * and he says, 'All right, thanks;' and I says, 'Good night,' * * * and we hung up." That, while he was operating for the sheriff's office, Robbins gave him a "25 Colt's automatic." That later he returned the "25" to Robbins, who then gave him "a 45 Colt's." None of the foregoing statements were contradicted by any witness. It is a reasonable inference that at least the sheriff would have been placed upon the witness stand to contradict the statement that McNett informed him of the intended crime if the statement is not true. If McNett was a real accomplice, it was a very unnatural thing for him to keep the officers informed of the contemplated crime and to again inform the sheriff thereof immediately prior thereto.

[1] While, of course, it is axiomatic that corroborative evidence of that given by an accomplice need not be direct and positive, and while circumstantial evidence, which tends to connect the defendant with the commission if the crime charged, is sufficient to fulfill the requirements of the law, and while the corroborative evidence required by the provisions of section 1111 of the Penal Code need not be strong and is sufficient if it tends to connect the defendant with the commission of the crime, though if it stood alone it would be entitled to but little weight (People v. McLean, 84 Cal. 480, 24 P. 32; People v. Barker, 114 Cal. 617, 46 P. 601), and while such testimony need not extend to every fact in detail covered by the statement of the accomplice (People v. Cloonan, 50 Cal. 449; People v. Kunz, 73 Cal. 315, 14 P. 836), and while it has been held that sometimes a fact or circumstance which seems to be very slight carries the quality of sufficient corroborative proof, and while it may be claimed that the corroborative evidence in the instant case is sufficient under section 1111 of the Penal Code, yet we are constrained to hold to the opinion that such corroborative evidence in the instant case is not so clear and convincing as to render serious errors occurring at the trial harmless.

[2, 3] We will next consider the fourth point, to wit, that the court erred in its rulings on the admissibility of evidence. The trial court admitted and there was read to the jury that portion of the statement of the appellant, McNett, wherein appeared in detail what occurred in the court of Judge McKenzie in Contra Costa county, including a statement made by the district attorney of that county, and which we think was purely hearsay, and its admission was immaterial and highly prejudicial to the rights of the defendant, especially that portion which related to the commission of other crimes by the appellant. The reference in the statement of the district attorney of Contra Costa county to crimes committed by the appellant in other counties doubtless had a decided influence on the jury, especially the reference to a gas station holdup in Butte county; it being a crime apparently similar to the one committed in the instant case. We quote from the record a portion of the statements admitted:

> "* * * Q. (interposing). Well, then, Mr. Tinning said (reads quotation): 'Well, if the court please, I want to say right here, that there was no knowledge'— The court interrupted and said: 'I mean he was sent off to go and help these officers. Mr. Tinning: No, sir; he was not. I positively wanted to make that clear. Before this man was released, there was a long discussion as to whether he should be given parole or not—probation. It was necessary to ask—we weren't going to release him in this county on probation, if he was going to be arrested for some transaction that had occurred prior to his arrest in this county, and it was for that purpose, and that purpose alone, that inquiry was made in the different counties where he had committed offenses, and in each of those counties the sheriff, or some other officer had been here and had gone over all those facts, and, after that was done, and that testimony was written up and in the hands of the district attorneys of the various counties, we inquired of them whether or not they desired to prosecute, and the only place where there was any difficulty about it was in Butte county, where that gas station holdup occurred, and there was some question there, and there was a delay of a couple of weeks before they determined what position they would take. * * * When McNett received his order of probation, he was advised by me, and his wife was advised by me, that he was not to associate with criminals, and was to have nothing to do with them, and that, if he did, I went so far as this, to ask his wife if he did commence to associate with them, to advise our office so that we could take steps to return him here. * * * I never encouraged him or any man—I say this, because I want it clear as to what his instructions were—to in any way act as a stool pigeon, or to go out and inform himself as to what other criminals were doing, and it was a surprise to me to find when this matter came up that he had been actively engaged or participated as a passive or active member of the group that were committing crime. I had understood and knew from what he had done here, that he knew enough of these men to be able to tell from newspaper articles who committed crimes and that sort of thing, and I never felt that

there was anything improper in that, but I certainly would feel, and I think any officer would feel, it was improper for a man that was sent away to rehabilitate, to again mix up with me violating the law, both because it put a premium on granting probation to stool pigeons, and, most important of all, it would not allow the man to rehabilitate himself, and I want my statement to be perfectly clear, because it was made clear to both McNett and his wife, that they weren't to associate with criminal associations. Isn't that true, Mr. McNett? Mr. McNett: A. Yes, sir. * * * Mr. Tinning: I made it very clear? Mr. McNett: A. Yes, sir. Mr. Tinning: I went so far as to tell your wife just what I have said, if you did start in missing, I wanted to know it. Mr. McNett: Yes; you told her that. You made the same remark to me, but I was given to understand through Mr. Harrison and the sheriff's office here, and what the other sheriffs had told me, that I was to clear up what crimes that had already taken place that I knew of. Mr. Tinning: It was never made a condition, either understood or expressed or inexpressed, that you were to go out and ferret out crime and act as a stool pigeon to the sheriff's office of Sacramento county or any other county? Mr. McNett: Not through you; no, sir.'"

The court first sustained objections made by the appellant to the foregoing testimony, but subsequently changed his ruling and permitted this evidence to stand. It would seem even if in his statement to the district attorney McNett had admitted these other crimes, such admissions could not properly have been introduced in evidence, because it is not possible to convict a defendant of one crime on proof of other independent crimes. People v. Adams (Cal. App.) 244 P. 106.

During the argument of counsel for the defendant, he stated:

"Because he (referring to McNett) has acted in the capacity of what we term a stool pigeon in this case for the sheriff's office, his conduct is being criticized by the men who inaugurated a system of stool pigeon in this county."

He was then interrupted by the district attorney, who used the following language:

"Mr. Henderson: Now, we object to that, if your honor please. I have never used a stool pigeon in any of my work. Mr. Russell is going out of his way to state a malignant falsehood to this jury. The men that I have employed in the district attorney's office have been detectives, investigators. A stool pigeon is a criminal who does just what McNett did. My men went out, just the same as traffic officers went out, to see the violations of the law that were performed, and we have yet to hear Mr. Russell or the Sacramento Bee or anybody else call the traffic officers stool pigeons."

Thereupon the court voluntarily used the following language:

"The Court: I think Mr. Russell knows himself that he was saying what was untrue when he made that statement. Mr. Russell knows that there hasn't been, in this court, a stool pigeon used on behalf of the people, and there hasn't been a stool pigeon used by either the district attorney's office, or in this court, and when you made that statement, Mr. Russell, I think you deliberately made a statement that you knew was untrue, and the court will state that to you, or anybody else present.

"Mr. Russell: May I be permitted to reply, your honor?

"The Court: You may proceed with your argument.

"Mr. Russell: I desire, at this time, to note an exception to your honor's remarks in reference to your statement about my statement."

[4] We think the language, especially of the court toward the defendant's counsel, must necessarily have had a tendency to prejudice the jury against the defendant's case. The jury may well have drawn the inference from such statements that the court believed that the conduct of the defendant was necessarily criminal.

The next point we will consider is that the court erred in instructions to the jury. We think it is sufficient, however, to say that there was no error in giving or refusing instructions.

[5] The last point raised for reversal is that the court had no power to impose a definite term of years, but should have pronounced a judgment for an indeterminate period. As the law now stands, it would seem that the opinion in the case of People v. Lee, 36 Cal. App. 323, 172 P. 158, applies. However, the pronouncement of an erroneous sentence would not be sufficient grounds for a reversal, but would be an informality which could be corrected by having the sentence again pronounced, and, in view of the fact that we feel compelled to reverse this case, we see no occasion for dealing with this point in greater detail.

For the reasons given, we are led to the conclusion that the defendant was not fairly tried nor justly convicted, and it therefore follows that the order denying his motion for a new trial and from the judgment and sentence of imprisonment must be reversed. It is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

80 Cal. App. 182

PEOPLE v. FERRARI. (Cr. 1340.) *

(District Court of Appeal, First District, Division 2, California. Dec. 9, 1926.)

1. Infants 🔑20—Defendant might be convicted of lewd acts with child not "constituting other crime," since prosecutrix testified that one crime followed other and jury might believe testimony as to one only (Pen. Code, §§ 288, 288a).

Defendant might be convicted under Pen. Code, § 288, prohibiting lewd acts with child other than acts constituting other crimes despite evidence of commission of offense under section 288a, since (1) prosecutrix testified that one crime followed other, and (2) jury might believe testimony of prosecutrix as to one crime only.

2. Infants 🔑20—Statements held admissible to show outcry in prosecution for lewd acts with child (Pen. Code, § 288).

Testimony of statements by prosecutrix to other children *held* admissible to show immediate outcry in prosecution under Pen. Code, § 288, prohibiting lewd and lascivious acts with child under 14 years of age.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Ceasar Ferrari was convicted of violating Pen. Code, § 88, condemning certain lewd and lascivious acts with a child under age of 14 years, and he appeals. Affirmed.

Elmer E. Robinson and Frank T. McGrath, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, of San Francisco, for the People.

NOURSE, J. The defendant was charged in the information with the commission of the offense denounced by section 288 of the Penal Code. The jury returned a verdict of guilty as charged, and from the judgment following the verdict and from the order denying his motion for a new trial the defendant has appealed on a typewritten record.

Testimony was offered to show that the defendant took the prosecutrix, a girl of seven years, into his bedroom, placed her upon the bed, removed some of her underclothing, and then committed the criminal act covered by section 288a of the Penal Code. The testimony of the prosecutrix was sufficient to show the commission of both offenses covered by these two sections of the Code, and other evidence was received, both direct and circumstantial, tending to corroborate her as to the first offense, and also showing similar acts by this defendant on other occasions. All this evidence was denied by the defendant when called as a witness in his own behalf.

[1] On this appeal the defendant concedes that the evidence was sufficient to constitute the crime as defined by the latter section, and, for this reason, argues that he could not have been guilty of any crime under section 288. The point is that because section 288 covers lewd and lascivious acts upon a child under 14 years of age "other than the acts constituting other crimes" provided for in the Code, and because testimony was given tending to show the commission of the crime covered by section 288a, the former section is not applicable to the facts proved. The answer is that the testimony of the prosecutrix tended to show that two separate offenses were committed, one directly following the other, and that it was the province of the jury to determine whether it should believe all the testimony of the prosecutrix or whether it should accept her testimony in so far as it related to the charge of lascivious conduct alone. In support of the verdict, we must presume that the jury was satisfied with the testimony covering the acts covered by section 288, and this appears reasonable in view of the fact that there was some corroboration of this testimony as well as evidence of similar acts on other occasions.

[2] Objection is made to the rulings of the trial judge in admitting testimony of statements made by the prosecutrix to other children of the neighborhood. The testimony was offered to show outcry on the part of the prosecutrix immediately following the commission of the offense and was admissible for that purpose. People v. Mayes, 66 Cal. 597, 599, 6 P. 691, 56 Am. Rep. 126; People v. Porter, 48 Cal. App. 237, 241, 191 P. 951.

We find no error in the record.

Judgment and order affirmed.

We concur: PRESTON, Presiding Justice, pro tem.; STURTEVANT, J.

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80 Cal. App. 230

LONGMIRE v. KRUGER. (Civ. 3167.)

(District Court of Appeal, Third District, California. Dec. 10, 1926.)

1. Deeds 🔑196(2)—Deed from parent to child is presumed valid, but burden is on child, exercising authority over dependent parent, to show that gift conveyance was fair and free from fraud.

In equity, deed from parent to child is presumed valid, but where parent is aged, infirm, or otherwise in condition of dependency on child, who exercises authority over him, presumption arises which places burden on beneficiary of gift conveyance to show that transaction was fair and free from fraud.

2. Deeds 🔑211(4)—Deed from aged, infirm parent to child exercising authority over him will be set aside for undue influence on slight evidence.

Equity will scrutinize with great care transaction in which aged, infirm, or otherwise dependent parent makes gift conveyance to child exercising authority over him, and slight

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*Hearing denied by Supreme Court February 7, 1927.

evidence is sufficient to warrant setting aside deed for undue influence.

3. Deeds 🔑211(4)—Sufficiency of proof of undue influence depends on circumstances.

What constitutes sufficient proof of undue influence, for which deed will be set aside, depends on facts and circumstances of each particular case.

4. Deeds 🔑196(3)—Gifts 🔑47(3)—Slight evidence that gift or conveyance inter vivos by aged, infirm person was coerced shifts burden to beneficiary to show freedom from undue influence.

With respect to gifts or conveyances inter vivos, as distinguished from wills, grantor's extreme age and infirmity, with slight evidence of circumstances from which it may be inferred that instrument was product of coercion, will suffice to shift burden to beneficiary to show affirmatively that transaction was fair and free from undue influence.

5. Deeds 🔑211(4)—Judgment that deed was result of grantee's undue influence on aged, infirm grandmother held supported by evidence.

Evidence *held* sufficient to support judgment that deed sought to be set aside was result of grantee's undue influence on his aged, infirm, and partially blind grandmother.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by S. Longmire, as administrator of the estate of Madura Coyle, deceased, against Hartley Kruger. Judgment for plaintiff, and defendant appeals. Affirmed.

F. W. Henderson, of Merced, for appellant.

Edward Bickmore, of Merced, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment canceling a deed of conveyance upon the ground of undue influence. The complaint also charged that the deed was the product of an unsound mind and that it was procured by fraud. Upon both of these last-mentioned issues the trial court found for the defendant. The only question involved in this appeal is whether the findings and judgment are supported by the evidence.

For many years prior to the execution of the deed in question Madura Coyle, an old, partially blind, and feeble widow, resided with her grandson, Hartley Kruger, at her home in Gustine, where he had lived since his childhood days. She had been twice married, and both of her husbands were dead. Her relatives consisted of a son, S. Longmire, and his family, who lived at Turlock, and one other grandson, Roy Kruger, the brother of defendant. The grantor owned the premises where they resided, which was valued at $3,000. She also had about $1,000 cash in bank. For many years both Hartley and Roy Kruger lived with their grandmother, who treated them as a mother would deal toward her own natural children. Some ten years prior to the making of the deed in question Roy married and established a home of his own, while Hartley continued to live with his grandmother, looking after her personal needs and household affairs, but living largely upon her money. She held a deep regard for Hartley and reposed great confidence in him, authorizing him to draw checks upon her bank account. She declared her preference for him because he had always remained with her and she felt that she could rely upon him. She was accustomed to make frequent visits to her son's home at Turlock, where she remained for weeks at a time. She appeared to be upon excellent terms with all of her relatives.

There is some conflict as to her physical condition, but it satisfactorily appears that she was 86 years of age, nearly blind, feeble and helpless, wandering about her home with a cane, and sometimes becoming lost in going from room to room. She was frequently ill and her memory was poor. Her attending physician testified that she was afflicted with a complication of ailments, including high blood pressure, indigestion, together with liver and kidney complaints; she fell in occasional spasms and lay unconscious for many hours. These spells occurred almost daily toward the latter portion of her life. Several witnesses referred to her as feeble-minded, old, or stupid. She was often forgetful, confused, and erratic. Evidently she was greatly impaired, mentally and physically, from both age and disease.

The defendant testified that in April, 1921, his grandmother told him she wanted to fix her property so there would be no dispute over it after she was gone, and for that purpose she sent him to summon a lawyer, together with her son, S. Longmire, who subsequently met at her home, where her will was prepared and executed. Her son testified that he never spoke to her about disposing of her property by will or otherwise, and, upon the contrary, that he considered her incompetent to make a will, yet he did not interfere with her purpose nor attempt to suggest how she should divide her property.

Mabel Burg, a daughter of plaintiff, testified that at the time of the making of the will in April, 1921, her grandmother had said that she wanted to give one-half of her property to her son and one-fourth to each of her grandsons, but that the defendant said to her, "No, you make it one-third; You make it one-third." And the witness concluded by saying, "And so she made it one-third to each." The son, Mr. Longmire, took no part in arranging for or making the will. The defendant testified that after the will was executed the attorney took it away with him, although he contradicted this statement and said that he rarely ever took charge of a will and he did not remember taking this one with him. At least the will was never again seen, and its disappearance is not accounted for.

Immediately after making her will Mrs. Coyle went to live with her son at Turlock. During the 20 months in which she lived with her son she made occasional brief visits to her home at Gustine. The defendant usually took her back and forth in his machine. At the time of the execution of the deed in question the defendant went to Turlock and took his grandmother to her home, where she remained for one week. No one except the grantor and the defendant occupied the home during this period of time. During this visit, and on September 10, 1921, the defendant procured Mr. Perrier, an attorney residing at Gustine, to prepare a gift deed from Mrs. Coyle to the defendant and bring it to the home to be executed. The defendant furnished all the information, including the description of the property, from which the deed was prepared. Mr. Perrier was the same attorney whom the defendant had procured to prepare the will some six months previous. Mrs. Coyle had never met this attorney except upon these two occasions, and had not counseled with him about either transaction. Having prepared the deed, the attorney brought it to the house, where he found the grantor in the presence of defendant and his friend, Mr. Davenport. The conversation regarding the execution of the deed was testified to by Mr. Perrier, and was not only exceedingly brief, but indicated prearrangement and a thorough understanding between himself and the defendant. The old lady had no opportunity for consultation or independent advice. Her replies to his inquiries throw very little light upon her understanding. He said:

> "I went to Mrs. Coyle's house. * * * I would not really state who asked me to go. I went down that morning with the deed, and Mrs. Coyle was in the room, and I said to her, 'Do you wish me to make you a deed of this property to Hartley Kruger?' And she said, 'I do,' or words to that effect. I said, 'You understand that in deeding this over you are giving the property to him?' And she said to me, 'I do.' I said, 'You are ready, then, to sign this deed?' And she said, 'I am.' And I said, 'All right; if you'll just come over here and sign it. * * *' She was unable to write, so she made a mark, and I wrote her name. * * * We signed, myself, as far as I can remember, and Mr. Davenport. * * * That was about all that was said in my presence about the deed."

As to her competency, he said:

> "Q. In your opinion, at the time of the execution of this instrument, was she mentally competent to make a deed? A. I would have no reason to say she was not. I would not be in a position to say, one way or another; it's a hard question to answer; by taking the time—the short time I was there—it was just perfect."

The attorney testified that he had met the grantor before, but never had any conversation with her. The only evidence of any previous meeting between them was at the time of the execution of the will. After the execution of the deed it was handed to the defendant, who said nothing about it to the Longmire family, and who failed to record it for some six months, and until he heard that plaintiff was searching the record to discover it, having learned of its existence from other sources. Immediately upon procuring this deed the defendant took his grandmother back to the home of her son at Turlock, saying that she required personal attention and he had no means of taking care of her.

Several months later, during the following spring, the defendant and his brother Roy met their grandmother at the Longmire home in Turlock. The defendant testified that on this occasion his brother Roy asked Mrs. Coyle why she had made this deed. And the defendant then said:

> "I told her she didn't need to answer the question if she didn't want to, but she said it was her own property and she thought she had a right to do what she pleased with it."

One Wassum, a neighbor, who was present at this conversation, said she asked the defendant why he had not been satisfied with a child's share of the property and that he replied:

> "I have got that deed, and I'm going to keep it. I have got Roy where I want him now, and I'll make a good dog out of him; they'll have to come to me from now on."

This witness then asked Mrs. Coyle if she had really deeded the property away, and she replied:

> "Not that I know of, but they say I have."

This last statement of the grantor was corroborated by other witnesses. Referring to the making of the will, Roy asked his grandmother if she wanted to divide her property one-third each, and she said: "No, she wanted to give her son one-half, and one quarter each to her grandsons, but that he (the defendant) made her draw it up one-third each."

Mr. Longmire, the plaintiff, testified that long prior to his mother's death she urged him to have the deed set aside, and that she always told him she did not remember making the deed. Subsequently, upon proceedings duly had, he was appointed and qualified as her guardian, and immediately commenced an action to set aside the deed. Pending this suit she died; he was appointed administrator of her estate, and as such was substituted as plaintiff and continued the proceeding.

Upon this evidence the trial court found the issues of unsound mind and fraud to be untrue, but upon the second cause of action found in favor of plaintiff, as follows:

> "That Madura Coyle was of weak and vacillating mind, by reason of extreme old age, illness, physical weakness, and a feeling of dependency, and by reason of said mental weakness was easily susceptible to the influence of others. * * * That by reason thereof, on September 10, 1921, the defendant * * * acquired a dominating and controlling influence over the mind and actions of the said Madura Coyle, which * * * overpowered the mind and will, and * * * did cause (her) * * * to execute the alleged deed. That said instrument was not the deed of Madura Coyle, and was not executed by her of her own free will and accord, but that the same was executed under the undue influence of defendant. * * *"

Following these findings a judgment was rendered and entered setting aside the deed as void.

The appellant asserts that there is no substantial evidence in this record to support the contention that undue influence was actually exerted upon the grantor to procure the deed in question; that mere opportunity to employ such influence, or mere inference that it may have been used, is insufficient to warrant the cancellation of a deed. In support of his contention the appellant cites Broaddus v. James, 13 Cal. App. at page 472, 110 P. 161, which was an appeal from a judgment upholding a deed of gift from a mother to her daughter, in which the court said:

> "The mere relation of parent and child is not sufficient to invalidate a deed from the former to the latter. It is a circumstance, of course, inviting careful consideration to the transaction, but before it can justify the inference of undue influence there must be added, imposition, fraud, importunity or something of that kind. It is so expressed in 2 Pomeroy's Equity Jurisprudence, 962, and Mackall v. Mackall, 135 U. S. 167, 10 S. Ct. 705, 34 L. Ed. 84.

[1] In the text of Pomeroy's Equity, above referred to, after discussing the subject of conveyances from a child to a parent, the author says:

> "Where the positions of the two parties are reversed, where the parent is aged, infirm, or otherwise in a condition of dependence upon his own child, and the child occupies a corresponding relation of authority, conveyances conferring benefits upon the child, will be set aside. Cases of this kind plainly turn upon the exercise of actual undue influence, and not upon any presumption of invalidity; a gift from parent to child is certainly not presumed to be invalid."

[2] Unquestionably this is the rule of equity, and a deed of conveyance from a parent to a child is not presumed to be invalid. Indeed, without further facts, just the contrary is true, and such a deed is presumed to be valid. 3 Thompson on Real Property, 1052, § 2886; 2 Pomeroy's Equity Jur. (4th Ed.) 2076, § 962. But where the parent is aged, infirm, or otherwise in a condition of dependency upon the child, who exercises authority over him, a presumption arises which places the burden upon the beneficiary of the gift-conveyance, to show the transaction was fair and free from fraud. Equity will scrutinize such a transaction with great care, and, under such circumstances, slight evidence will suffice upon which to base a finding of undue influence and set aside the deed. 18 C. J. 445, § 552; 3 Thompson on Real Property, 1040, §§ 2877 2879; Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Richards v. Donner, 72 Cal. 207, 13 P. 584; Carleton v. Bonham, 60 Cal. App. 725, 739, 214 P. 503; Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289; Becker v. Schwerdtle, 6 Cal. App. 462, 92 P. 398.

In the case of Campbell v. Genshlea, 180 Cal. 213, 224, 180 P. 336, 341, it is said:

> "It is to be remembered that in a case involving a purported gift inter vivos, based upon an alleged consideration of love and affection, where the donee is a daughter having the control and direction of the aged donor, a strong presumption of confidential relation arises which would place upon the beneficiary in the transaction the burden of showing fairness in dealing and full understanding on the part of the person parting with the property. Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289. In the absence of such showing, the conveyance is presumed to have been obtained by undue influence and to be void. Piercy v. Piercy, 18 Cal. App. 751, 124 P. 561; Odell v. Moss, 130 Cal. 352, 62 P. 555; Ross v. Conway, 92 Cal. 632, 28 P. 785."

And in section 2877 of Thompson on Real Property, Id., it is said:

> "Weakness of mind furnishes ground of suspicion of improper influence, and therefore, if an unfair advantage over the grantor can be shown or inferred from the circumstances of the transaction, a court of equity will afford relief against it."

Harding v. Handy, 11 Wheat. (U. S.) 103, 6 L. Ed. 429, is authority for the statement that:

> "Extreme weakness will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though the contract in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet, if it should appear to be of such nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value, fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it."

With respect to the character of evidence which is necessary to adduce under circumstances similar to those presented in the case at bar, Mr. Tiffany, the author of that excellent authority on Real Property, in volume 2 (2d Ed.) p. 1640, § 439, says:

> "A conveyance may also be set aside on account of undue influence exerted upon the grantor. Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment. The fact that the parties stand in such a position toward one another, either by reason of relationship, professional employment, or otherwise, that the grantor is peculiarly susceptible to the exertion of influence by the grantee, is a consideration of primary importance in this connection, in cases where the transaction is in itself improvident or disadvantageous to the grantor. And the fact that the grantor is lacking in such mental vigor as to enable him to protect himself against imposition is a reason for the interposition of equity to protect him, although the mental weakness is not such as to justify him in being regarded as totally incapacitated."

The Civil Code, § 1575, defines undue influence, and subdivision 2 of that section reads:

> "Undue influence consists: In taking an unfair advantage of another's weakness of mind."

[3] The question of what constitutes sufficient proof of undue influence depends upon the facts and circumstances of each particular case. 3 Thompson on Real Property, § 2876; Shipman v. Furniss, 69 Ala. 555, 565, 44 Am. Rep. 528, 533. Quoting from the last-mentioned citation, this language is used:

> "What constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded." Bigelow on Frauds, 283; 1 Redfield on Wills, 530.

[4] The Estate of Donovan, 140 Cal. 390, 73 P. 1081, is relied upon by appellant as authority for his contention that the bare fact that the grantor and grantee occupied the relationship of loco parentis, and that the grantee had the opportunity to exert undue influence, and received the benefit of the conveyance, is insufficient upon which to set aside a deed, but that there must have been a showing of actual pressure which overpowered the mind and mastered the volition of the grantor, by such proof as is inconsistent with absence of undue influence, or the deed will be held to be valid. Estate of Kendrick, 130 Cal. 360, 368, 62 P. 605; Estate of McDevitt, 95 Cal. 17, 34, 30 P. 101; Estate of Carithers, 156 Cal. 428, 105 P. 127; Estate of Baird, 176 Cal. 381, 168 P. 561; Estate of Anderson, 185 Cal. 700, 198 P. 407. But the law makes a clear distinction between the proof of the existence of undue influence necessary to set aside a will, and that which is required to cancel a deed of gift or conveyance inter vivos. No presumptions of undue influence are indulged in upon the contest of a will, unless confidential relations are first established; but with respect to gifts or conveyances inter vivos, the extreme age and infirmity of the grantor, together with slight evidence of circumstances from which it may be inferred that the instrument was the product of coercion, will suffice to shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence.

In the case of Parfitt v. Lawless, 27 English Law Reports (N. S.) 215, Lord Penzance, in a most interesting opinion on this subject, says:

> "In equity, persons standing in certain relations to one another, such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward, are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that transaction was fairly conducted as though between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced over-reached by him of more mature intelligence. * * *
>
> "The influence which is undue in the case of gifts inter vivos, is very different from that which is required to set aside a will. In the case of gifts inter vivos, it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different."

[5] The fact that the defendant did not record his deed for a considerable period of time, and that he then recorded it only when the plaintiff had discovered its existence and was searching for it in the records of the county, is a suspicious circumstance which tends to indicate guilty conscience of unfair means resorted to in procuring the instrument. Piercy v. Piercy, 18 Cal. App. 751, 124 P. 561.

So, also, the radical change from the terms of the will, to an absolute conveyance of the bulk of her property, during the short period of six months, without any added knowledge on the part of the grantor, or any change in the relationship of the parties, to lead her to believe that her son was likely to oust defendant from his home, is also a circumstance indicating the result of undue influence upon her mind. In the case of Teter v. Teter, 59 W. Va. 449, 53 S. E. 779, the court says:

> "That a disposition previously intended is wholly changed and altered amounts to a circumstance, a fact, having direct and important bearing on the question of undue influence, where there is other evidence having a like tendency, is plain; but if there is a reason for it, or if there are facts and circumstances which the court can see may have been deemed by the grantor * * * a sufficient ground for the change, the force and effect of the circumstances are, in reason, seriously broken and impaired, if not wholly overthrown."

In this case the grantor and grantee occupied a relationship equivalent to that of loco parentis; they had lived together in the same household for years; the grantor had implicit confidence in the grantee, even to the extent of permitting him to draw checks upon her bank account. She was 86 years of age, infirm, partially blind, mentally and physically impaired by age and sickness; the grantee was 39 years of age and in the prime of health and vigor; the grantor previously made a will, the terms of which were radically changed by the deed in question, within the period of six months, without satisfactory explanation; the defendant obtained the bulk of the estate for the avowed consideration of love and affection; the deed was not recorded until the son of the grantor discovered its existence; the will disappeared, and the deed was kept a secret for a period of time; the grantee brought the grantor from her home where she then resided with her son and kept her in his home for a week, during which time no one else occupied the home; the grantee personally procured the attorney, giving him the information and description from which he drew the deed; the grantor never consulted with the attorney regarding the transaction; her son was kept in ignorance of the purpose of executing the deed; when the attorney brought the deed to the home, already prepared, the entire material part of his conversation regarding the deed consists of the following: "Do you wish me to make you a deed of this property to Hartley Kruger?" Answer: "I do." "You understand that in deeding this over, you are giving the property to him?" Answer: "I do." "You are ready to sign this deed?" Answer: "I am." And then he said: "If you'll just come here and sign it." Which she did by mark, being unable to write because of infirmity and blindness. Immediately after securing the deed, the grantee returned his grandmother to her son's home, saying he had no means of taking care of her.

These circumstances furnish ample evidence to support a judgment to the effect that the deed was the result of undue influence. The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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80 Cal. App. 271

ROBBINS v. HERCULES GASOLINE CO.[*]

(Civ. 5579.)

(District Court of Appeal, First District, Division 2, California. Dec. 14, 1926.)

1. Appeal and error 🔑657(1)—Circumstances of second hearing in personal injury case being shown only by affidavit, record might be returned for certification (Code Civ. Proc. § 953a).

Where, by affidavit, plaintiff, appealing under Code Civ. Proc. § 953a, showed that hearing on motion for nonsuit had been continued, that he had been granted leave to reopen case, that, after such reopening, ordinance offered in evidence had been excluded because not included in his complaint, reasons for affidavit being given that no reporter was present at second hearing, that defendant's counsel refused to stipulate facts stated and that trial judge was absent on vacation, record could be sent back for proper certification.

2. Master and servant 🔑322—Abutting owner causing excavations in street cannot pass duty of maintaining warning signals to contractor.

Though doctrine of respondeat superior generally does not apply where injury results from negligent acts of independent contractor, such rule has application where property owner knowingly causes excavations to be made in or obstructions to be erected on public streets or sidewalks fronting his property, owner then owing duty to public to maintain sufficient warning signals thereon.

3. Master and servant 🔑317—Abutting owner excavating in street with or without permit is liable for injuries from contractor's failure to maintain warning signals.

Where by statute or ordinance owner is prohibited from excavating or obstructing public street without permit, he is liable for injuries resulting from failure of contractor to maintain proper warning signals, whether work was done with or without permit.

4. Municipal corporations 🔑692—Anything unlawfully obstructing use of street is nuisance (Civ. Code, § 3479).

Anything unlawfully obstructing free passage for use of any public street is nuisance, in view of Civ. Code, § 3479.

5. Trial 🔑165—Noncompliance of excavation with permit held admitted by motion for nonsuit in personal injury action (Code Civ. Proc. § 1963, subds. 1, 20, 33).

Though defendant to suit for injuries resulting from fall into excavation dug at his orders would be presumed to have obtained permit required, in view of Code Civ. Proc. § 1963, subds. 1, 20, 33, there was reasonable inference from plaintiff's oral testimony as to lack of barriers and signal lights on night when accident oc-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[*] Rehearing denied January 10, 1927. Hearing denied by Supreme Court February 10, 1927.

curred that work was not done in manner designated in permit, which testimony, and inferences and presumptions therefrom, was admitted by motion for nonsuit.

6. Municipal corporations ⚷816(8)—Ordinance regulating construction of excavations in sidewalks is admissible on issue of negligence though not pleaded.

If ordinance regulating making of excavations in public streets and sidewalks should be again offered in evidence in new trial of action for personal injuries received from falling into unprotected excavation, such ordinance should be admitted notwithstanding plaintiff's failure to plead it, cause of action not being for violation of ordinance but for negligence in maintaining excavation without protections, and ordinance being evidence of such negligence.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action by Vernon W. Robbins against the Hercules Gasoline Company for personal injuries. From a judgment of nonsuit, plaintiff appeals. Reversed.

Charles G. Young and C. P. Johnson, both of Los Angeles, for appellant.

McComb & Hall, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued for damages caused by having fallen into an excavation in a sidewalk in a public street of the city of Los Angeles. He was nonsuited upon the ground that it appeared that the excavation had been made by an independent contractor acting under contract with the defendant. Plaintiff has appealed from the judgment of nonsuit under section 953a, Code of Civil Procedure. The notice to the clerk given under that section called for a transcript of all evidence offered or received, acts or statements of the court, and all minutes of the court. In an affidavit filed by plaintiff's counsel and certified by the clerk it appears that the hearing on the motion for nonsuit was continued from June 9, 1924, to June 23, 1924, and this is confirmed by the judgment. It also appears that on June 23 plaintiff requested and was granted leave to reopen his case; that he thereupon offered in evidence an ordinance of the city of Los Angeles relating to and regulating the making of excavations in public streets and sidewalks, and that said offer was rejected on the ground that the ordinance had not been pleaded in the complaint.

[1] The reasons for making the affidavit are stated to be that no reporter was present at the second hearing of the cause, that counsel for defendant refuses to stipulate as to the facts stated, and that the trial judge was absent on his vacation and could not be found. The respondent at this time objects to a consideration of the facts stated in the affidavit because it has not been certified by the trial judge. Under section 953, Code of Civil Procedure, we might return the record for proper certification, but this is not necessary because the judgment must be reversed irrespective of what appears in the affidavit.

The defendant had let a contract for the construction of a gas filling station on its property, and the contractor had made an excavation of about 20 feet in length across the sidewalk for the purpose of constructing a driveway over the sidewalk into the lot upon which the station was to be operated. This excavation was left wholly unprotected by barrier or warning light, and the plaintiff, on a dark and stormy night, while walking along the sidewalk, fell into the excavation and was injured. The only question presented on this record is whether the doctrine of respondeat superior applies.

[2, 3] Generally speaking, the rule does not apply where injury results from the negligent acts of an independent contractor, but it is a well-known exception to this rule that where the owner of property knowingly causes excavations to be made in or obstructions to be erected on the public street or sidewalk fronting his property, he owes a duty to the public to maintain sufficient warning signals thereon and cannot pass this duty on to another. Thus, where by statute or ordinance an owner is prohibited from excavating or obstructing a public street without permit, he is liable for injuries resulting from the failure of his contractor to maintain proper warning signals whether the work was done with or without permit—in the first instance, on the theory that through the permit he has assumed the duty of the municipality to maintain the street in a safe condition, and in the second instance, on the theory that, having acted in violation of law, he has created a nuisance per se. Colgrove v. Smith, 102 Cal. 220, 224, 36 P. 411, 27 L. R. A. 590; Luce v. Holloway, 156 Cal. 162, 165, 166, 103 P. 886.

[4, 5] When the plaintiff rested it appeared from the evidence that at the point where the alleged accident occurred a sidewalk had theretofore been constructed. It further appeared that the sidewalk had been torn up. It further appeared that the particular locality was within the city of Los Angeles. In connection with these facts it is apparent that anything which unlawfully obstructs the free passage or use of any public street is a nuisance (Civ. Code, § 3479), and that any one who negligently removes any public highway is guilty of a misdemeanor. To avoid the provisions of the statutes just quoted it is ordinarily provided by ordinance how, when, and in what manner excavations can be made without danger to the traveling public. It will be presumed that the ordinary course of business has been followed, that the law has been obeyed, and that a person is innocent of crime. Code Civ. Proc. § 1963, subds. 1, 20, and 33. At the time the motion for a nonsuit

was made the motion admitted the evidence that had been introduced by the plaintiff and the inferences and presumptions in his favor. Goldstone v. Merchants', etc., Co., 123 Cal. 625, 627, 56 P. 776; Hoff v. Los Angeles Pacific Co., 158 Cal. 596, 599, 112 P. 53. In accordance with one of the presumptions above stated it will be assumed that the excavation was not made without first obtaining a permit, because it will not be assumed that the defendant was guilty of a crime. However, in the case of the oral testimony that the accident occurred at night, that it was very dark at the place of the accident, that no barriers were installed, that no signal lights were in place, and that no guard was on duty, it may be reasonably inferred that the work was not done in the manner designated in the permit.

[6] As the cause must go back for a new trial, it is proper to say that if the municipal ordinance is again offered in evidence it should be admitted, notwithstanding the failure to plead it in the complaint. The cause is not one for a violation of the ordinance, but is for negligence in maintaining the excavation without proper barriers or lights, and the ordinance is evidence of such negligence. Martin v. Shea, 182 Cal. 130, 137, 187 P. 23; Szopieray v. West Berkeley Express, etc., Co., 194 Cal. 106, 113, 227 P. 720.

Judgment reversed.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 243

PEOPLE v. RUSSELL. (Cr. 1343.)*

(District Court of Appeal, First District, Division 2, California. Dec. 13, 1926.)

1. Criminal law 🔑829(16)—Refusal to instruct that mere declaration of witness was not binding held not prejudicial, in view of other instructions.

Refusing to instruct that jury was not bound by mere declaration of witness *held* not prejudicial, being abstract, embodied in other instructions, and in view of instruction that presumed truth of testimony might be repelled by its character.

2. Criminal law 🔑829(1)—Instructions covered by given instructions were properly refused.

Instructions covered by full, correct, and more direct and certain instructions given by court, were properly refused.

3. Criminal law 🔑829(14)—Refusing further instructions, where testimony stricken out, held not error.

Refusing instruction based on noncompletion of cross-examination of state's witness *held* not error, where testimony was stricken, and court instructed at the time and in the charge to disregard testimony.

4. Witnesses 🔑344(2)—In prosecution for lewd acts with child, evidence of similar charges by prosecutrix and her conviction held inadmissible for impeachment (Pen. Code, § 288).

Cross-examination as to whether prosecutrix had made similar charges of improper conduct against other men and been found guilty of immoral behavior *held* inadmissible for impeachment, in prosecution for lewd and lascivious acts with child under 14 years of age in violation of Pen. Code, § 288.

5. Infants 🔑20—Consent is not involved in prosecution for lewd acts with child, and testimony is inadmissible to show it (Pen. Code, § 288).

Crime, under Pen. Code, § 288, prohibiting certain lewd and lascivious acts with child under 14 years, does not require consent, and hence cross-examination of prosecutrix as to similar charges against other men and her conviction of immoral behavior is inadmissible to show consent.

6. Witnesses 🔑379(1)—In prosecution for lewd acts with child, testimony as to similar charges by prosecutrix and her conviction of immoral behavior held inadmissible as inconsistent statements (Code Civ. Proc. § 2049).

In prosecution for lewd acts with child, certain cross-examination of prosecutrix as to similar charges against other men and conviction of immoral behavior *held* inadmissible, as inconsistent statements, under Code Civ. Proc. § 2049, where prosecutrix had not stated that any other than defendant had committed crime.

7. Infants 🔑20—Evidence held to sustain conviction of lewd acts with child, where part only of testimony of prosecutrix as to acts and positions was inherently improbable (Pen. Code, § 288).

Where certain of prosecutrix's testimony as to acts and positions of prosecutrix and defendant at same time was inherently improbable, but certain of it was not, conviction, under Pen. Code, § 288, of lewd and lascivious acts with child under 14 years of age, *held* sustained by evidence.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Jess Russell was convicted under Pen. Code, § 288, prohibiting certain lewd and lascivious acts with a child under the age of 14 years, and he appeals. Affirmed.

Philip M. Carey and Marvin B. Sherwin, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

STURTEVANT, J. The district attorney filed an information against the defendant, charging him with having violated the provisions of section 288 of the Penal Code. The defendant entered a plea of not guilty and a trial was had before the trial court sitting with a jury. The jury returned a verdict of guilty. The defendant made a motion for a

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court February 10, 1927.

new trial, but his motion was denied. A judgment based on the verdict was entered and the defendant has appealed from the judgment and order.

The offense, it is claimed, was committed at a small house or shack at Seventy-Seventh avenue and East Fourteenth street in Oakland at about 4 p. m. in January, 1926, upon the body of Orpha Miller, a girl of 12 years of age. In presenting its case the prosecution called as a witness Orpha Miller, who testified to the acts done by the defendant at said time and place. The appellant claims that the judgment should be reversed because of the inherent improbability of the testimony given by the prosecutrix. She was on the stand as a witness a long time. Her testimony covers about 200 folios. As to the acts and positions of the prosecutrix and the acts and positions of the defendant at the same instant, the witness testified to many combinations. As to some of those combinations, the defendant is clearly right when he states that that particular testimony is inherently improbable, but as to other combinations, the attack is without merit. When the record stands thus it is within the province of the jury, being guided by proper instructions, to weigh the evidence and determine whether a part of the testimony is true, and, if so, to render a verdict accordingly. In such a case the court has no right to substitute its conclusion for the conclusion of the jury.

[1] The defendant asked the trial court to give an instruction which defendant numbered 21. The trial court did not do so. Its ruling is assigned as error. The instruction was framed by the defendant by quoting the language used by the writer of the opinion in Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513. The language quoted was taken from the sentence at the bottom of page 241 and the top of page 242 (116 P. 515). It has often been decided by the Supreme Court that the language used by the court in writing an opinion should not be used as an instruction. Assuming, without deciding, that the proposed instruction was a correct statement of the law, it is patent that it was but a mere abstract principle of law which is embodied in and forms a part of the basis for the broader instructions which were given by the court. The jury was instructed that it was the judge of the weight and effect of the evidence and of the credibility of the witnesses. It was also instructed that a witness is presumed to speak the truth, but that this presumption may be repelled by the character of his testimony. We may assume that defendant's counsel duly argued the abstract principle for which he now contends to the jury. In the face of the record which we have quoted we cannot see how he could have been prejudiced by the refusal of the trial court to read to the jury the abstract principle embodied in the requested instruction. People v. Delucchi, 17 Cal. App. 96, 110, 118 P. 935.

[2] The appellant complains because his requested instructions 14 and 19 were not given. His complaint is without support. The subject-matter of each of those instructions was covered by instructions which the court gave which were full and correct and which were more direct and certain in their meaning than the instructions requested.

[3] The plaintiff called and examined Mrs. Victoria Richards as one of its witnesses, and she testified to certain acts of the defendant which she claimed she saw looking through a window. The plaintiff then passed the witness to the defense. Mr. Carey, as attorney for the defendant, had propounded to the witness a few questions on cross-examination, when the witness began to weep. The court took a recess. After the recess, by consent, other witnesses were called. Later it was represented to the trial court that Mrs. Richards was suffering from a breakdown and that it would be six weeks before her health would permit her to subject herself to further cross-examination. Later Mr. Carey made a motion to strike out all of the testimony given by Mrs. Richards, and also that the court admonish the jury to disregard entirely the testimony of Mrs. Richards. The court granted the motion and admonished the jury in language that was most emphatic, clear and complete. No objection was intimated at that time by either party. Later, after the arguments had been made and as a part of its charge, the trial court again instructed the jury "not to consider any testimony or evidence which has by order of the court been stricken out. Such testimony or evidence should be treated by you as though you had never heard or seen it." In his requested instruction numbered 22 the defendant treated the same subject-matter. The appellant makes the point that the trial court committed error because it refused to give that requested instruction. The point is based on the claim that the trial court's instructions had not met the dilemma confronting court and counsel. We find no error in the court's refusal to give the requested instruction.

[4-6] While the prosecutrix was being cross-examined she was asked if she had not made similar charges against other men and that she had been found guilty of immoral behavior. It is settled law that such evidence was not admissible as going to the credibility of the witness. People v. Murphy, 53 Cal. App. 474, 481, 200 P. 484. The issue of consent or nonconsent was not involved in the instant case and the facts sought to be proved were not admissible for that purpose. Appellant says the testimony sought was admissible as inconsistent statements. Code Civ. Proc. § 2049. But it was not claimed the witness ever asserted that the particular attack alleged in the information was committed by any man other than the defendant.

[7] Returning to the first point discussed, we do not understand the appellant to claim

that in the sense in which the expression is ordinarily used that the evidence is insufficient to support the verdict. The respondent takes a different view of the appellant's contention. It is proper to state, therefore, that we have also considered the case from that angle. So viewed, the record discloses: That the information was filed March 25, 1926; a few weeks before that, the date not being exactly fixed, according to the testimony of Orpha Miller, Gustave Gorsky, and Laura Gorsky, the prosecutrix came out of the shack crying; according to the testimony of the prosecutrix and of her mother the child was then 12 years old; the shack was a one-room structure about 7 feet by 11 feet; according to the testimony of Orpha Miller, Gustave Gorsky, and Laura Gorsky, when the prosecutrix came out, she was followed almost immediately by the defendant, who came out, got in his car and attempted to drive off; that no one else was in the shack to come out or did come out; according to the testimony of the prosecutrix she screamed several times before coming out of the shack, and, according to Carrie J. Beal and Laura Gorsky, the screams of a child were heard coming from within the shack just before the prosecutrix came out, and, when the defendant came out he attempted to get in his car and drive off, but was stopped from driving off and held by Gorsky until the police came. It is therefore clear that no part of the case of the prosecution was left to be proved by the prosecutrix except the act, or acts, alleged to have been committed by the defendant inside of the shack. Those acts only rested for proof on the testimony of the prosecutrix and she testified fully as to those matters. We have held that we cannot say all of her testimony regarding those acts was inherently improbable, and we are constrained to hold that the appellant's claim that the evidence is insufficient may not be sustained.

We find no error in the record. The order and judgment appealed from are affirmed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

199 Cal. 759

In re SEXTON'S ESTATE.

SEXTON v. DALY et al.

(L. A. 9147.)

(Supreme Court of California. Dec. 9, 1926.)

1. Appeal and error 🔑979(2)—New trial 🔑70—Granting new trial for insufficiency of evidence is discretionary and will not be disturbed in absence of abuse of discretion.

Motion for new trial for insufficiency of evidence to sustain verdict is addressed to sound legal discretion of trial court, and its action in granting motion will not be disturbed on appeal unless clear abuse of discretion is shown.

2. Wills 🔑337—If evidence of testamentary incapacity would not support verdict for contestant, granting new trial on contestant's motion is abuse of discretion.

If evidence on issue of testator's mental incompetency would not support verdict for contestant, granting new trial on contestant's motion, based on insufficiency of evidence to support verdict, is abuse of discretion.

3. Wills 🔑50—Testator, understanding and remembering nature and extent of his property and his relations to natural objects of his bounty, has testamentary capacity.

Testator has testamentary capacity if, at time of making will, he has sufficient mental capacity to remember and understand nature of act, locality, nature, and situation of his property, and his relations to persons having claims on his bounty.

4. Wills 🔑53(2)—Actual mental condition of testatrix at time of execution of will is condition to be determined, in will contest.

To contest will on ground that deceased was of unsound mind, actual mental condition of testatrix at execution thereof is question to be determined, and her mental condition before or after execution is important only as tending to show mental condition at time of execution.

5. Wills 🔑55(1)—Weight to be given evidence of mental capacity before or after execution of will is for jury.

Evidence of testatrix' mental condition before or after execution of will, if it has any evidentiary force on issue of mental capacity at time of execution of will, is to be given such weight as jury thinks it deserves.

6. Wills 🔑34—To invalidate will, testatrix must be generally incompetent or subject to delusions influencing testamentary act.

Mental derangement sufficient to invalidate will must be insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity under which testatrix has hallucinations or delusions directly influencing testamentary act, and mere insanity, in medical sense of any mental unsoundness, is insufficient.

7. Wills 🔑52(1)—Testamentary capacity is presumed, and burden is on contestant to show testator was of unsound mind, when will was executed.

Testamentary capacity is presumed to exist until contrary is established, and burden is on contestant to show affirmatively and by preponderance of evidence that testator was of unsound mind when will was executed.

8. Wills 🔑55(1)—Testamentary incapacity held not shown.

Evidence *held* insufficient to show testamentary incapacity of testatrix when will was executed.

9. Wills 🔑50—Ability to transact important or ordinary business is not standard of testamentary capacity.

Ability to transact important, or even ordinary business, is not legal standard of testamentary capacity.

10. Evidence 🔑506—Physician's opinion as to testamentary capacity of testatrix held to invade province of jury.

In will contest on ground of lack of testamentary capacity, opinion of physician that testatrix was not capable of making will *held* of no probative value, but was mere opinion on question of mixed law and fact to be decided by jury.

In Bank.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Proceeding by Alva Daly and others for the probate of the will of Mary Sexton, deceased, opposed by Henry Sexton. From an order granting a new trial, after verdict upholding the will, proponents appeal. Reversed.

Joseph Scott and A. G. Ritter, both of Los Angeles, for appellants.

Verge, Cooney, Davin & Kearney, Arthur C. Verge and A. H. De Tremaudan, all of Los Angeles, for respondent.

FINLAYSON J. This is an appeal from an order granting a new trial, in a will contest, after the jury had returned a verdict upholding the will.

The document offered for probate was executed by Mary Sexton at San Francisco, on July 12, 1921. She died about three years later. Alva Daly, a daughter of the decedent, named in the proffered will as executrix, offered the instrument for probate. In due time Henry Sexton, the surviving husband of the testatrix, appeared and filed a contest. An answer to the contest was filed by all but one of those who were named in the will as legatees and devisees. Those thus answering will hereafter be referred to as the "proponents." The husband contested the will upon the grounds of insufficiency of execution, undue influence, and mental incompetency. A nonsuit was granted as to the first two grounds. The issue as to mental competency was submitted to the jury, resulting in a verdict for the proponents. Thereupon the contestant moved for a new trial upon a number of statutory grounds, one of which was that the evidence was insufficient to justify the verdict. The trial court granted the motion, and in so doing specifically stated in the order that the motion was granted solely upon the ground of insufficiency of the evidence to justify the verdict. It is from that order that the proponents have appealed.

Though something is said in the briefs about the sufficiency of the evidence upon the issue as to undue influence, we do not understand counsel on either side seriously to contend for a review of the trial court's disposition of that issue. On the contrary, it seems to be assumed in the briefs on both sides that the sole question to be considered here is this: Was the trial court warranted in granting a new trial upon the ground of the insufficiency of the evidence to justify the jury's finding of mental competency? For the purpose of this decision, we shall adopt counsel's assumption and shall confine our attention to that one question.

[1, 2] A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and its action in granting the motion will not be disturbed on appeal unless it appear that there was a clear abuse of such discretion. Warner v. Thomas, etc., Works, 105 Cal. 409, 38 P. 960; Estate of Motz, 136 Cal. 558, 69 P. 294; Estate of Everts, 163 Cal. 449, 125 P. 1058; Estate of Wall, 183 Cal. 431, 191 P. 687; De Vall v. Perrin, 34 Cal. App. 676, 168 P. 584. The precise test whereby to determine when a trial court abuses its discretion in granting a new trial after the verdict of a jury upholding a will appears not to have been determined by any previous decision of this court. This much, however, seems certain. If the entire evidence upon the issue of mental competency is of such a character that it would not have supported a verdict for the contestant had the jury brought in such a verdict, then it should be held that the trial court abused its discretion in granting the new trial. Indeed, this seems to be the view taken by counsel on both sides of this appeal. The question then is this: If the jury had found for contestant, would its verdict have totally lacked the support of substantial evidence? If it would, then the order granting the new trial must be reversed.

Mary Sexton died at Santa Monica Canyon, in Los Angeles county, on September 25, 1924, at the age of 64 years. She left surviving her the contestant, a second husband to whom she was married in 1899, one child by that husband, and five children by her first husband. The proponents of the will are the five children by the first husband. By the terms of the will she left all of her property to her six children, share and share alike. She suffered a slight stroke of apoplexy in 1913—11 years before her death. During the ensuing years of her life she suffered a few other slight strokes, and finally, a few days before her death, she was the victim of a very severe stroke, from the effects of which she died. The stroke which she suffered in 1913 left her face twisted and her right side paralyzed, so that she walked with a limp. For a long time prior to the execution of the will on July 12, 1921, her organs of speech were so affected by the preceding apoplectic stroke or strokes that her ability to speak was considerably affected. As some of the witnesses put it, she had "some throat affection" and "could not talk above a whisper." For many years prior to her death she and contestant resided together at Santa Monica Canyon. From the latter part of May to about the middle of July, in 1921, Mrs. Sexton was the guest of her daughter, Mrs. Daly, and of a son, both of whom lived in the central part of the state—the daughter in San Francisco and the son at Lodi. The first two weeks of the visit were spent by Mrs. Sexton with her daughter, at the latter's apartment in San Francisco. Then she visited her son and his family at Lodi, remaining with them until the early part of July, when she returned to Mrs. Daly's home in San Francisco where she remained until she returned to her own home in Santa Monica Canyon about the middle of July. On her trip from Santa Monica Canyon to San Francisco, as well as on her trip from the latter city to Lodi, Mrs. Sexton was accompanied by Mrs. Daly. But it seems that on the return trip from her son's home at Lodi to her daughter's apartment in San Francisco, she traveled alone and unassisted.

According to the testimony of Mrs. Daly, her mother, almost from the time of her arrival in San Francisco in the latter part of May, repeatedly said that she wanted to make her will. Accordingly, Mrs. Daly, shortly after her mother's return from Lodi, requested Mr. Daly, her husband, to ask some lawyer to come to their apartment for the purpose of drafting a will in accordance with her mother's wishes. On the evening of July 11th there arrived at the apartment an attorney, who practiced his profession in San Francisco and who had been requested by Mr. Daly to call. Present upon that occasion were the lawyer, the testatrix, a son by the first husband, the daughter, Mrs. Daly, and the latter's husband. The lawyer talked with Mrs. Sexton about the nature of the will which she wished to make, received instructions from her, and made such notes as were necessary to enable him to prepare the document. After about an hour's stay he took his departure. The next day Mrs. Sexton, her son, and Mrs. Daly went to the lawyer's office. Meanwhile the lawyer had drafted the document in accordance with the instructions given him by Mrs. Sexton, and it was ready for execution by her when she called at his office. The lawyer, accompanied only by Mrs. Sexton, stepped across a hall from his office into an office occupied by two other lawyers, both of whom witnessed the execution of the will. The lawyer by whom the document was drawn read it to Mrs. Sexton before she signed it. After it was duly subscribed and properly witnessed, it was delivered by the attorney to Mrs. Sexton, who thereafter handed it to her daughter, presumably for safe-keeping.

It is apparent from what has been said that this is not a case of delusion taking hold of a vigorous mind, but of a loss of mental power; that it is not the case of an irregular working of the mental faculties, but of a ceasing to work with normal strength. It was contestant's theory at the trial, not that Mrs. Sexton was an irrational lunatic, an idiot or a congenital imbecile, or that she was the victim of insane delusions, but that her mental processes were so benumbed by the paralytic strokes that her mind was not strong and clear enough to be able to make a valid disposition of her property by will. Without doubt she was a woman of weakened mentality at the time when she executed her will. Her intellectual faculties were considerably enfeebled. But the question is, Was there any substantial evidence to show that her mental weakness was of such a degree that it incapacitated her from making a valid will? Was she, in short, a woman of sound and disposing mind and memory? Before proceeding to a more detailed consideration of the evidence, it may aid us to a correct solution of this question if we briefly advert to a few rules of law applicable to cases of this character.

[3-5] A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. Estate of Motz, supra; Estate of Dole, 147 Cal. 188, 81 P. 534; Estate of Huston, 163 Cal. 166, 124 P. 852; Estate of De Laveaga, 165 Cal. 607, 133 P. 307; Estate of Casarotti, 184 Cal. 73, 192 P. 1085. The actual mental condition of the testator *at the time of the execution of the will* is the question to be determined. Estate of Perkins, 195 Cal. 699, 235 P. 45; 26 Cal. Jur. 635. Evidence as to mental condition before and after the execution of the will may be relevant and admissible, but it is important only in so far as it tends to show mental condition at the time of executing the testamentary document. That is to say, facts as to mental condition, whether anterior or subsequent to the date of the execution, depend for their probative force upon the clearness and certainty with which they tend to demonstrate the condition of mind and memory at the moment the will is executed. Estate of Perkins, supra. Evidence of mental condition before or after the execution of the will, if it have evidentiary force; i. e., if there exist a reasonable and logical relation between it and the issue as to mental competency at the moment of execution, is to be given such weight as the jury thinks it deserves. Estate of O'Connor, 51 Cal. App. 339, 196 P. 792; Estate of Barr, 69 Cal. App. 16, 34, 230 P. 181.

[6] "Insanity" is a broad, comprehensive, and generic term of ambiguous import. In a medical sense, it is used to denote any unsound and deranged conditions of the mind, and every degree of mental unsoundness, whatever may be its source or cause. 32 C. J. 594. But mere proof of mental derangement, or of insanity in a medical sense, is not sufficient to invalidate a will. Not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity. The contestant is required to go further than that. He must either show such a complete mental derangement as denotes utter incapacity to know and to understand those things which a testator must be able to know and to understand in order to possess testamentary capacity, or he must show the existence of a specific insane delusion which affected the making of the will in question. Estate of Shay, 196 Cal. 355, 237 P. 1079. In other words, mental derangement sufficient to invalidate a will must be an unsoundness of mind in one of two forms: (1) Mental unsoundness of such broad character as to establish incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it is not sufficient merely to establish that the testator was the victim of some hallucination or delusion; it must be shown that the will

was the offspring of the hallucination or delusion. Estate of Perkins, supra.

[7] Testamentary capacity is always presumed to exist until the contrary is established. That is to say, the presumption is always that a person is sane, and the burden is always upon the contestant to show affirmatively and by a preponderance of evidence that the testator, at the time of executing the will, was of unsound mind. In re Wilson, 117 Cal. 262, 49 P. 172, 711; Estate of Perkins, supra; 26 Cal. Jur. 756.

[8] If these principles of law be applied to the facts of this case, the conclusion is irresistible that the evidence, considered in its entirety, falls short of establishing lack of testamentary capacity at the time of executing the will. The only direct evidence of facts existing when the instrument was executed is that which was given by witnesses for the proponents, who testified substantially as follows: Mr. Morris, the attorney who drew the will, testified that in the course of his conversation with the testatrix on the evening preceding the execution of the document she gave him a list of the persons to whom she wished to leave her property; that she expressed concern about the welfare of her children; that she answered all questions asked her; that she appeared to understand the questions; that, in his opinion, she acted rationally; that she was a sweet, elderly lady; that he gained the impression that her mind was perhaps not as brilliant as it had been in bygone years, but that he attributed that condition more to advancing years than to anything else; that, on the day the will was executed, he read it to her before she signed it, and that she then said, "That is just the way I want it"; that there was nothing in her conversation or actions which appeared to him to be peculiar or out of the ordinary.

Mr. Duane, one of the witnesses to the will, testified that he did not observe anything unusual or out of the ordinary in the appearance or actions of the testatrix during the ten minutes or so that the parties were occupied with the formalities of the execution—that she did not make any more impression upon him than any other individual would. Judge Jacks, the other attesting witness, gave testimony of like import.

The testimony of these three gentlemen—lawyers trained in their profession and who had an abundance of opportunity to observe the testatrix at the very moment of the execution of the will—discloses to us an elderly woman, spent with years, whose mental faculties were somewhat dimmed, but who, nevertheless, was clearly able to comprehend the business in which she was engaged and to know and to understand those other things which the law requires a testatrix to be able to know and to understand in order to have capacity to make a valid testamentary disposition of her property.

Proponents produced a number of other witnesses, relatives and intimate acquaintances of the deceased, who testified to the mental soundness of the testatrix at about the time of, as well as before and after, the date of the execution of the will. Each of these witnesses, besides stating that in his or her opinion testatrix was mentally sound, related conversations and described acts of the decedent at about the time of, or shortly before or after, the execution of the testamentary document. These conversations and acts picture to us a woman possessed of a mind sufficiently clear and strong to make a valid will, albeit she was worn with age and her intellectual faculties were somewhat enfeebled by the paralytic strokes from which she had suffered.

A clear case of testamentary capacity of the decedent, *at the very time* of the execution of the will, having been made by the evidence of the proponents, the question is, Did the contestant introduce evidence so inconsistent with and contradictory of that adduced by the proponents that it would have been sufficient to support a verdict for contestant under the "conflicting evidence" doctrine, if the jury had seen fit to bring in such a verdict? We think not.

The evidence is so voluminous that it would be impracticable to give even a synopsis of the testimony of every one of contestant's many witnesses. It will suffice, however, if we give a brief statement of the testimony of one or two of his principal witnesses, setting forth those parts of their testimony upon which he especially relies, with comments thereon as we proceed, and point out the reasons why we think such selected portions insufficient to support any other verdict than the one which was actually returned by the jury.

Dr. Mortensen, a physician who became acquainted with Mrs. Sexton in 1906, and who at times attended her professionally, testified that she suffered from the effects of chronic high blood pressure or arterial sclerosis; that prior to the execution of the will she had suffered from several slight paralytic strokes from which she only partially recovered; that from 1917 she gradually grew worse; that in 1921 her appearance was that of an old lady, one whose life had been partly spent and whose mental activities were extremely weak; that he would not say she was irrational, but that he would say she was feeble-minded from 1917; that she would not frequently initiate conversations; that he believed she understood, at all times in 1921, her relationship to contestant, and that she was able to and did recognize her relatives; that, in his opinion, she would not, in the month of July, 1921, "be able to transact any important business such as the making of a last will and testament."

Counsel for contestant lay much stress upon Dr. Mortensen's opinion that the testatrix, in July, 1921, would not be able to transact any important business, such as the making of a last will. In stressing this testimony, counsel have adopted a false standard of testamentary capacity and have overlooked the fact that no witness, lay or expert, may usurp the province of the jury to determine the ultimate question of decedent's capacity to make a will. The first part of the doctor's opinion, that wherein he assumes to say that the testatrix was not able to transact any *important* business, is entirely consistent with ability to make a valid will.

[9] Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will. Says the Iowa Supreme Court:

> "While, as every lawyer knows, a man may be capable of making a good will after he is so far gone into imbecility and mental darkness as to be no longer capable of making a valid deed or of transacting business generally, the very opposite conclusion seems to pervade the lay mind, and the making of a will is, to its apprehension, the one item of business which requires the presence of all one's faculties in their normal strength." Perkins v. Perkins, 116 Iowa, 253, 90 N. W. 55.

A person who has mental power to understand and to transact the ordinary business affairs of life, doubtless, has capacity to make a valid will. But the converse is not necessarily true. Mental perception and power to think and reason of a lesser degree than that which is required in the understanding and transaction of ordinary business may be all that is requisite to the full understanding of everything involved in the execution of a will. Rowcliffe v. Belson, 261 Ill. 566, 104 N. E. 268, Ann. Cas. 1915A, 359; Ravenscroft v. Stull, 280 Ill. 406, 117 N. E. 602, Ann. Cas. 1918B, 1130; Ring v. Lawless, 190 Ill. 520, 60 N. E. 881; Craig v. Southard, 148 Ill. 37, 35 N. E. 361; Stubbs v. Houston, 33 Ala. 555; Whitney v. Twombly, 136 Mass. 145; Thompson v. Kyner, 65 Pa. 369; McDonald's Estate v. McDonald (Tex. Civ. App.) 150 S. W. 593; Estate of Halloway, 195 Cal. 711, 733, 235 P. 1012. It was said in Guarantee Trust & S. D. Co. v. Waller, 240 Pa. 575, 88 A. 13, that an instruction that "less capacity is needed to make a valid will than is sufficient in most cases to transact ordinary business" is a correct statement of the law.

[10] The second part of Dr. Mortensen's opinion, that wherein he says that he does not believe testatrix was capable of making a will, has no probative value whatever, in the absence of a showing that this learned disciple of Æsculapius was acquainted with the law's criteria of testamentary capacity. Indeed, when he says that, in his opinion, the testatrix was not able to transact any *important* business, *such as* the making of a will, he unmistakably betrays the erroneous notion that the ability to transact *important* business is an essential prerequisite to the possession of testamentary capacity. If, as in the Estate of Russell, 189 Cal. 759, 210 P. 249, the doctor had given an opinion respecting the testatrix's ability to understand those concrete facts, the understanding of which the law makes requisite to a capacity to make a valid will, the situation then would have been altogether different. But here the doctor, in undertaking to say that the testatrix lacked the capacity to make a will, presumes to give an opinion upon a question which is one of mixed law and fact, to be decided by the jury under proper instructions from the court as to what is the legal test of testamentary capacity. Estate of Perkins, supra, page 710, 235 P. 45. See, also, Estate of Taylor, 92 Cal. 564, 28 P. 603; Conner v. Stanley, 67 Cal. 315, 7 P. 723; and McCracken v. McCracken, 109 Or. 83, 219 P. 196. It is a question, the correct determination of which presupposes a knowledge of the law as to the requisites of testamentary capacity. There is not a scintilla of evidence to indicate that Dr. Mortensen had the faintest idea of what is the standard prescribed by law for the determination of that question. It is not at all improbable that, as a physician, he erroneously measured testamentary capacity by a more exacting standard of mental soundness than is required by the law. As has already been stated, in a medical sense, insanity or unsoundness of mind is anything short of a mind wholly normal and free from a defective power of co-ordination, whereas, the law does not demand such perfection to render one competent to manage his own affairs and to make a valid disposition of his property. Estate of Collins, 174 Cal. 663, 670, 164 P. 1110.

Another witness upon whose testimony contestant places much reliance is Philip Hooper, a nurse. While this witness was engaged in caring for patients whom he accompanied on their walks into the Santa Monica Canyon, he frequently saw and talked to Mrs. Sexton. He testified that he saw the testatrix about once every two weeks over a period of four months in 1914; that he saw her again at least twice a week from June to November in 1920; that when he saw her in 1920 he observed a decided change in her physical and mental condition; that at that time her mind appeared to be blank; that what he means by saying that her mind appeared to be blank is that, when he would talk to her, she apparently would not understand what he was saying or could not converse with him; that she would talk very little; that she was very reticent about answering questions and would shake her head and smile when questioned; that her physical condition was feeble; that he saw her in September of 1921; that at that time her condition seemed to be much worse, in that she made no response at all when questioned; that it was very difficult to converse with her; that she was easily influenced to answer a question "Yes" or "No," as the questioner wished, depending upon how the question was put. The witness also stated that, in his opinion, the testatrix was irrational in 1921.

Hooper's testimony is not necessarily irreconcilable with that testamentary capacity which the law presumes to exist until the contrary is established. The opinions of lay witnesses have no greater probative force than the facts given by them as the bases for their conclusions. The facts from which the opinions are deduced are more decisive than the opinions. Now it seems that the decedent's vocal organs were so affected by the paralytic strokes that she could speak only with difficulty, and then not above a whisper. Who can say, then, that her reticence was not due to this physical condition, rather than to any serious mental malady? By reason of the condition of her organs of speech and the physical difficulty which she experienced when she tried to talk, it was but natural that she should simply shake her head and smile when spoken to and be more than sparing of her words. And yet it was this very reticence, quite natural under the circumstances, which seems to have led this witness to the conclusion that her mind appeared to be a blank and that she was irrational. Without doubt, Mrs. Sexton's mind was weakened by the strokes, and she doubtless was easily influenced to give to a question the answer desired by the interrogator. But this, while betokening an easy susceptibility to undue influence on the part of others, does not necessarily indicate that complete mental derangement which involves an utter incompetency to know and to understand those things which a testator must be able to know and to understand in order to possess testamentary capacity.

Contestant, surely, could not have believed that his wife's mind was so utterly feeble and unsound that she was incapable of understanding the nature of her testamentary act and appreciating its consequences; for, upon a number of occasions intermediate the execution of the will and his wife's demise, he procured her to join with him in the execution of deeds which conveyed valuable parcels of community real property to third parties.

A further review of the testimony would only unduly prolong this opinion. Let it suffice to say that a careful consideration of the testimony of contestant's witnesses leaves in the mind the composite mental picture of a woman 61 years of age at the date of the execution of the will, grown old before her time, feeble in body, mentally weak, and given to an habitual quiescence and a torpor peculiar to those who have suffered from cerebral hemorrhage. While a survey of all the facts may warrant a diversity of opinion as to the exact state of her mind and the precise degree of mental capacity retained by her, it is evident that there was not such a complete prostration or alienation of intellect as to incapacitate her from making a testamentary disposition of her property. The Kentucky Court of Appeals, speaking of a paralytic's will and addressing itself to a case similar to this in its main aspects, says:

> "It may be true that some of those who saw him [the testator] could not understand what he attempted to utter; and, nevertheless, he may not have been insane, unless the mind can never conceive what the tongue will not utter; and so every other fact stated for the defendants [contestants] may be reconciled with a disposing mind. * * * How much soever, the muscular and nervous system may have been affected, it is hardly possible that the mind could have been paralyzed in an equal degree; for if it had been, it was scarcely possible, as it seems to us, that he could have lived four years. * * * We cannot admit that a paralysis, however universally it may pervade the system, affects the mind equally with the body. It could not do so unless the mind were material. The mind derives its ailment from the body, through the senses; whilst any one sense remains, the mind can act rationally. * * * The nature of mind, and its mysterious connection with matter, are equally incomprehensible. * * * The soundness and energy of the body are not always sure criteria of the sanity and force of the mind; and * * * many whose bodies have been prostrated by the most invincible lingering paralysis, have still, in their physical desolation, enjoyed the light of reason. * * * As long as the body retains sensibility, the mind which animates it may remain sound. A paralysis does not destroy sensation. It impairs muscular power, and prevents the organs of the body from obeying, implicitly, the will of the mind. It affects the mind in some degree, of course; but its ravages do not prostrate the action of mind and body in the same degree. The faculties of each do not sink 'in pari passu.' That which is immaterial and self-evident, and which reasons, and thinks, and lives forever, does not always slumber, when the body is powerless. It may be sane, though occasionally lethargic. It may be sound and active, when the tongue, and the hand, and the eye are incapable of motion, and may conceive and will, what they refuse to execute." McDaniel's Will, 2 J. J. Marsh. (Ky.) 331.

See, also, Rollins v. Smith, 72 Cal. App. 773, 238 P. 171.

If Mrs. Sexton's last will and testament be considered in the light of the fact that contestant is a man of affluence, it will be found to be just and equitable in all its provisions. According to the testimony of the proponents' witnesses, uncontradicted by any direct evidence to the contrary, the plan of the will was the product of decedent's own mind, uninfluenced by the advice or dictation of any other. The mind that so planned must have had testamentary capacity.

The order is reversed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.; SULLIVAN, J.; CURTIS, J.

200 Cal. 1

BANK OF ITALY v. JOHNSON, Superintendent State Banking Department.

(S. F. 11654.)

(Supreme Court of California. Dec. 15, 1926, as Modified Jan. 13, 1927.)

1. Banks and banking 🔑3—Constitutional law 🔑296(1)—Banking is subject to regulation under state's police power without limitation, except that of reasonableness (Const. U. S. Amend. 14).

Banking business affects so intimately commercial welfare of people as to be proper subject of regulation by state under police power without limitation, under Const. U. S. Amend. 14, except that regulation must be reasonable.

2. Banks and banking 🔑33—State may make any regulations respecting branch banks which are reasonable and uniform.

Since state may prohibit branch banks entirely, it may make and enforce any regulations short of prohibition which are reasonable and uniform.

3. Banks and banking 🔑33—Branch banking is prohibited without written approval of superintendent of banks (Bank Act, § 9).

Bank Act, § 9 (St. 1909, p. 88), prohibits all branch banking except on written approval of superintendent of banks, which he may grant or deny in his discretion, and he is enjoined from granting permission until he has ascertained that public convenience and advantage will be promoted thereby.

4. Banks and banking 🔑4—Constitutional law 🔑62—Discretion granted superintendent of banks to grant or deny permission to operate branch banks held lawful delegation of authority (Bank Act, § 9).

Discretion granted superintendent of banks, under Bank Act, § 9 (St. 1909, p. 88), to grant or deny permission to open branch banks is lawful delegation of authority, such discretion being limited by requirement that it be exercised impartially and without infringement on applicant's constitutional rights.

5. Banks and banking 🔑33—Superintendent of banks may not by rule curtail exercise of his discretion to approve opening of branch banks (Bank Act, § 9).

Superintendent of banks may not by adoption of rule, policy, or procedure so curtail exercise of his discretion to grant or deny approval to operate branch banks, under Bank Act, § 9 (St. 1909, p. 88), as to prevent free exercise thereof in every case.

6. Banks and banking 🔑33—Superintendent of banks may not refuse to exercise discretion to approve or deny opening of branch banks (Bank Act, § 9).

Superintendent of banks may not refuse to exercise discretion to approve or deny opening of branch banks, under Bank Act, § 9 (St. 1909, p. 88), when called on to do so by application duly presented to him, but must act on application within reasonable time.

7. Constitutional law 🔑80(1)—Superintendent of banks, in determining whether to approve branch bank, performs administrative and not judicial function (Bank Act, § 9).

Under Bank Act, § 9 (St. 1909, p. 88), it is duty of superintendent of banks, in passing on application for permission to open branch bank, to determine whether such bank will promote "public convenience and advantage," and in doing so, he performs administrative and not judicial function.

8. Banks and banking 🔑33—Superintendent of banks, in passing on application to open branch bank, is not limited by purely local considerations (Bank Act, § 9).

Under Bank Act, § 9 (St. 1909, p. 88), superintendent of banks, in granting or denying application to open branch bank, is not limited to purely local considerations, but may consider questions of state-wide policy.

9. Banks and banking 🔑17—Administrative board or officer, such as banking superintendent, has implied authority to adopt reasonable rules to carry out express powers.

Administrative board or officer, such as superintendent of banks, has implied authority to adopt reasonable rules and regulations necessary to exercise powers expressly granted.

10. Constitutional law 🔑77—Administrative officer may not, by rule, change or extend his statutory powers.

Administrative officer or board may not, in promulgation of rules, change, alter, amend, or extend his or its statutory powers.

11. Banks and banking 🔑33—Rule promulgated by bank superintendent restricting opening of branch banks beyond locality of parent bank held valid (Bank Act, § 9).

Rule promulgated by superintendent of banks that no branch bank shall be created in any locality other than that of parent bank, except by purchase or consolidation, unless public convenience and advantage requires, construed as merely casting on applicant burden of proving that opening of branch bank would promote public convenience, within Bank Act, § 9 (St. 1909, p. 88), *held* valid.

12. Mandamus 🔑154(2)—Petition for mandamus to compel bank superintendent to permit branch banks, held insufficient on general demurrer (Bank Act [St. 1909, p. 88] § 9; St. 1917, p. 601, § 3).

Petition for mandamus to compel superintendent of banks to issue permits for establishment of branch banks, which fails to allege that petitioner's capital and surplus complies with Bank Act, § 9 (St. 1909, p. 88), or that superintendent knew such facts, that petitioner paid or tendered fees, as required by the 1917 amendment (St. 1917, p. 601, § 3), or presented all essential facts to superintendent, or that superintendent knew such facts, is insufficient as against general demurrer, but omissions may be supplied by amendment.

13. Pleading 🔑253—Allegations of amendments to mandamus petition are deemed denied, where respondent denies allegations of original petition.

Where respondent denies material allegations of petition for mandamus, allegations of amendments to petition to conform to proof are deemed denied.

14. Mandamus 🔑87—Bank superintendent's refusal to exercise discretion to grant or deny permit to open branch bank warrants issuance of peremptory writ (Bank Act, § 9).

Superintendent of banks' refusal to exercise his discretion to grant or deny permit to open branch bank in another city, as required by Bank Act, § 9 (St. 1909, p. 88), because of rule promulgated by him, warrants issuance of peremptory writ of mandamus to compel him to exercise his discretion.

15. Mandamus 🔑87—Bank superintendent's refusal of permit to open branch bank on untenable ground held not to preclude setting up legal grounds (Bank Act, § 9).

Superintendent of banks' refusal to grant permit to open branch bank on untenable ground, under Bank Act, § 9 (St. 1909, p. 88), *held* not to preclude him setting up legal grounds for refusal on petition for mandamus to compel approval.

16. Mandamus 🔑72—Mandamus may not issue to compel officer having discretionary power to act in particular way.

Writ of mandamus may not be employed to compel public officer having discretionary power to act in particular way, but court in such proceeding may only compel him to act.

17. Mandamus 🔑168(4)—Mandamus will be denied, if there is any substantial evidence supporting administrative officer's refusal to act.

If there is any substantial evidence supporting administrative officer's refusal to act, mandamus will be denied, preponderance of evidence rule governing jury trials in civil cases not being applicable.

18. Mandamus 🔑168(4)—Bank superintendent's denial of permit to open branch banks held justified by evidence (Bank Act, § 9).

Superintendent of banks' refusal of permit to open branch banks in city other than that of parent bank's location, under Bank Act, § 9 (St. 1909, p. 88), *held* authorized by evidence, and mandamus to compel issuance of permit denied.

19. Banks and banking 🔑33—Validity of rule promulgated by bank superintendent respecting branch banks held not affected by his reasons for rule (Bank Act, § 9).

Validity of rule respecting opening of branch banks, under Bank Act, § 9 (St. 1909, p. 88), promulgated by superintendent of banks, *held* not affected by questions of legislative or administrative policy contributing to superintendent's decision to adhere to rule.

20. Banks and banking 🔑33—Superintendent of banks, in determining whether to grant permit for branch bank, should act independently of Federal Reserve Board.

Statutory powers and duties of superintendent of banks, in determining whether to approve or deny permits for branch banks, should be exercised independently of any action taken by Federal Reserve Board in denying petition to open such banks.

Original proceeding in mandamus by the Bank of Italy against John Franklin Johnson, as Superintendent of State Banking Department, to compel the Superintendent to issue permits for the establishment of two branch banks in the city of Los Angeles. Writ denied, and proceeding dismissed.

Cullinan & Hickey and Garret W. McEnerney, all of San Francisco, for petitioner.

James M. Oliver and Elbert W. Davis, both of San Francisco, for respondent.

Thelen & Marrin, of San Francisco, amicus curiæ.

SHENK, J. This is an original proceeding in mandamus to compel the respondent superintendent of banks to issue to the petitioner two permits for the establishment and maintenance of branch banks in the city of Los Angeles, one for a branch at North Spring street and Sunset boulevard, and the other for a branch in the building of the Women's Athletic Club at No. 833 South Flower street.

The petition was filed on June 18, 1925, and an alternative writ was issued, returnable on September 15th. On the return day the respondent filed a demurrer on the ground that the petition did not state sufficient facts to entitle the petitioner to the relief sought and at the same time filed an answer which, in the opinion of counsel for petitioner, presented issues of fact requiring the taking of testimony. By stipulation, concurred in by the court, Mr. B. Grant Taylor, clerk of this court, was appointed commissioner with the understanding that he should not submit findings on the evidence taken before him, but that the court should make its own findings and draw its own conclusions from the record. It was also agreed that, after the evidence was taken and filed, the matter should be set down for oral argument. The evidence was taken from time to time before the commissioner, both in San Francisco and in Los Angeles. The hearings were protracted, the last occurring in San Francisco on March 22, 1926. The commissioner thereupon filed a transcript of the evidence which comprises 1,925 pages of oral testimony and 227 exhibits. The matter was set down for oral argument and was argued on April 9 and 10, 1926. On the request of counsel for both sides, permission was granted to file briefs, the last one being filed by the petitioner on September 1, 1926. Thereafter, on application of petitioner, but over the objection of respondent, the court, on October 4th, granted leave to file amendments to its petition, which were intended in the main to conform to the proof as counsel for petitioner construed the proof to be, but such leave was granted of course without prejudice to the rights of the respondent in the premises. The matter was thereupon ordered submitted for decision.

The insistence of counsel for respondent that his general demurrer is well taken renders it necessary to determine, first, the sufficiency of the facts as alleged by the petitioner. In the first cause of action in its original petition, it was alleged, among other things, that the petitioner is a banking corporation incorporated in August, 1904, under the laws of this state, with its principal place of business in the city and county of San Francisco; that it is authorized by its articles of incorporation to establish and maintain branch offices in the city and county of San Francisco and elsewhere throughout the state; that on February 1, 1923, the respondent was appointed, and became, and ever since has been the duly qualified and acting superintendent of banks of the state banking department of the state of California, as provided for in an act entitled "An act to define and regulate the business of banking," and known as the Bank Act (St. 1909, p. 87), and amendments thereto; that there are and for some years last past have been two general systems or methods of branch banking sanctioned by law in California, one known as state-wide branch banking, by which a bank maintains its principal office in one city and branches in other cities or towns within the state, and the other known as city-wide branch banking, by which a bank maintains branches in the city in which its principal place of business is located; that banks which do not maintain branches are known as unit banks; that certain banks in San Francisco and Los Angeles, including the petitioner, have adopted a branch banking system for areas beyond the territorial limits of the city in which the principal place of business is located, and that the petitioner first entered upon that field and thus far has embarked upon a more extensive area than any other of such banks doing the same branch banking business; that, with the exception of petitioner, no bank with branches, the principal place of business whereof is north of 37 degrees north latitude (which runs through the extreme southern portion of Gilroy) has established or applied for permission to establish any branch south of said line of latitude, and no bank with branches, the principal place of business whereof is south of said line of latitude, has established or applied for permission to establish a branch north of said line of latitude; that both state-wide and city-wide branch banking are authorized by said bank act and have received the approval of the superintendent of banks.

The petition then set forth generally the reasons, from the viewpoint of petitioner, why, as a matter of economic policy, state-wide branch banking should be favored and the status of petitioner as a sound financial institution which conducts a well managed and highly profitable banking business; that with the written approval of respondent or his predecessors in office the petitioner has heretofore opened 78 branch banks in 62 cities and towns in the state other than the city and county of San Francisco, many of which are north and many south of the latitude aforesaid; that it maintains 6 branches in various parts of the city of Los Angeles; that 5 of said branches were authorized by the respondent's predecessor in office, and the sixth required the written approval of the respondent; that of the branch banks opened and maintained by petitioner all were acquired by the purchase of existing banks with the exception of 20, which were newly established; that is to say, were established where no bank had theretofore been conducted, and were and are banking offices commonly known as de novo branches. The petitioner then set forth tabulations showing the names of eight of the leading metropolitan banks in San Francisco, Oakland, and Los Angeles, and the number of branches maintained by them by purchase and de novo. By comparison, it is seen that the petitioner maintains 10 more branches than the highest in that group of 8 and has established a greater proportion of branches by purchase or merger than any bank in the group.

It was next alleged that the petitioner now maintains a branch office on the southwest corner of Temple and Spring streets, in the city of Los Angeles, known as its international branch. This bank was acquired in September, 1917, and before that time was an established and widely patronized independent bank at the same location; that the city of Los Angeles has instituted proceedings to condemn the property on which that branch bank is located, and that by reason thereof said branch must be moved to another location; that with said necessity in view the petitioner applied for and was, by respondent, granted permission to remove said branch bank from its present location to No. 214 North Main street, which is across the street on Main street from the present location. In its application for said removal, the petitioner also applied for an additional branch at North Spring street and Sunset boulevard, a distance of about four blocks northerly from the location of the present international branch office. This application was denied by the respondent, and the petitioner now seeks by this proceeding to compel the respondent to grant said application and in that behalf alleges that public convenience and advantage require and would be promoted by the opening of a branch bank at the corner of North Spring street and Sunset boulevard, and that, unless said permission be granted, much business conducted at its present location will be diverted to other banks, and public convenience and advantage will be retarded and averted: that there is and has been no evidence of any substantial character justifying the conclusion that the public convenience and advantage would not require or be promoted by the opening of said branch bank, and that the action of the respondent in denying permission to open a branch bank at said new location "was arbitrary and capricious and without support whatever in reason"; that the respondent, "ever since his incumbency began on February 1, 1923, has administered his office upon the theory that his decisions were and are to be controlled, and the exercise of his discretion confided to him by section 9 of the Bank Act is limited by and subordinate to and controlled by a rule of his office commonly called and sometimes herein spoken of as the de novo rule": that Mr. Jonathan S. Dodge, the respondent's immediate predecessor in office, promulgated said rule and throughout his term declared the same to be a valid rule of and within the state banking department; that continuously and ever since the respondent's induction into office he has announced his adherence to said rule, and he has promulgated and maintains the same as a valid rule of the state banking department; that in denying the application for said branch the respondent was controlled wholly and solely by said self-imposed de novo rule; that it is the claim of the petitioner that there is no statute which gives authority for the promulgation of said rule, and that, if authority to make and enforce a rule of that character has been given by the Legislature, such legislation would have been unconstitutional as involving unlawful delegation of legislative power; that in denying said application the respondent did not question the fact that public convenience and advantage would be promoted by the granting thereof and did not find that the public convenience or advantage would not be promoted thereby; that the respondent interprets the said de novo rule to mean that occasions might and could arise wherein the public convenience and advantage would be promoted by the granting of a permit, but that under the rule the public convenience and advantage must require the granting of such permit; that if the word "require" be interpreted to mean anything essentially different from the words "will be promoted" in section 9 of the Bank Act, the said rule would be invalid for this additional reason: that, at the time of the making of said application and ever since, the public convenience and advantage did require and they do now require the granting thereof; that since November 1, 1921, 103 permits for the establishment of branches de novo within the city of Los Angeles to 5 of the principal banks of said city have been granted; that during that period no permit for the establishment of a branch de novo has been granted to the petitioner within that city except the San Pedro branch, and during said period the petitioner made no other applications to the respondent for permission to establish de novo branches within the city of Los Angeles except the application for the branches involved in this proceeding; that the granting of said 103 permits to the said 5 banks, which are all competitors of petitioner in the city of Los Angeles, has enabled said competitors to secure great advantages over the petitioner in obtaining new business and in the accommodation to customers of the banks of the city of Los Angeles; that public convenience and advantage would have been promoted and the business of petitioner would have been benefited by the establishment of de novo branches in the city of Los Angeles since November 1, 1921, but the petitioner refrained from making application for permits with the exception of the application for the branch at San Pedro and the branches involved in this proceeding, because the petitioner believed that such applications would be denied by the incumbent superintendent of banks for the reasons involved in the de novo rule, for he, in terms, has held that the public convenience and advantage would not be promoted by the establishment of such branches, thereby putting upon the petitioner the burden of attacking the determination of the incumbent superintendent of banks as involving abuse of discretion and arbitrary exercise of power, an issue in which the petitioner was disinclined to become embroiled, but that longer forbearance has become intolerable.

As and for a second cause of action the petitioner alleged that on February 28, 1925, it made application, in writing, to respondent for his written approval to establish a de novo branch in the building occupied by the Women's Athletic Club, situated at No. 833 South Flower street; that on March 17, 1925, the respondent, in writing, denied said application; that the same was denied "solely upon the ground that the location of the proposed branch office is outside the limits of the city in which is located the principal place of business of the applying bank," meaning thereby that under the de novo rule the petitioner could not obtain permission to establish branch offices in the city of Los Angeles. The allegations in the first cause of action with reference to public convenience and advantage, evidence concerning the same, the action of respondent, and the de novo rule were incorporated in the second cause of action by reference.

[1, 2] In order to determine the sufficiency of the facts so stated by the petitioner, it is necessary to examine the law applicable to the establishment and regulation of branch banks in the state of California and to the powers and duties of the superintendent of banks in the premises. In the progress made in the industrial and economic world within comparatively recent years, the business of banking has ceased to be, if indeed it ever was, a purely private enterprise. Such business affects so intimately the commercial welfare and business interests of the people as to render it a proper subject of regulation by the state in the exercise of the police power. People v. Bank of San Luis Obispo, 154 Cal. 194, 97 P. 306. The public patronage which the banker invites and receives is of such a character that he becomes, in a just sense, the trustee of the fiscal affairs of the people of the state. State Savings & Commercial Bank v. Anderson, 165 Cal. 437, 132 P. 755, L. R. A. 1915E, 675. The power of the state to regulate banking business is supreme, subject to no limitation so far as the Fourteenth Amendment to the Constitution of the United States is concerned, except that such regulation must be reasonable. State Savings & Commercial Bank v. Anderson, supra, affirmed in 238 U. S. 611, 35 S. Ct. 792, 59 L. Ed. 1488. See 4 Cal. Jur. p. 106 et seq. Since the state may prohibit branch banks entirely, it may make and enforce any regulations short of prohibition, provided the same be reasonable and uniform. It is appropriate to note that, under sections 7 and 90 of the Bank Act, foreign corporations entitled by law to act as trustees in this state are absolutely prohibited from establishing or maintaining, "directly or indirectly, any branch office or agency in this state." Stats. 1917, p. 601, 615.

Prior to 1909, the state of California had no thoroughgoing law regulating state banking business. Following the general financial depression of 1907, the preparation and adoption of a comprehensive banking law seemed imperative. With the co-operation of the legislative committee of the California Bankers' Association a bill was drafted and passed by the Legislature (Stats. 1909, p. 87). That act has been amended at numerous sessions of the Legislature since its original adoption, but without any fundamental change in its purport. The act embraces within its regulatory provisions two main subjects of the banking business, departmental banking and branch banking. Within the former field of activity is included the savings, commercial, and trust departments of state banks, but with regulations in that field we are not here concerned. The issues involved in this proceeding directly concern the regulatory provisions of the act relating to branch banking, and particularly the following portion of section 9 thereof:

> "No bank in this state, or any officer or director thereof, shall hereafter open or keep an office other than its principal place of business, without first having obtained the written approval of the superintendent of banks to the opening of such branch office, which written approval may be given or withheld in his discretion, and shall not be given by him unless he has ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch office." Stats. 1909, p. 88.

The foregoing provision was incorporated in the original act and has remained unchanged. It is at once observed that there is no uncertainty or ambiguity in the language of the portion of section 9 above quoted. It contains a prohibition of the establishment or maintenance of a branch office, either in the city of the head office or elsewhere in the state, except upon the written approval of the superintendent of banks which (a) may be given or withheld in his discretion, and (b) shall not be given by him until he has ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of the branch office. It is undeniable that the question of permitting branch banks at all is one of legislative policy on the part of the state. In 17 states all branch banking is prohibited by law, although in some of said 17 states the prohibition does not apply to branches established prior to the passage of the prohibitory legislation. Typical legislation prohibiting all branch banking is the statute of Illinois, which was passed by both houses of the Legislature, signed by the Governor, and later submitted to and approved by a vote of the electors of the state under referendum law on November 4, 1924. This prohibitory statute is found in Smith-Hurd Illinois Revised Statutes, 1925, c. 16½, § 9, at page 177, and is as follows:

> "No bank shall establish or maintain more than one banking house, or receive deposits, or pay checks at any other place than such house; and no bank shall establish or maintain any branch bank, branch office or additional office or agency for the purpose of conducting any of its business."

In six states the law is silent on the subject, but branch banking is prohibited under rulings of the Attorney General or the banking commissioner. In five states the law is silent; there is no ruling by the Attorney General or banking department, but no branches are in operation in those states. In nine states branch banking is authorized, but is confined to the city of the bank's head office. In two states county-wide branch banking is authorized, and in nine states state-wide branch banking is permitted. The foregoing data is obtained from Exhibit 217, which is a transcript of the hearings before the committee on banking and currency in the House of Representatives of the Sixty-Eighth Congress, first session, on H. R. 6855, of which committee the Hon. Louis T. Mc-

Fadden of Pennsylvania is chairman. This measure involves, among other things, the scope of proposed federal permission and regulation of branch banking by national banks. An examination of the record of such hearings discloses that the subject of branch banking is fraught with great public interest, is highly controversial, and is wise or unwise, dependent upon the particular viewpoint of those affected, or to be affected by such regulations, existing or proposed.

[3] California is one of the nine states in which state-wide branch banking is permitted. To say that the Bank Act of this state "gives the right to establish a branch at any point in the state," as contended for by the petitioner, does not correctly reflect the meaning of our statute. Rather, it should be said that all branch banking is prohibited in this state with the proviso that a branch bank may be opened at any point in the state upon the written approval of the superintendent of banks, which he may grant or deny in his discretion, and he is specifically enjoined from granting his permission unless and until he has ascertained that the public convenience and advantage will be promoted thereby.

[4] We do not understand the petitioner seriously to claim that the discretion vested in the superintendent of banks by said section 9 is an unlawful delegation of authority to that official. Indeed, the exercise of a similar discretion by state officials having authority over banks has been upheld in other jurisdictions. People v. Brady, 268 Ill. 192, 108 N. E. 1009; Schaake v. Dolley, 85 Kan. 598, 118 P. 80, 37 L. R. A. (N. S.) 877, Ann. Cas. 1913A, 254; State v. State Securities Commission, 145 Minn. 221, 176 N. W. 759; State v. State Securities Commission, 149 Minn. 102, 182 N. W. 910; In re Commercial State Bank, 105 Neb. 248, 179 N. W. 1021; Matter of Lunghino & Sons, 176 App. Div. 285, 163 N. Y. S. 9; Mulkey v. Bennett, 95 Or. 70, 186 P. 1115; Commonwealth v. Puder, 261 Pa. 129, 104 A. 505; Mee v. Hirning, 45 S. D. 582, 189 N. W. 675; State v. Hill, 84 W. Va. 468, 100 S. E. 286. See, also, Engel v. O'Malley, 219 U. S. 128, 31 S. Ct. 190, 55 L. Ed. 128. The petitioner has cited no authority holding that such discretion may not lawfully be vested in an executive or administrative officer of the state banking department.

[5] We therefore conclude that the discretion so lodged in the superintendent of banks in this state is a lawful delegation of authority to him. But such authority is not without its limitations in law, independent of the statute, and in the statute itself. Included in the limitations in law, independent of the statute, is that the discretion thus conferred shall be exercised impartially and in such manner as not to infringe upon any constitutional right of an applicant. It is also clear that the superintendent of banks may not by the adoption of any rule of policy or procedure so circumscribe or curtail the exercise of his discretion under the statute as to prevent the free and untrammeled exercise thereof in every case, for an attempt to do so would be for him to arrogate to himself a legislative function.

[6] Another limitation in law is that the superintendent of banks may not refuse to exercise the discretion thus conferred when called upon to do so by an application duly presented to him, but must act upon such application within a reasonable time. The statutory limitation on his authority to act is that he is prohibited from granting his written approval unless and until he has ascertained that the public convenience and advantage will be promoted by the opening of the branch bank permission to establish which is sought.

[7] The Legislature has not attempted to define the phrase "public convenience and advantage." Nor has it attempted to declare where or how or under what circumstances the public convenience and advantage would or would not be promoted by the opening of a branch bank in any particular case. The obvious reason for the omission to define the phrase is because it would seem to be impossible to define it so that the definition would comprehend every variety and set of circumstances surrounding each particular application, for the facts and circumstances in each case would necessarily be different, at least, so far as local conditions were concerned. So, too, it is impossible for the court to lay down any hard and fast rule that would be applicable to every case, and the ingenuity and resourcefulness of counsel have not suggested how or in what manner a general rule could be devised. The phrase would seem to be as difficult of definition as "police power," "public convenience and necessity," "due diligence," or "probable cause," as those expressions are used in our law. But the impossibilities of definition do not detract in the least from the necessity of undertaking the task and of ascertaining the facts in each case, and it is for the superintendent of banks to so proceed and to ascertain them in the exercise of his power. In that exercise he performs an executive or administrative function, and not a judicial one, for it is beyond the power of the state to confer upon him, as a state-wide officer not in the judicial branch, the power to exercise a judicial function. Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076.

[8] Furthermore, the Legislature has not attempted to indicate whether, in the use of the world "public" in the phrase "public convenience and advantage," reference was thereby made to the people of the state at large, or to the people of the particular portion of the public affected or to be served by the particular branch bank sought to be established. We incline to the view that the

interest of the public immediately contiguous to the proposed branch bank, or of the public reasonably subject to service by the proposed branch, should first be considered by the superintendent of banks, but we are not prepared to hold that the superintendent of banks may not, in the administration of the duties imposed upon him, take into consideration the question whether the convenience and advantage of the people of the entire state would be promoted or retarded by the unlimited establishment of state-wide branch banks. He is a state-wide officer and, as such, is not limited by the statute to purely local considerations in passing upon any application for his written authority. Such being the fact, we do not feel justified in laying down a rule that would remove from his consideration all questions of state-wide policy in the administration of his office.

With the foregoing observations as to the scope and effect of section 9 of the Bank Act, and of the powers of the superintendent of banks thereunder, we pass to a consideration of the history, authority, and construction of the de novo rule promulgated by the respondent's predecessor in office and thereafter adhered to.

Since the adoption of the Bank Act in 1909, it has been the general policy of the successive superintendents of banks not to permit the establishment of branch banks outside the city of the head office except by purchase of or merger with an existing bank in such outside city or town. As this policy was adhered to and enforced, it was realized that the restriction should not be deemed inflexible or absolute, but that exceptions should be made in proper cases when, in the discretion of the superintendent of banks, such exceptions should be made. The respondent's immediate predecessor in office, Mr. Jonathan S. Dodge, appears to have been the first to formulate the policy into a written rule of the state banking department. On his own initiative, Mr. Dodge called a conference of the legislative committee of the California Bankers' Association and, after discussing with them the necessities of the banking situation in California, explained the rules which he proposed to set in motion. Thereafter he carried his plan into execution. On November 22, 1921, he addressed a letter to Mr. Leo V. Belden, vice president of petitioner, at San Francisco, wherein he stated in part:

> "In the conference with the legislative committee, the matter of the allocation of branch banks in California was discussed very fully by all present. After hearing all sides of the matter, I have decided that the policy of my department will be as follows: First. Any bank whose main office is located within the limits of a city will be permitted to extend into other parts of that city with branches, on application to the superintendent of banks, and without acquiring another bank. Second. Any bank located within a city, desiring to extend a branch into another city of the state where competition now exists, will be required to acquire an existing bank before the request will be granted. This rule will be subject to exceptions such as I made in your behalf at Sacramento, and I hope the exceptions will be few. * * * Fourth. All banks that may be members of the Federal Reserve Bank will be required to secure the consent of that institution before any franchises are authorized. * * * I think I said to you that the calling of this conference was occasioned by conditions in southern California, and in no wise related to the activities of your bank."

Mr. Dodge appeared as a witness in this proceeding and was interrogated by counsel for petitioner as to the history and origin of the de novo rule. He was asked to explain the circumstances and conditions which caused him to promulgate it, and he answered:

> "As superintendent of banks, it was a very live question at that time about the establishment of branches, particularly of branches in small cities; and the bankers, the independent bankers in the small cities, were very much exercised for fear that their territory would be invaded by branches of big banks, and that their business would be sacrificed thereby. The first big contest, I guess, came on probably at Santa Maria and the second was at Sacramento, and, after we had hearings on these two, other requests came in for branches, particularly one at San Pedro. I saw that some plan, method, or rule should be laid down that would govern the establishment of banks in other cities and in other localities than the main office, and I had prepared what I thought was a good rule to follow, and which is practically stated in that letter [referring to letter of November 22, 1921, above referred to], and I called together the legislative committee of the Bankers' Association of the state of California in meeting, and presented it to them, and discussed with them the advisability of making it one of the rules for the governing policy of the state banking department of California. And that was held in the latter part of November, about the time this letter was written, probably a few days prior to it."

He was then asked why he formulated that rule and he answered:

> "Well, it was pretty nearly necessary in order to have any sort of comfort in the office of the superintendent of banks. It was necessary. It had to come. I won't say that I was the first man who ever thought of the de novo rule. I guess that my predecessors in office had thought of it and would have established it. I can't say. Perhaps I was the first man that wrote it out and put it in words. Probably that is the truth of the matter."

He was asked:

> "Well, now, was this rule adopted as the result of an agreement, or was it a dictated rule —dictated by you as superintendent of banks?"

And he answered:

> "It was dictated by me; yes, sir. This is the rule of the banking department."

This general policy was adhered to by Mr. Dodge during the remainder of his administration. When the respondent came into office on February 1, 1923, he continued in adherence to the same policy. The Legislature was then in session, and certain amendments to the Bank Act had been proposed by the California League of Independent Bankers, the purpose of which, among other things, was to provide by law that "no branch banking system shall maintain more than one office in any municipality other than that wherein is located the parent office." At the request of the California League of Independent Bankers these proposals were transmitted to the members of the executive committee of the California Bankers' Association, which was composed of 11 officers and representatives of leading banks in the state, including Mr. W. R. Williams, cashier of the petitioner. Thereafter a conference was held between the respondent and said executive committee, at which it was agreed that it would be advisable to leave the statutory provision as incorporated in section 9 of the Bank Act unchanged, but that the state banking department should continue to adhere to the policy announced in the de novo rule. This plan was agreeable to all of the representatives of the California League of Independent Bankers and to the members of the executive committee of the California Bankers' Association, with the exception of the representative of the petitioner. Thereafter the respondent announced the continuance of the policy of his department with reference to branch banking, as set forth in the rules promulgated by his predecessors in office and first reduced to writing by Mr. Dodge. The rule, as announced by the respondent, was in more condensed form, and was and is as follows:

> "No branch of any bank shall be created in any locality other than the city or locality in which is located the principal place of business of such bank, except by purchase of or consolidation or merger with an existing bank in such city or locality in which it is desired to create or establish such branch bank, unless the superintendent of banks, in his discretion, shall find that the public convenience and advantage require it."

[9] It is the contention of petitioner that the adoption of and adherence to the said de novo rule is an unlawful assumption of legislative power. The authority of an administrative board or officer, such as the respondent, to adopt reasonable rules and regulations, which are deemed necessary to the due and efficient exercise of the powers expressly granted, cannot be questioned. This authority is implied from the power granted. The petition concedes and states the rule to be that, if the power "had not been expressly, but merely implied, the result would be the same for whatever is necessarily or plainly implied in a statute is as much a part of it as that which is expressed." Johnston v. Baker, 167 Cal. 260, 139 P. 86. In St. Charles State Bank v. Wingfield, 36 S. D. 493, 155 N. W. 776, cited and relied upon by petitioner, the court held invalid a certain rule adopted by the superintendent of banks in South Dakota, but guarded its ruling by the following language:

> "In holding this particular rule promulgated by the public examiner to be void, we are not to be understood as denying the public examiner full authority to adopt and promulgate any rule or regulation necessary or proper in the discharge of particular administrative duties imposed by the statute. In all such matters he may properly exercise reasonable discretion in the adoption of administrative rules within the purview of the particular provision of the statute which imposes the duty. By way of illustration, the statute imposes upon the public examiner the duty and authority to approve banks as reserve depositaries. In the discharge of this duty he may adopt any reasonable rule as to the method of procedure, or the showing required, upon which such approval will be given."

Under the authority of the National Bank Act (U. S. Comp. St. § 9657 et seq.), the Controller of the Currency, as shown by Exhibit 216 herein, has adopted rules and regulations relating to the establishment of offices by national banks. It is interesting to note that among those rules is one that a "national bank will be permitted to establish such an office only within the limits of the city, town, or village named in its organization certificate as the place where its operation of discount and deposits are to be carried on," and also upon a showing to the Controller that the facts and conditions make it necessary to establish such office. Likewise, the Federal Reserve Board has adopted a rule governing its member banks and known as the "continguous territory rule," which provides:

> "The Federal Reserve Board will, as a general principle, restrict the establishment of branches, agencies, or additional offices by such banks or trust companies to the city of location of the parent bank and the territorial area within the state contiguous thereto, as said territory has been defined in the board's resolution of November 7, 1923, excepting in instances where the state banking authorities have certified and the board finds that public necessity and advantage render a departure from the principle necessary or desirable."

The resolution defining the term "contiguous territory" defines the same as "the territory of a city or town whose corporate limits at some points coincide with the corporate limits of the city or town in which the parent bank is located." The petitioner is a member of the Federal Reserve System and it does not appear that such a rule is not a proper administrative regulation.

[10, 11] It is contended by petitioner and is well established that an executive or administrative officer or board may not, in the promulgation of rules, change, alter, amend, or extend his or its statutory powers. But petitioner contends that the de novo rule assumes to lay down a general rule legislative in character, limiting the exercise of the discretion reposed in the respondent by section 9 of the Bank Act. In consonance with the foregoing concededly correct rule, it is obvious that if the word "require," as contained in the rule, be deemed to have a meaning materially different from the statutory word "promoted," and as such would have the effect of restricting the statutory powers of the superintendent of banks, such rule would be invalid. The word "require" is defined to mean "to demand; to claim by right and authority; to exact; to demand as appropriate; to need, or call for." To "need" is given as a synonym. The word "promote" is defined to mean "to contribute to the growth, enlargement, or prosperity of; to forward; encourage; advance." One of its synonyms is to "help." Webster's New International Dictionary, latest edition, Merriam Service, p. 1812. Roget in his International Thesaurus of Words and Phrases, at pages 258 and 300, gives one use of the word "require" as in the sense of "need, want, or have occasion for," and the word "promote" in the sense of "aid, assistance, help, or advancement." With these different shades of meaning applied to those words, it is at once difficult, if not impossible, for this court to determine, as a matter of law, on the face of the de novo rule that any alleged difference in their meaning could have any practical effect in the administration thereof. It would seem to be true that if the public convenience and advantage would be promoted by the establishment of a de novo branch, such public convenience and advantage would require its establishment. Conversely, if the public convenience and advantage would require the establishment of a de novo branch, its establishment would promote the public convenience and advantage. Whether the respondent in the application of the de novo rule has overstepped his statutory duty or authority will be referred to later in the consideration of the evidence.

When the rule on the face thereof is thus construed as in harmony with section 9 of the Bank Act, it is but a declaration of policy on the part of the superintendent of banks. It is set up for the guidance of his own department in the orderly and efficient discharge of the duties of his office and is also a notification to banking corporations under his jurisdiction to the effect that, if and when they desire a branch bank outside of the city of the head office, a prima facie showing of the promotion of public convenience and advantage will be deemed to have been made when it appears that by purchase, consolidation, or merger the applying bank has acquired the control of an existing bank at the location of the proposed branch in such outside city, and that, when the applying bank proposes to establish a de novo branch in such outside city, the fact that it is to be a de novo branch will in itself constitute some showing that public convenience and advantage will not be promoted by the establishment of the new branch and will cast upon the applicant the burden of showing that an exception to the general rule should be made —the final ruling of the superintendent of banks to be subject at all times and in every case to the statutory power and duty of the superintendent of banks to deny the application, unless he shall first ascertain that the public convenience and advantage will be promoted by the opening of the new branch. Such an announced policy we consider within the power of the superintendent of banks as a rule or guiding consideration of his department, and as a notice to applicants as to the showing necessary to be made, and, as such, is a valid regulation of the state banking department.

[12] Having in mind the foregoing determinations as to the powers and duties of the superintendent of banks and as to the proper construction of the de novo rule, and assuming that the original petition otherwise stated a cause of action to compel the respondent to act or to act in a particular manner, we are confronted with certain deficiencies in the said petition which render it vulnerable as against the general demurrer. For instance, it is not alleged therein that the capital and surplus of the petitioner were at the time of making said applications equal to or in excess of the amount required by section 9 of the Bank Act (St. 1909, p. 88) for the opening of said branches or that such facts were known to the respondent. It was not alleged that the petitioner had paid or tendered for payment the fees required by said section 9 (Stats. 1917, p. 602). It was not alleged that the petitioner had presented all of the essential facts to the respondent upon which he might properly exercise his discretion. Sleeper v. Board of Supervisors, 60 Cal. App. 744, 214 P. 292. It was not alleged that the respondent was in possession of the facts of his own knowledge from which the only reasonable conclusion could be drawn that the public convenience and advantage would be promoted by the granting of said applications. These omitted allegations, or the substance thereof, were essential to state a cause of action against the respondent. In advance of a ruling on the demurrer, the commissioner was appointed and the parties proceeded to produce evidence before him. The petitioner appears to have introduced its evidence on the theory that all matters essential to state a cause of action were in issue, and the respondent introduced evidence to meet the petitioner's showing thereon. The petitioner, in the amendments to the petition which this court permitted to be filed, supplied the omitted allegations es-

sential to state a cause of action. The court was prompted to grant leave to file said amendments, not on the theory that the subject-matter thereof had been proved in its entirety, for the evidence had not then been examined at length, but rather that the case might be determined on its merits. Under the peculiar circumstances here presented, the respondent is nevertheless entitled to have a ruling on his demurrer. In the exercise of our discretion, we will consider the demurrer as interposed to the petition as amended. With the amendments the petition states a cause of action and the demurrer is overruled.

[13] In his answer the respondent denied the material allegations of the petition which are in controversy, and under the practice the allegations of the amendments filed to conform to the proof are deemed denied. McDougald v. Argonaut Land Co., 117 Cal. 87, 48 P. 1021; Glougie v. Glougie, 174 Cal. 126, 162 P. 118. He then affirmatively alleged that, since the adoption of the Bank Act in 1909, 109 permits for branch banks have been issued to the petitioner by the state banking department. From the tabulation presented it appears that of this number 34 have been issued since January 1, 1923. He set forth at length the situation as to the business conditions and banking facilities existing at the time the applications here in suit were made and in the localities where it was sought to establish said de novo branches; that he had made a personal examination of the situation on the ground before he denied said applications, and that, as a result of said examination and investigation and from his personal knowledge of the existing conditions, he had determined that public convenience and advantage would not be promoted by the opening of said branches, and that he denied said applications for that reason; that the conditions, as they existed at the time of the exercise by him of his discretion in so ascertaining, and at all times since said action was taken, would not warrant the opening of said branches; that he has adhered to the de novo rule only in the sense that he had made use of the same as a guide or policy and not as a controlling factor in the exercise of his discretion, and that he has never permitted it to limit, modify, or interfere with the exercise by him of his statutory discretion; that in the exercise of said power and in the discharge of his duties, under the Bank Act and under the de novo rule, he has considered each application for permission to open a branch bank on its own merits and has treated applications from all banks seeking such permits with like consideration; that the reason why the petitioner has not applied for more permits for de novo branches outside the city of its head office, and particularly in Los Angeles, is not as alleged in the petition, but that the true reason is that the Federal Reserve Board has refused its permission to open such de novo branches, and if it were not for that fact the petitioner would have applied to him for numerous other branches de novo in Los Angeles and elsewhere, and in this connection alleges that on December 13, 1922, a permit was issued by his predecessor in office to the petitioner to open a de novo branch office at Yuba City, but that such branch has never been opened for the reason that the Federal Reserve Board denied petitioner's application therefor; that on July 13, 1923, the respondent issued to petitioner his written authority to open a de novo branch at Santa Maria, and that said branch has never been opened because the Federal Reserve Board denied its permission; that on March 2, 1923, he granted petitioner his permission to open a de novo branch at Sacramento, and that the Federal Reserve Board likewise denied its permission for that branch; that he granted permission to open a branch bank by purchase or merger with a local bank at Kingsburg, but that the Federal Reserve Board denied its permission to open said branch.

The respondent then set forth at length the history of the de novo rule and its general approval by the California League of Independent Bankers and by the unanimous action of the California Bankers' Association in convention assembled; also the reason, from the viewpoint of the respondent, for the existence of the de novo rule, and the reasons why the said rule should be deemed a wise and salutary policy as affecting business and economic conditions in the state at large, and why the continued adherence to the same should not be disturbed.

With the issues thus framed and presented we are brought to a consideration of the evidence. It is unnecessary, and indeed it would be futile, to attempt to state the same in detail within the confines of this opinion. With the latitude accorded the parties before the commissioner, any and all evidence having any real or probable pertinency to the issues involved seems to have been elicited. We will therefore, of necessity, set forth only portions of the evidence, and be content with a reference to the remainder, and then announce our findings and conclusions on the material portions thereof.

[14] In proof of the allegation that the respondent had denied the applications here in suit solely because of the existence of the de novo rule, the petitioner introduced in evidence a letter from respondent, dated March 10, 1925, which was in response to the petitioner's application for the opening of the branch on South Flower street. In this letter the respondent stated in part:

"I regret very much the necessity of denying this application. This denial is based solely upon the ground that the location of the proposed branch office is outside of the limits of the city in which is located the principal place of business of the applying bank. As perhaps you may know, I have announced and agreed to certain rules regarding the granting of branch offices, one of which is that no de novo permissions for branch offices shall be granted for a location outside of the city in which the principal place of business of the applying bank is located. There is no application which has come to me to which I would rather give my sympathetic and affirmative consideration than this one of yours, but unfortunately I consider that I am bound in the exercise of my discretion by the rule above referred to."

This letter was addressed to the petitioner and was signed by the respondent in his official capacity. The respondent testified that said letter did not set forth the true reason for the denial of the application; that said application was denied after his personal survey and inspection of the local conditions and an ascertainment by him that the public convenience and advantage would not be promoted by the granting thereof; that said letter was drafted by a subordinate in his office after a conference with him as to what action should be taken on the application, and that he did not instruct his subordinate how to word the letter; that said letter was signed by him as a matter of office routine; and that he did not recall that the letter he signed was so worded. But it does not appear that he was laboring under any disability, and the responsibility was his. The considerations urged by him in disparagement of the import of the language of the letter are not appealing. He must be held to have meant what the letter stated, as those dealing with him, as a public officer, had a right to assume that the language was authoritative.

In his letter to the petitioner of date March 20, 1925, which was in response to petitioner's application to remove its international branch from its then location to No. 214 North Main street and to establish the new and additional branch at North Spring street and Sunset boulevard, the respondent stated in part:

"We note your application for permission to move your international branch in the city of Los Angeles to the premises commonly known as No. 214 North Main street. Permission is hereby given to make this transfer, and our license for the new address will be issued as soon as the date of opening at the new location has been fixed. We also note your application for permission to establish a branch 'de novo' to be located at the northwest corner of North Spring street and Sunset boulevard in the city of Los Angeles. * * * I regret that it is not possible for me to grant this application under the conditions which govern the exercise of my discretion in the matter of establishing branch offices. You are familiar with the ruling of this department issued March 8, 1923, affecting the granting of permission for the establishment of branch offices in localities outside the city wherein is located the head office of the applying bank. While I appreciate the needs of your business as you see them, there are other banks in Los Angeles situated about as you are in this civic center removal. I am unable to believe that the public convenience and advantage 'requires' at least three new branch offices in the city of Los Angeles because of the changes incident to the creation of this new civic center. * * * While I appreciate your own point of view in this matter, I cannot believe that you are suffering any injustice in not receiving permission to establish de novo an additional branch office in the city of Los Angeles in consideration of being obliged to move your present international branch."

This letter was likewise signed by the respondent in his official capacity. He testified that it was also drafted by a subordinate in his office and was signed under like circumstances as the letter of March 10th, and after an ascertainment by him that the public convenience and advantage would not be promoted by the granting of the application. Our conclusion with respect to the authenticity of this letter is the same as announced concerning the other. In each case the reason assigned for the denial was unauthorized. The respondent misconceived the effect of the de novo rule as preventing favorable consideration of said applications. His discretion, under the statute, could not thus be circumscribed. Under the law, he had the power to grant the applications, notwithstanding the de novo rule. Even under the language of the rule itself he could have granted them, provided he ascertained that the public convenience and advantage would be promoted thereby.

The position taken by the respondent, as evidenced by those letters, amounted to a failure or refusal to act and exercise his discretion, as the law required. Said letters, when considered alone and without reference to any other evidence, would justify the issuance of the peremptory writ to compel the respondent to act in accordance with his statutory powers; but the petitioner is not seeking the issuance of the writ to compel the respondent to act, but seeks the issuance thereof to compel him to grant said applications.

[15] We are not at liberty to accord to the language of said letters of denial the determinative importance contended for by petitioner. The reasons assigned for the denial of said applications did not preclude the respondent from setting up in this proceeding and relying upon any and all legal reasons for denying the same. The leading case in this state on this subject is Ward v. Flood, 48 Cal. 36, 17 Am. Rep. 405. In that case the mother of a negro girl sought, in a mandamus proceeding, to compel the principal of the Broadway Grammar School in San Francisco to receive the girl as a pupil in said school. The petitioner alleged that the principal had refused to admit the girl to the school, "assigning as the only reason for such action and refusal, the fact that she was a colored person." In his answer the principal

set up another defense; namely, that the lowest grade in his school was the sixth grade, and that the girl had not received sufficient instruction to enable her to enter that grade. The petitioner made a motion for the issuance of the peremptory writ, notwithstanding the matters alleged in the answer. The writ was denied, and, as to the right of a public officer to set up in such a proceeding any lawful reason in opposition to the issuance of the writ, the court said:

> "There is no doubt that if a party, upon tender or demand made, or other proceeding en pais, had put his refusal upon some particular omission or defect in the proceedings of his adversary, he will not afterwards be permitted, in support of such refusal, to allege a new or additional defect or insufficiency in those proceedings, especially if such defect or insufficiency be of such a character as that it might have been cured if it had been pointed out or relied upon at the time. This is the ordinary and general rule, and it proceeds upon the idea that, having specially designated one or more supposed insufficiencies, the party thereby waives and abandons all others. But it is obvious that this rule can have no just application to the case now under consideration. If the law, under the circumstances actually appearing in the record before us, forbade the respondent, as the principal of the school, to admit the petitioner as a pupil therein, the circumstance that the respondent put his refusal on an untenable ground ought not, in this proceeding, to preclude an examination into the very right of the case. The claim of the petitioner to be admitted, and the corresponding duty of the defendant to admit her as a pupil, are governed by law; and if it appear, as it does unquestionably appear, upon the record before us, that she did not possess the requirements, in point of learning, sufficient to entitle her, whatever her color, to be admitted to any class in the school, even the lowest, then the respondent must be considered to have correctly refused to entertain her application for admission, and the legal sufficiency of the particular reasons assigned by him for such refusal becomes wholly immaterial."

See, also, Berger v. Justice, 4 Cal. App. 532, 88 P. 591. The petitioner seeks to avoid the applicability of the case of Ward v. Flood, supra, on the ground that the allegations of the answer therein were admitted. We are unable to discover any difference in principle between that case and the case at bar. The respondent herein alleged in his answer that his denial of said applications was based also on the ground that he had ascertained that the public convenience and advantage would not be promoted by the granting thereof. In his testimony he stated and reiterated that such was the fact and gave his reasons therefor, and in the many days of his examination at the hands of counsel for petitioner his testimony was not seriously discredited. In one of the amendments to the petition, it is alleged that the respondent, in denying said applications, "found and determined that public convenience and advantage would be promoted by the opening of said branches." There is no evidence in the record to support said allegation, and the same is found to be untrue. The contrary under the evidence is found to be true; namely, that the respondent has never at any time found that public convenience and advantage would be promoted by the opening of said branches. For the foregoing reasons the claim of petitioner that, because respondent's letters predicated his denial upon the existence of the de novo rule, all other questions must be deemed resolved in its favor cannot be sustained.

There is another reason why said letters of the respondent should not be held determinative of the rights of the parties herein. It is this. That the petitioner by its pleading and proof has thrown the case wide open on the question of whether, as a matter of law, on the face of the record and regardless of the de novo rule, the respondent was compelled to find that the public convenience and advantage would be promoted by the opening of said branches; or, to put it another way, whether the showing is sufficient to authorize the court to find and conclude, as matter of law, that the respondent could have drawn but one conclusion from the facts before him; namely, the conclusion that the public convenience and advantage would be promoted by the granting of said applications. The law bearing on the solution of the problem thus presented is well settled.

[16] It is the general rule that the writ of mandamus may not be employed to compel a public officer possessing discretionary power to act in a particular way. The court in such a proceeding may compel him to act, but it may not substitute its discretion for the discretion vested in such officer. This general rule is well stated with supporting authority in 16 Cal. Jur. at page 809, as follows:

> "It is a familiar rule governing the issuance of the writ of mandate that an officer in whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Mandamus may not compel the exercise of such discretion in any particular manner; it may only direct that the officer act, and must leave the matter as to what action he will take to his determination."

See, also, 38 C. J. 594.

An important exception to the foregoing general rule is that if the facts as admitted or proved be susceptible of but one construction or conclusion, the right to the writ becomes a matter of law, and the officer may be compelled to act in accordance with the facts as admitted or established. Dufton v. Daniels, 190 Cal. 577, and cases cited on page 581, 213 P. 949. Cases further illustrating the exception to the general rule are Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Hammel v. Neylan, 31 Cal. App. 21, 159 P. 618;

and Walker v. Kingsbury, 36 Cal. App. 617, 173 P. 95. That the exception to the general rule is well established can admit of no doubt, but where the facts are not admitted and are controverted and are susceptible of more than one construction or conclusion and are susceptible to the conclusion adverse to the claimed right, the writ should be denied.

[17] We are brought, then, to this question: Are the facts contained in the record before us susceptible of but one reasonable construction or conclusion; namely, that the public interest and advantage would be promoted by the opening of said branch banks? In answering this question, we may not permit ourselves to be governed by the preponderance of evidence rule such as governs a trial court or jury in an ordinary civil action. If that rule were to be applied, we would be called upon to find and decide whether the petitioner had proved by a preponderance of evidence that public convenience and advantage would be promoted by the opening of said branches. This we may not do. When the court is called upon, as in this case, to determine the character and sufficiency of the evidence to justify the writ as against the respondent, we are governed by the rule that, if there be any substantial evidence in the record which would have supported a conclusion on the part of the respondent that public convenience and advantage would not be promoted by the opening of such branches, the writ must be denied. The rule which applies here is analogous to the rule that, if there be any substantial evidence to support the finding of a trial court on an issue of fact, such finding may not be disturbed, even though the court on appeal might consider that the evidence preponderated the other way. Applying, then, the rule which must govern in this case, we find evidence at great length on both sides of that question. On the one hand, the petitioner has presented volumes of evidence by witnesses examined orally, and by maps, plats, surveys, records, and charts to prove that public convenience and advantage would be promoted by the opening of said branches. On the other hand, the respondent has presented evidence to prove that public convenience and advantage would not be promoted thereby.

From an examination of the record and giving due credit to the material evidence therein presented, it must be said that there is evidence of a very substantial character to support the conclusion that the public convenience and advantage would not be promoted by the opening of said branches. It may also be said that there is very substantial evidence to support the contrary conclusion. But when once we determine from the evidence presented that the conclusion could have been either for or against the petitioner's applications, the inquiry is at an end. To hold otherwise would be to substitute the discretion of the court for the discretion of the superintendent of banks, under the statute, and to transfer from the duly constituted officer of the state to the court the power and the resultant duty of supervising to that extent the state banking department. It is conceivable that, in connection with every application, facts of a substantial character might appear in support of one conclusion or the other. The court might thus be called upon to ascertain the facts and to draw its own conclusions therefrom in the case of every application to the superintendent of banks and his action thereon. It would be manifestly improper for the court, under the law, to undertake that task.

The many cases cited and relied on by petitioner, among which are Riley v, Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418, Tulare Water Co. v. State Water Com., 187 Cal. 533, 202 P. 874, Tarpey v. McClure, 190 Cal. 593, 213 P. 983, are cases wherein a public officer or board was compelled to act in a particular way by reason of the fact that he or it had no discretion in the premises, or had improperly assumed discretion, or having discretion the facts entitling the aggrieved party to the relief sought either as admitted or proved were solely susceptible of the construction or conclusion that, as matter of law, the relief sought should be granted. This is not such a case, and the authorities relied upon are inapplicable.

The petitioner concedes that the de novo rule, which the respondent in a sense inherited from his predecessor and thereafter adhered to, was not designed to discriminate against it, but claims that the respondent acted arbitrarily in connection with said applications and in the enforcement of said rule which by its terms is alleged to be discriminatory. As to the disability or restriction which the respondent assumed himself to be laboring under by reason of the existence of the de novo rule, as expressed in his written denials, the petitioner's charge is sustained, but, as the rule is a valid rule, the action of the respondent thereunder becomes immaterial if it now appear that there were valid reasons for his denial of said applications.

[18] Notwithstanding the fact that we hold the reasons assigned for the denial of said applications in the respondent's letters of denial to be untenable, still we are met by the determinative consideration that by pleading and proof, regardless of the de novo rule and regardless of the said denials, the record in this proceeding presents substantial evidence sufficient to have supported the denial of said applications on legal grounds.

In the recent case of Doble Steam Motors Corp. v. Daugherty, 195 Cal, 158, 232 P. 140, this court approved another guiding principle to be applied to a case where it is sought, in a court proceeding, to interfere with discretionary power of a public board or officer. That was an application for a writ of mandate to compel the commissioner of corporations of this state, another state-wide officer possessing broad powers and duties of a discretionary nature, to issue his permit to the petitioner therein authorizing the latter to issue and deliver certain shares of its capital stock to certain individuals. It was decided that the facts presented were sufficient to support a denial of the application. In the course of the opinion the court said:

> "In the case of Union Transp. Co. v. Bassett, 118 Cal. 604 [50 P. 754] which was a proceeding in equity brought to enjoin the board of harbor commissioners from putting into effect an order of said board with respect to certain docking facilities, this court held that, when subordinate boards or commissioners were by statute invested with discretion with respect to the exercise of their powers, courts would not interfere with such discretion, in the absence of grave reasons tending to show that fraud, corruption, improper motives or influences, plain disregard of duty, gross abuse of power, or violation of law had entered into or characterized the determination of such body; and that, in the absence of such showing of an abuse of discretion, the determination of such board or commission would not be interfered with or overthrown."

There is no showing herein, either by pleading or proof, of fraud, corruption, improper motives, or influences on the part of the respondent. If it be assumed that, in assigning untenable reasons for the denial of said applications, the respondent was guilty of "plain disregard of duty" and consequent violation of the statute by refusing to exercise his discretion as required, we are brought back to the proposition that what the petitioner desires herein is not the issuance of a writ to compel the respondent to act, but to compel him to act favorably on said applications. Here, again, it must be said that the untenable reasons assigned for denial became and are immaterial in the state of the record.

On October 8, 1923, the Federal Reserve Board received a communication from some of the banks of this state concerning the action of the respondent in passing upon certain applications for branch banks, in which communication the respondent was requested to set forth his position with reference to the matters contained in said communication. In reply the respondent, over his signature, in his official capacity, and of date October 30, 1923, submitted a communication to the Federal Reserve Board, in which he stated that, in his opinion, branch banking in California had been such as to justify its continuance in this state, and that whatever might be said as to branch banking generally it is and has been a success in California. He then referred to the fact that conferences had been held with reference to proposed legislation designed to curtail, if not to prohibit, further branch banking in this state, and his determination to adhere to the de novo rule as a guiding consideration in his department within his statutory powers and duties. Continuing, he said, in part:

> "So far as I am aware, and judging from the reports of the Washington hearing that have come to me, the only instance where the propriety of a branch charter granted by me has been seriously questioned is that granted to the Bank of Italy for a branch de novo at Santa Maria. The Santa Maria situation had been an acute one for a considerable time, far antedating my incumbency as superintendent of banks. No profit can come from my entering into a discussion here of the merits of the Santa Maria situation. I accept the responsibility for the decision and wish to say that it was my own independent decision; that I knew at the time a former superintendent of banks had refused permission, and I was well aware of the fact that there would be considerable criticism and a great deal of misunderstanding of my motives in the event that I did grant permission to the Bank of Italy to enter Santa Maria de novo. * * * The decision was made solely on the grounds of public convenience and necessity, and I wish to say here that nothing has since been presented to cause me to change the opinion that I then formed that the people of Santa Maria were entitled to additional banking facilities. I do not intend to enter into a defense of my position in this matter any further than this, and to state that, so far as the conference agreement with reference to branch banking is concerned, the decision in the Santa Maria Case was made with that agreement entirely before my mind and that the decision was made, not in violation of that agreement, but rather as coming within the exception laid down in that agreement which had been very carefully placed therein at the suggestion of my attorney at the time the agreement was entered into. He pointed out the fact that to permit the agreement to be made hard and fast, so that no banks de novo should be granted to branch banks, would be to abdicate the authority granted me in the Bank Act and would be in violation of my oath to accept the duties and responsibilities of that act; i. e., to refuse to determine for myself in obedience to the mandate of that act in each and every instance where application is made, whether 'the public convenience and advantage would be promoted' by the granting of the charter to the applicant. More than that, it was then pointed out and the logic apparently appealed to all the conferees that discretion should reside in the superintendent to deal with those instances, where, through failure to keep pace with the demands of the community, the local banks had failed to meet the requirements of local service. Instead of incorporating the language of the statute into the exception, the language was changed from the 'public convenience and advantage be promoted thereby' to 'public convenience and advantage require it'; in other words, the shade of difference runs from the rather mild word 'promoted' to the somewhat positive word 'require,' and in my finding after a personal investigation of conditions at Santa Maria I so found and have advised the Bank of Italy that I would give them permission to enter the town of Santa Maria upon the ground that I found the conditions to come within the exception laid down in this limitation, to wit, that the public convenience and advantage of

Santa Maria require further banking facilities."

The foregoing communication to the Federal Reserve Board, its authenticity, and the foundation for its introduction in evidence formed the subject of much controversy between counsel. It is sufficient to say that it is deemed properly in evidence.

Respondent testified that his attorney drafted the said communication, that it was so prepared in the nature of a brief, and that, although the attorney seemed to have attempted therein to draw some "fine-haired" distinction between the meaning of the words "require" and "promote," he was unable to draw the same or any differentiation in their meaning, and that in the practical application of the rule there was, to his mind, no distinction between the two words. Here, again, the respondent must be held to have meant what he said, regardless of who drafted the letter. Counsel for petitioner stresses at length the alleged significance to be attached to the phraseology employed by the respondent in said communication seeking thereby to demonstrate that, in the practical application of the rule, the respondent has given the word "require" a more restrictive meaning than the word "promote." There is merit in the petitioner's criticism of the attempt thus, in the face of the statute, to draw any distinction between the meaning of the words. But when the words are properly given no difference in meaning the said communication indicates clearly that in the application of the de novo rule the respondent was duly cognizant of his statutory powers and duties under his oath of office.

[19] The petitioner charges that the California League of Independent Bankers, the members of which were apprehensive of their security and of further invasion of their territory by branches of metropolitan banks, forced the respondent to adhere to the de novo rule, and that it was only after the respondent's agreement to continue to adhere to it that the advocacy and support of legislation, pending in the Legislature of 1923 and designed practically to prohibit all branch banking, was withdrawn by the independent bankers. The record supports the conclusion that the insistence of the independent bankers for legislation on the subject and the withdrawal of their support of pending measures were considerations in the mind of respondent in his decision to continue the rule. But we discover nothing that took place reflecting in any derogatory sense upon the action of the respondent or of the independent bankers in the premises, nor do we perceive how the validity of the rule could be affected by these questions of legislative and administrative policy which contributed to the decision to adhere to it.

[20] It is insisted by the respondent that to issue the writ as sought would in any event be a vain and useless thing for the reason that the Federal Reserve Board has not granted its permission to the petitioner to open branch banks at the locations in question. We think the contention without merit for two reasons. First, the Federal Reserve Board is an official body entirely independent of any state authority, and the respondent is not responsible to that board in the exercise of his statutory powers, although he might properly feel called upon to act in co-operation with that board consistently with his duties under state law; and, secondly, the Federal Reserve Board might adopt and enforce a rule to the effect that it would not grant branch bank permits until the state superintendent of banks had first granted his permission. Each application might thus be brought to a standstill at the outset. Without question, the statutory powers and duties of the respondent should be exercised and discharged independently of any authority having no lawful jurisdiction over him.

Many additional points are discussed in the briefs, but we deem it unnecessary specifically to refer to them, in view of what has been decided.

We therefore find and conclude, in accordance with the foregoing: (1) That section 9 of the Bank Act constitutes a lawful regulation governing the establishment and maintenance of branch banks in this state. (2) That the discretion vested in the superintendent of banks by said section is a lawful delegation of authority to him, to be exercised within the limitations expressed in the section itself and as otherwise provided by law, as above indicated. (3) That the de novo rule on the face thereof is a lawful exercise of the powers of the superintendent of banks as a policy to be followed by him, and as an indication to applicants for branch bank permits of the showing necessary to be made to entitle them to obtain affirmative action on their applications, but in no sense as restricting, modifying, or controlling his statutory discretion. (4) That the reasons assigned by the respondent for his denial of said applications in his communications of March 10 and 20, 1923, were insufficient, but that such untenable reasons did not preclude him from setting up herein additional and valid reasons for such denial. (5) That substantial evidence to support the conclusion that public convenience and advantage would not be promoted by the opening of said branch banks appears in the record; assuming that said evidence be sufficient to support a conclusion the other way on that issue, nevertheless this court should not substitute its discretion for the discretion vested in the superintendent of banks. (6) That the respondent has at no time ascertained that the public convenience and advantage would be promoted by the opening of said branch banks, and that the contention of the petitioner that the respondent was bound to ascertain such fact, as matter of law, on the face of the record, is not sustained. (7) That, taken as a whole, the record does not present facts justifying the issuance of the writ as sought.

The peremptory writ is therefore denied, and the proceeding is dismissed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; FINLAYSON, J.; SULLIVAN, J.; SEAWELL, J.

199 Cal. 724

In re RIDER'S ESTATE (two cases).
(Sac. 3872, 3873.)

(Supreme Court of California. Dec. 7, 1926. Rehearing Denied Jan. 6, 1927.)

1. Perpetuities 🔑6(15)—Beneficiaries, in will directing payment of bequests after paying debts of life tenant, take subject to payment of debts (Civ. Code, §§ 715, 716).

Provision of will, directing payment of bequests after payment of funeral expenses and debts of life tenant, *held* not in violation of Civ. Code, §§ 715, 716, and beneficiaries take bequests subject to payment of debts.

2. Wills 🔑634(15)—Beneficiaries of bequests, subject to payment of debts of life tenant, have vested interest on death of life tenant.

Under will directing payment of bequests, after paying debts of life tenant, beneficiaries to whom property is given on death of life tenant have vested interest in respective bequests upon such death.

3. Wills 🔑629—Interest in estate will be presumed to be vested, unless contrary intention is shown (Civ. Code, § 1341).

The law favors vesting of estates, and, under Civ. Code, § 1341, every interest will be presumed to be vested, unless contrary intention is shown.

4. Wills 🔑634(15)—Testator held to have intended bequests on death of life tenant, subject only to payment of life tenant's debts.

Terms of will, directing payment of bequests after payment of debts and funeral expenses of wife who was given life estate therein, *held* to show intention that beneficiaries should, on death of wife, become entitled to respective bequests, subject only to payment of debts.

5. Wills 🔑473 — Provision for payment of wife's debts after death, if creating invalid trust, held severable and not to impair validity of other provisions.

Provisions in will for payment of wife's debts after her death *held* severable from other provisions making bequests subject to life estate in wife, so that, even though creating invalid trust, invalidity would not impair other portions of will.

In Bank.

Appeals from Superior Court, Sacramento County; Charles O. Busick, Judge.

Petition for distribution by the National Bank of D. O. Mills & Co., executor of the estate of George K. Rider, deceased. From a decree in favor of Edward Rider, contestant, and others, the executor and Mary C. Crosby and others, legatees and devisees, appeal, and Annie Rider, surviving wife, separately appeals, for whom Joseph H. Crosby, executor of her estate, was substituted after her death. Decree reversed in part, with directions.

See, also, 251 P. 805, 807.

Devlin & Devlin, of Sacramento, Fitzgerald, Abbott & Beardsley, of Oakland, Butler, Van Dyke & Desmond, A. I. Diepenbrock, and Arthur E. Miller, all of Sacramento, for National Bank of D. O. Mills & Co. and others.

White, Miller, Needham & Harber, of Sacramento, for Joseph H. Crosby.

Thomas B. Leeper, and O. G. Hopkins, both of Sacramento, and Arthur C. Huston, of Woodland, for Edward Rider and others.

CURTIS, J. The deceased, George K. Rider, died in the city of Sacramento on the 6th day of July, 1921. He left a last will and testament dated November 14, 1919, which was on the 21st day of July, 1921, duly admitted to probate in the superior court of the county of Sacramento. Said will is as follows:

"In the name of God, Amen.

"I, George K. Rider, of the county of Sacramento, state of California, being of sound and disposing mind and memory, and not acting under duress, menace, fraud or undue influence of any person or persons whatsoever, do hereby make, publish and declare this to be my last will and testament.

"First: I hereby revoke any and all wills by me at any time heretofore made.

"Second: I hereby nominate, constitute and appoint National Bank of D. O. Mills & Co., a banking corporation, as the executor of this my last will and testament, and also as trustee of the trusts hereinafter created, and I hereby direct that no bond or undertaking of any kind be required of my said executor, either as such executor or as such trustee, or in the performance of any power or duty imposed upon it in connection with my estate, or the probate of this my last will and testament, and the said trusts, either hereunder or by statute.

"I hereby authorize, empower, direct and instruct my said executor to sell, dispose of and convert into cash, at the earliest practical moment consistent with good business judgment, all of the property and effects of my said estate, both real and personal (excepting, however, any bonds then held by me and excepting also such personal property as is herein specifically devised), in order that the bequests herein made may be promptly paid and the purposes of this my will performed with reasonable expediency and dispatch.

"I hereby authorize, and empower my said executor to sell at public or private sale, and without obtaining any previous order of court therefor, any property, real, personal or mixed, which may belong to me at my death, excepting however, bonds and such personal property as is herein specifically devised or bequeathed, which said property is not to be sold, but to be distributed as hereinafter provided.

"I further authorize and empower my said executor, in its discretion, pending the administration of my estate, and pending such time as a sale of the property thereof may be made, to continue to carry on any and all business ventures in which I may be interested or engaged at the time of my death, either singly or in a copartnership or association with others, in order that, and until such time as, the same may be sold to the best business advantage as the judgment of my executor, or its officers and directors, shall direct.

"I authorize, empower and direct my said executor in the discretion of its executive officers or board of directors to settle and compromise, upon such terms as to them shall seem proper, any litigation or dispute in which my estate or any part thereof shall be involved.

"Third: I give, devise and bequeath to my said trustee above named all of the property and effects left by me at the time of my death or in which I then have any interest and wheresoever the same may be situate, subject at all times to the power of my executor and the authority hereby vested in such executor to convert the same into cash, in trust nevertheless, and for the uses and purposes as follows, to wit:

"To invest and reinvest the same in safe interest-bearing securities, and to lend the same upon promissory notes, secured by first mortgages upon real property or upon ample and safe collateral security, and to pay over the net income derived therefrom monthly, to my wife, Annie Rider, if she survives me, so long as she shall live. And thereafter, in the event of her death, to pay all her just debts and liabilities, funeral expenses and expenses of last illness, and thereupon the remainder of said trust fund then in the hands of my said trustee, shall be vested in and shall go to the several parties who are hereinafter named as beneficiaries in the succeeding paragraphs of this my last will and testament and in the amounts and proportions as in such succeeding paragraphs provided.

"Fourth: If my said wife, Annie Rider, should not survive me, then and in such event (and also in the event of her death after mine, but then subject to the trusts hereinabove created), I make the following bequests and devises, hereby disposing of all of the corpus of my said estate in manner following, to wit:

"(a) I will, devise and bequeath to the Right Reverand Bishop of the diocese of Sacramento, the sum of five thousand dollars ($5,000.00), to be used and expended by him for general repairs of the Catholic Cathedral, situate at the northeast corner of Eleventh and K Streets, in the city of Sacramento."

Then follow subsections (b) to (n), inclusive, whereby said testator provides for 13 separate bequests to individuals and institutions which he desires to favor.

"(o) I will, devise and bequeath to Mrs. Mary C. Crosby, now residing at 3116 Telegraph avenue, Oakland, California, the sum of twenty-five thousand dollars ($25,000.00), provided she be then living at the time of the death of both my wife and myself. Otherwise this bequest shall be void.

"(p) I will, devise and bequeath to Joseph H. Crosby, now residing at 3116 Telegraph avenue, Oakland, California, the sum of two thousand dollars ($2,000.00).

"(q) I will, devise and bequeath to Margaret Faber, now residing at 3116 Telegraph avenue, Oakland, California, the sum of two thousand five hundred dollars ($2,500.00).

"(r) I will, devise and bequeath to Hazel Lamphrey of Sacramento, California, the sum of one thousand dollars ($1,000.00).

"(s) I will, devise and bequeath to Hattie Kunz the sum of two hundred fifty dollars ($250.00), and to Emma Kunz the sum of two hundred fifty dollars ($250.00), both of said persons now residing at 2131 10th Street, Sacramento, California. In the event of the death of either of said last-named persons before the death of both my wife and myself then the bequest hereby made to such person shall go to the survivor. In the event of the death of both of said persons before the death of both my said wife and myself then these bequests shall be void.

"(t) I will, devise and bequeath to my said trustee above named, the sum of five hundred dollars ($500.00), in trust nevertheless, for the following uses and purposes, to wit:

"To invest and reinvest the same in safe interest-bearing securities or to lend the same on promissory notes secured by first mortgage upon real property or upon ample and safe collateral security and to pay the annual issues and profits thereof for the care and preservation of and to keep in good condition the lot or plot in the city cemetery, known as the Rider plot, wherein are buried my father, John Rider, and my mother, Nancy A. Rider.

"(u) I will, devise and bequeath my library, books, bookcases and desk to Evelyn M. Crosby and William J. Crosby, share and share alike.

"(v) All of the rest, residue and remainder of my said estate I will, devise and bequeath to my said trustee above named, in trust nevertheless, for the following uses and purposes, to wit:

"To invest and reinvest the same in safe interest-bearing securities or to lend the same upon promissory notes secured by first mortgages upon real property or upon ample and safe collateral security during the lifetime of Evelyn M. Crosby and William J. Crosby and out of the income thereof to pay to Margaret Faber, now residing at 3116 Telegraph avenue, Oakland, California, during her lifetime the sum of one hundred fifty dollars ($150.00) per month; to pay to William Egan, now residing at 3116 Telegraph avenue, Oakland, California, during his lifetime, the sum of fifty dollars ($50.00) per month; the remainder of such income shall be paid share and share alike to Evelyn M. Crosby and William J. Crosby, or the survivor of them during the continuance of this trust, provided however, that in the event of the arrival of both Evelyn M. Crosby and William J. Crosby or the survivor of them at the age of 21 years, then this trust shall cease and determine and the corpus of said trust fund shall then go and belong to the said Evelyn M. Crosby and William J. Crosby in equal portions, share and share alike, or to the survivor of them, then living. Provided, however, that the bequest of the residue hereinabove made which shall become the absolute property of the said Evelyn M. Crosby and William J. Crosby upon the arrival of both of them or the survivor of them, at the age of 21 years, if then living, is conditional upon and impressed with the burden of the payment of the following sums for the following periods of time, to wit:

"That there shall be paid out of the corpus of said residue or the income therefrom, if such income be sufficient, to Margaret Faber, the sum of one hundred fifty dollars ($150.00) per month during the term of her natural life and to William Egan, the sum of fifty dollars ($50.00) per month during the term of his natural life.

"(w) I direct that during the probate of this my last will and testament and during the administration of my said estate, that there be paid out of the funds in the hands of my executor, dating from the day of my death and ending on the date of the distribution of my said estate, to Evelyn M. Crosby and William J. Crosby, each the sum of seventy-five dollars ($75.00) per month, such payment, however, to cease as to either or both of said last-named parties upon the death of either or both of them prior to distribution.

"(x) I have intentionally omitted to provide herein for or to make any bequest to any of my brothers or any other of my heirs-at-law, or to any other person except those herein specifically mentioned, I have living at the date of the execution of this my will, two brothers, William Rider and Edward Rider. Both of my said brothers are amply able to provide for themselves, and I have omitted them from the terms of this my last will and testament after full consideration and due deliberation and with full intention.

"(y) In the probate of this my last will and testament, and in all matters concerning or affecting my said estate, I request my said executor to employ as its attorney and counsel, J. W. S. Butler, and so far as I may do so under the law, I hereby appoint him as attorney and counsel for said executor. I make this statement for the reason that the said J. W. S. Butler, for a long period of time, has acted as my counsel and legal adviser and he has a more thorough knowledge of my business and affairs than any other person.

"In witness whereof, I have hereunto set my hand and seal this 14th day of November, 1919.

"George K. Rider [Seal]."

The said deceased left an estate consisting of real and personal property, which was later appraised at an amount in excess of $200,000. The National Bank of D. O. Mills & Co., named in said will as the executor thereof, was appointed as such executor by the probate court and thereafter qualified and entered upon the discharge of its duties.

Upon the hearing of the petition for distribution, one of the respondents, Edward Rider, appeared and contested the right of the appellants to share in the distribution of said estate and claimed that he, as an heir at law of said deceased, was entitled to have an undivided one-half of the said estate distributed to him, subject only to a life interest in the trust fund created by said will in favor of the widow of said deceased, the said Annie Rider. This claim on the part of said respondent was based upon the contention that all that portion of the trust provision of said will, except that in favor of the wife of deceased to receive during her lifetime the income from said trust fund, was void for the reason that it was in conflict with sections 715 and 716 of the Civil Code of this state. Said respondent further contended that the said Annie Rider, the wife of said deceased, had waived all her right as surviving wife and heir at law of said decedent to receive any of the property of said estate, except a life interest in said trust fund, by her written waiver signed by her and annexed to said will. Said written waiver is as follows:

"I, the undersigned, Annie Rider, the wife of George K. Rider, do hereby certify and declare that I have read the above and foregoing which is the last will and testament of George K. Rider; that I am familiar with all of the terms of said last will and testament; that the same is made with my full knowledge and consent; that I hereby accept the terms of said last will and testament and specifically waive any and all rights which I may have under the law or otherwise as heir at law or surviving wife or otherwise, in and to any of the property and effects of said George K. Rider, except such bequests as are specifically made to me and in my favor in said last will and testament; and I hereby accept the bequests contained in said last will and testament in full of all property rights or other rights of any kind and character to which I may be entitled under the laws of the state of California as surviving wife of the said George K. Rider.

"Witness my hand this 14th day of November, 1919. Annie Rider."

The probate court sustained the claim of said respondent, and by the decree of distribution distributed the entire estate of said deceased to the said National Bank of D. O. Mills & Co., in trust for the use and benefit of decedent's widow, Annie Rider, for the term of her natural life and all the rest and residue thereof to respondents herein, except that there was ordered paid by said decree upon the death of the said Annie Rider all the bequests made by said deceased in paragraph 4 of his will except those mentioned and provided for in subsections (o), (p), (q), (u), (v), and (w) of said fourth paragraph. The bequests which were ordered paid by said decree, however, were directed to be paid, so it is recited therein, "as per agreement, wishes and assignments of respondents." None of the bequests, however, in favor of any of the appellants herein were by said decree directed to be paid. This provision of the decree distributing these bequests is not material to any of the issues raised on either of the appeals taken in this matter, and it will probably not be necessary to again refer to it.

Two appeals were taken from said decree of distribution, and they are before us upon separate records. One of said appeals is by the National Bank of D. O. Mills & Co., the trustee named in said will, and the following named persons, all of whom were named as legatees in said fourth paragraph of said will: Mary C. Crosby, Joseph H. Crosby, Evelyn M. Anderson, formerly Evelyn M. Crosby, William J. Crosby, and Margaret Faber, all of whom were excluded by said decree of distribution from participating in the distribution of said estate. The said William J. Crosby, being a minor, appears by his guardian ad litem, Joseph H. Crosby. The second of said appeals was taken by the said Annie Rider, the widow of decedent. As the validity of the trust provision of said will, except that portion thereof in favor of the said Annie Rider, is one of the main questions presented on each appeal, the two appeals will be considered together. Should said trust provision be found to be invalid, there will then remain the further question presented by the appeal of Annie Rider as to the effect of the written waiver of said widow attached to the will of said deceased, and the validity of that portion of the decree of distribution based upon the construction given said written waiver by the probate court, which resulted in the distribution of the whole of said estate, except a life interest in the trust fund provided in said will in favor of the widow, to the respondents herein to the entire exclusion of any right therein of the said Annie Rider, either as the surviving wife or heir at law of said decedent. The respondents herein are the said Edward Rider, a brother of said deceased, and Hazel Lamphrey and Genevieve Wallace, daughters of a deceased brother of the testator, whose death took place prior to that of the testator. Since the perfecting of her appeal Annie Rider has died, and Joseph H. Crosby, the executor of her last will and testament, has been substituted in her place as a party hereto.

The position of the widow of said decedent, Annie Rider, relative to the validity of those portions of said will in question was that it was her desire that they be enforced according to their terms. She did not question their validity and made no contention that they were illegal in any particular. She therefore joined with the other appellants herein in asking to have the will of decedent, in its entirety, declared legal and all the terms given the effect intended for them by the testator. She did contend, however, that in case portions of the will which the probate court declared void were finally determined to be contrary to the law of this state and therefore void, that she was entitled to share in the distribution of his estate as the surviving wife and heir at law of her deceased husband.

The validity of the trust, created by said will, other than that portion thereof in favor of the widow, it is conceded by all the parties hereto, depends upon the effect to be given the following provisions found in the third paragraph of said will:

"And thereafter in the event of her death to pay all her just debts and liabilities, funeral expenses, and expenses of last illness, and thereupon the remainder of said trust fund then in the hands of my said trustee shall be vested in and shall go to the several parties hereinafter named as beneficiaries."

The probate court construed this provision of the will as creating a trust in favor of the creditors of Annie Rider, the widow of said deceased, and that its effect was to suspend the power of alienation for an indefinite period beyond the life of said Annie Rider, and possibly beyond the lives of the persons in being at the time of the creation of said trust. Accordingly, the court held that this provision of the will was in violation of sections 715 and 716 of the Civil Code and was for that reason void. Not only did the probate court hold that this provision of the will was void, but it further held that all of the provisions of the fourth paragraph of said will were also void and declared that the bequests, which the testator attempted by the terms of said paragraph to make in favor of the individuals and institutions therein enumerated, were invalid and void by reason that none of said bequests were to take effect within the period of time limited by said sections 715 and 716 of the Civil Code.

[1] Appellants, in attacking this conclusion of the probate court, contend that the provision directing the trustee to pay the debts, liabilities, funeral expenses, and expenses of last illness of the wife is a mere charge upon the property of the estate in the hands of the trustee; that it does not create any trust whatever; but that upon the death of the said Annie Rider, the beneficiaries in paragraph 4 of said will take the entire estate, subject only to said charge for the payment of the debts and expenses of the deceased widow. We find but few adjudicated cases where any provision, even similar to that now under consideration, has been construed by the court. In the case of Scofield v. Olcott, 120 Ill. 362, 11 N. E. 351, the testator by his will left all his estate to trustees, with directions for them to hold the same and to pay the income therefrom to his wife during her lifetime or so long as she remained unmarried. Upon the marriage or death of his wife, the trustees were directed to convert into money sufficient of his estate to pay certain legacies. Said legacies were to be paid within three months after the death or marriage of the wife, and the trustees were then directed to pay the rest and residue of the estate to the son of said testator as soon as said legacies shall have been paid. It was contended that the son did not take under the will for the reason that his estate in remainder did not take effect until three months after the wife's death, and until the legacies had been fully paid. The Supreme Court of Illinois refused to follow this reasoning, and in ruling adversely to this contention did so in the following language (page 355 [120 Ill. 375]):

"It is said that in this case the interest in question was not a vested one at the death of the testator, for the alleged reason that the estate in remainder was not to take effect at the expiration of the life estate, but after the lapse of three months thereafter, during which time property was to be sold, and out of the proceeds of such sales legacies to the amount of $15,000 were to be paid. This position, however, is not sound. A devise to a person after the payment of debts and legacies is not contingent until such debts and legacies are paid. Such a devise confers an immediately vested interest. The words of apparent postponement are considered only as creating a charge."

In McGraw v. McGraw (C. C. A.) 176 F. 312, the testator also conveyed his property to trustees. One of the conditions of the trust was that the trustees were to pay certain of the income from the property of the estate to the decedent's wife and daughter. The will further provided:

> "Upon the death of my said wife said trustees out of the gross income of said estate shall pay the expenses of her funeral and burial in proper and fitting manner and of the inscription of her name upon the monument above provided for. * * *
>
> "Upon the death of both my said wife and my said daughter, and after the payment of all my said debts, my remaining estate, real and personal, shall be distributed by my said trustees as follows:"

The decision in this case was rendered by Mr. Justice Harlan, later of the Supreme Court of the United States, and in part was as follows:

> "The general contention of the plaintiff is that the provisions of the will amount to a prohibition, expressed or implied, of the 'alienation' of the McGraw building during a period of time not based on lives in being at the date of the creation of the estate. And that contention rests principally on those clauses directing that the estate shall not be finally distributed except upon the death of both the wife and daughter, and after the payment of the testator's debts. Items 9 and 10. Thus, it is argued, the alienation of that estate is suspended not only during the lives of the wife and daughter, but must await the payment of debts which might not occur until long after the death of the wife and daughter. We cannot accept that view. If the testator had given no specific direction for the payment of debts, his estate would still have been charged with such debts. * * * The direction, therefore, in the will, not to finally 'distribute' the estate until the debts were paid, should be interpreted to mean nothing more than what the law required as to payment of debts. We cannot agree that the will created a separate, specific, independent trust for the payment of debts to continue, if necessary, beyond the lives of the wife and daughter. If the will were so construed, there would be some ground to contend, as to the McGraw building and lots, that the power of 'alienation' had been suspended beyond the term of two lives in being at the date of the creation of the estate. State v. Holmes, 115 Mich. 456, 73 N. W. 548; Casgrain v. Hammond, 134 Mich. 419, 96 N. W. 510, 104 Am. St. Rep. 610. But we do not so construe the will. In effect, it provided that the estate created was to be enjoyed after the death of the wife and daughter, subject to the payment of any debts legally chargeable upon it. That is, the words 'after the payment of all my said debts' should be held to mean nothing more than if the testator had said, in terms, that the property devised could be enjoyed by the beneficiary after the death of the wife and daughter, 'subject to the payment of all my said debts.' We accept that view. Sound reason, we think, supports this view, and it is sustained by many authorities."

It is a significant circumstance to be observed, that, while said opinion discusses and decided that the "clauses directing that the estate shall not be finally distributed except upon the death of both the wife and daughter, and after the payment of the testator's debts," did not render the bequests following this clause void on account of the direction therein for the payment of the testator's debts, yet no question appears to have been raised as to the validity of said bequest on account of the direction to the trustees to pay the expenses of the funeral and burial of the testator's wife. Evidently, they did not consider that this provision of the will directing the payment of these expenses after the wife's death constituted any serious defect in the will, or one which would render the bequests in question of doubtful validity. The decision, however, is authority, supporting appellants' contention that, under the provisions in a will directing the payment of a bequest after the payment of debts, the beneficiaries take the bequest subject to the payment of the debts.

[2, 3] The case of Shipman v. Rollins, 98 N. Y. 311, was brought by the surviving executor to secure a judicial construction of a will involving certain bequests made to take effect after the death of the wife by the testator. This will contained a provision similar to that in the Rider will, directing the payment of Mrs. Rider's debts after her death, and read as follows:

> "After the death of my wife, what may be left of the real and personal estate hereinbefore devised to her, or the proceeds thereof, I authorize my executors to sell, and add the proceeds of said sales to the amount which is to produce her annuity; and from this fund (if she leaves no cash or property of her own) I direct them to pay her funeral expenses, and such debts as she may have contracted."

The bequests therein were held valid, but, again, neither the court nor counsel seemed to have raised any question as to their invalidity by reason of the provision of the will directing the executor to pay the wife's debts and funeral expenses after her death. These authorities, although they cannot be regarded as absolutely decisive of the questions involved, indicate that the trend of judicial decisions is not to construe a provision of a will similar to that in the Rider will, directing the trustees to pay the debts of the wife after her death, as creating a separate trust in the trustees in favor of the creditors of the wife, but rather to regard such a provision simply as a charge upon the estate then in the hands of the trustees, and that the beneficiaries to whom said estate has been bequeathed or devised by the will succeed to the same subject to such charge. There are no authorities to the contrary, to our knowledge. Under such a construction, there being no intervening trust, the beneficiaries to whom the property is given upon the death of the wife have a vested interest in their respective bequests upon such death. This is in accord with the well-established doctrine that the law favors the vesting of estates, and every interest will be presumed to be vested unless a contrary intention is shown. 10 Cal. Jur. 603; Civ. Code, § 1341; Williams v. Williams, 73 Cal. 99, 14 P. 394. On page 102 (14 P. 396) of the Williams Case, the court states the law in the following language:

> "The law favors the vesting of interests, and every interest will be presumed to be vested, unless a contrary intention is clearly manifest."

[4] It was also the evident intention of the testator that the beneficiaries named in paragraph 4 of his will should, upon the death of his wife, become entitled to their respective bequests, subject only to the payment of the debts of the wife and her funeral expenses and expenses of last illness. This is evident from the terms of the will, notwithstanding the use of the words "thereafter" and "thereupon" in the provisions of the will under discussion. These words must be construed in connection with the words used by the testator in paragraph 4, where the several bequests are provided for. Invariably, the testator, in making these bequests, uses the expression "I will, bequeath and devise." These latter words unquestionably express an intent on the part of the testator to give to the beneficiaries therein named a vested interest in the respective bequests upon the wife's death. Estate of Ritzman, 186 Cal. 567, 569, 199 P. 783; Estate of De Vries, 17 Cal. App. 184, 190, 192, 119 P. 109. In Estate of Ritzman, supra, the court quotes the language of Chief Justice Marshall, found in Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322, as follows:

> "The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law."

With this rule as our guide, there could be no question as to the ultimate construction to be placed upon the will of George K. Rider, deceased. His intention is clear and perfectly apparent. His first wish was to provide his wife with the entire income of his estate so long as she should live, and that all her debts, liabilities, and funeral expenses should be paid. Upon her death, the residue remaining in the hands of the trustees was, by the testator, in plain and unequivocal language, given to the beneficiaries named in the fourth paragraph of his will. In unmistakable language he further indicated that it was his intention that the respondents should not receive any part of his estate, except the bequest of $1,000 to Hazel Lamphrey. The only claim that testator's will is inconsistent with the rules of law is based upon the provision requiring the payment of the wife's debts. We have already shown that a reasonable interpretation of the meaning of this provision does not render it inconsistent with the provisions of any of the rules of law of this state. The will therefore, as a whole, expresses the intention of the testator as to the disposition of his estate and should be upheld as his final testamentary act.

Numerous authorities have been cited by respondent in support of his contention that, if the provisions of the will in question created a trust, it suspended the power of alienation beyond the lives of those in being, or that it possibly did so; that, accordingly, the interest of the beneficiaries under paragraph 4 of the will does not become vested upon Annie Rider's death, but only at the termination of the trust to pay her debts, and, therefore, there are no persons in being during the period of the execution of this trust by whom an absolute interest in possession could be conveyed. We are satisfied that the exposition of the law, as set forth in these authorities, is a correct statement of the legal principles presented therein, but these authorities are, in our opinion, inapplicable to the facts in the present proceeding, inasmuch as the facts herein fail to show that any trust to pay the wife's debts was created by said will.

[5] For another reason we think the bequests in paragraph 4 of the will should be held to be valid. The provision for the payment by the trustee of the wife's debts and liabilities, funeral, and expenses of last illness is, in our opinion, severable from the other provisions set forth in the will, and cannot be considered as a necessary and integral part of the testator's scheme of disposing of his property by last will and testament. This scheme of the testator contemplated that his wife should enjoy the entire income of his estate so long as she might require said income, or, in other words, during her lifetime. When her wants were all met and she had no further need of said property and it could be of no further use to her, the scheme of said testator contemplated that the property of his said estate should then go to the beneficiaries; in the amounts and in the manner provided in paragraph 4 of said will. It is true that it was a part of this scheme that the wife's debts and liabilities, funeral, and expenses of last illness should be paid after

her death by said trustee, but the payment of these obligations of his wife was a trivial and inconsequential part of the whole scheme of the testator. This part can be eliminated from the whole scheme without any serious impairment of the scheme as a whole. With this part of the scheme eliminated, the material and essential features of the testator's plan for the disposition of his estate by last will and testament remain intact, and every person and institution, which said testator desired to share in his bounty, receive the amount in the precise manner and at the exact time designated by said testator in his said last will and testament. Therefore, conceding that the provisions of the will in reference to the payment of the wife's debts after her death created an invalid trust, yet its invalidity will not impair the validity of the portions of the will which are legal. Estate of Phelps, 182 Cal. 752, 190 P. 17; Estate of Whitney, 176 Cal. 19, 167 P. 399; Estate of Pichoir, 139 Cal. 685, 73 P. 606; Estate of Fair, 136 Cal. 79, 68 P. 306.

In Estate of Phelps, the rule is prescribed as follows:

> "Where there are 'several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statutes against perpetuities, the estate of the trustee will be upheld to the extent necessary to enable him to execute the valid trusts, and will only be void as to the illegal or invalid trusts.' It is an application of rule stated in section 1317 of the Civil Code that, where the intention of the testator cannot have effect to its full extent, it must have effect as far as possible. The rule is also stated as follows: 'Where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator.' * * * A perusal of the trust clause shows that the preliminary portion providing for the annuities to the brothers and sisters temporarily, until the accumulation of the fund, was but a minor part of the main scheme of the testatrix. It is temporary in character, in the nature of a family allowance. It was intended merely to provide an income for them during the period of the settlement of the trust. The principal parts of the plan were to provide the fund of $240,000, to divide the income thereof among the brothers and sisters during their respective lives and give the remainder to their children or heirs, as specified; to pay the specific legacies mentioned in the succeeding clause and to the residuary legatees the ultimate residue. The preliminary scheme is not essential to the main plan, nor so interwoven with it that the two must stand or fall together."

We conclude, therefore, that the bequests provided for in paragraph 4 of said will are valid, even though the provision in the will for the payment of the wife's debts after her death might be invalid, as this latter provision is but a minor part of the general scheme of the testator and can be severed therefrom without materially affecting said general scheme. But, as we have before indicated, the provision providing the trustee to pay these debts of the wife after her death, is, in our opinion not objectionable to the terms of sections 715 and 716 of the Civil Code or any other law of the state. It is, accordingly, a valid and legal part of the will of the testator and should be given effect with the other provisions of said will.

This conclusion that the will, as a whole, is valid renders it unnecessary for us to consider any of the points raised by the appeal of the surviving wife, Annie Rider. Her concern, as we have already pointed out, was as to a legal distribution of any property of said estate as to which it might be held that said deceased died intestate. The will, as we construe it, disposes of the whole estate of said decedent, and, therefore, the questions presented by her appeal are no longer of any concern to her or any one else.

The decree of distribution, except as to that portion thereof providing for a trust in favor of Annie Rider during her lifetime, is reversed, and the probate court is directed to enter a decree distributing the property of said estate in accordance with the terms of the last will and testament of said deceased.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; FINLAYSON, J.; SEAWELL, J.; SULLIVAN, J.;

199 Cal. 742

In re RIDER'S ESTATE. (Sac. 3874.)

(Supreme Court of California. Dec. 7, 1926.)

1. Executors and administrators ⟹513(12)—Orders approving executor's accounts, including payments made to surviving wife under will, held conclusive (Code Civ. Proc. § 1637).

Payments made by executor to surviving wife, under will directing payment of all income to her, *held* properly included in executor's accounts so that, under Code Civ. Proc. § 1637, order of probate court settling accounts was conclusive and binding on parties interested in estate.

2. Executors and administrators ⟹513(3)—Orders of probate court approving executor's account will be presumed to have been made on proper proof.

It must be presumed that orders of probate court, approving executor's account, were made on proper and legal proof, and that all legal requirements have been complied with.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceeding for distribution by the National Bank of D. O. Mills & Co., as the executor of the estate of George K. Rider, deceased.

Decree of distribution in favor of Edward Rider, contestant, and others, and from that part of the decree charging the executor with certain moneys as cash on hand the executor appeals. Reversed.

See, also, 251 P. 799.

Butler, Van Dyke & Desmond and Arthur E. Miller, all of Sacramento, for appellant.

Thomas B. Leeper and O. G. Hopkins, both of Sacramento, and Arthur C. Huston, of Woodland, for respondents.

CURTIS, J. This appeal is from the same decree of distribution in the Estate of George Rider, Deceased, from which two other appeals were taken and which have been decided this day. (Sac. Nos. 3872, 3873), 251 P. 799. The appeal herein is from that portion of said decree charging the appellant, the executor of the will of the deceased, with $56,206.32, as representing the total balance in cash on hand in said estate. Appellant contends that it was erroneously charged with $28,051.49, which it had paid to Annie Rider, the surviving wife of said deceased, and that an error in the figures, amounting to $322.76, had been made in computing said balance.

The item of $28,051.49 was paid by said executor to Annie Rider, the widow of said deceased, under what said executor conceived to be the intent and purpose of the last will and testament of said deceased, a copy of which may be found in the decision of this court above referred to. By the terms of this will, the whole estate of the testator was devised and bequeathed to the National Bank of D. O. Mills & Co., as trustee, to pay the entire income therefrom to the widow of said deceased during her lifetime. The National Bank of D. O. Mills & Co. was also appointed the executor of said will, and during the administration of said estate, and, acting under the terms of said will as it construed them, said executor paid to Annie Rider the income from the estate as it received the same from time to time. $11,851.49 was in this way paid to Annie Rider during what was practically the first year after decedent's death. This item was included in the executor's first annual account. During the next period of time, practically 18 months, covered by the second annual account, the executor in the same manner paid Annie Rider $16,200, and this amount was included in its second annual account. These accounts each came on regularly for hearing, after due notice given, and were approved and allowed by the probate court. Thereafter, however, and at the hearing of the petition for distribution the probate court, notwithstanding these previous orders approving the first and second annual accounts, directed said executor to account for all sums of money paid Annie Rider during the period of time covered by said accounts and charged said amounts against said executor in fixing the balance of money in its hands for distribution. Appellant contends that this action of the probate court was erroneous and that the court had no power, after settling the two accounts of the executor, to thereafter charge it with the items which had been included in said accounts, and allowed, and approved by the court. As supporting this contention appellant relies upon section 1637 of the Code of Civil Procedure and Estate of Grant, 131 Cal. 426, 63 P. 731.

The court in Estate of Grant, supra, goes into the matter quite thoroughly and concludes that the order settling accounts, whether it be an annual or a final account, "is conclusive as to all 'items contained therein' except as to persons under legal disability." On the other hand, respondents contend that an order approving an account is binding and conclusive only as to the items that are properly included in such an account; that advances made to beneficiaries are not proper items, either in an annual or a final account; and that an order of court approving such an account is not conclusive or binding as to such items improperly included therein. It was held in Estate of Willey, 140 Cal. 238, 241, 73 P. 998, 999, that:

> "The duties of the executors are to preserve the estate, pay the indebtedness of the deceased, the charges of administration, and put the estate in such condition that distribution may be had to those entitled to it under the will. In the matter at bar, however, the executors did something more. They assumed, in advance of the decree of distribution, to construe the terms of the will, the validity of particular bequests, who were the beneficiaries thereunder, and to make payments of the funds of the estate upon their own judgment as to these matters. This was clearly outside of their duties, was an attempt to intrench on the exclusive jurisdiction of the court to determine these matters on distribution, and an infringement upon the rights of all persons interested in the estate to have these matters disposed of solely on distribution —partial or final."

This case arose, however, on an appeal from an order striking out from an account certain payments made to beneficiaries under the will of the deceased on the ground that they were not proper items for settlement or approval in an executor's account. The question as to the conclusive and binding effect of an order settling an executor's account, including such items, did not arise in this case. Neither was it one of the questions decided in Estate of Ross, 179 Cal. 358, 182 P. 303, cited by respondents.

[1] We think, however, that the payments made by the executor to Annie Rider were more than mere advances to a beneficiary under the will of the deceased. By the terms of the will of George K. Rider, deceased, his wife, Annie Rider, was to receive all the income from the property of said estate. Included in the decedent's estate was not only his separate property, if he had any, and his

interest in the community property, but also the interest of his wife, Annie Rider, in the community property. In consideration of the provisions in the will giving to her the income during her lifetime, she surrendered her right in the community property and waived all her right to any of the property of her deceased husband as his surviving wife and heir at law. There is no evidence that she was possessed of any other property than that which she received under the will of her husband. The testator in turn evidently attempted to provide for her every need, even making provision therein for the payment of her debts and liabilities after her death and her funeral and expenses of last illness. It is inconceivable that he could have been so solicitous for her welfare, as manifested by his scrupulously making provision for her care, support, and maintenance after the property of the estate should come into the hands of the trustee, not forgetting to provide for her last illness and final interment, and then refusing or intentionally neglecting to provide for her immediate needs following his death and during the administration of his estate. To attribute to deceased any such intention would be to place an unreasonable and unnatural, and we believe unwarranted, construction upon the terms of his will and the conduct and actions of the testator surrounding its execution. Undoubtedly he intended the provisions that he had made in his will for the care and support of his wife should be for her maintenance, until such a time as the property of the estate should be distributed to the trustee, when she would continue to receive the entire income therefrom. Such a provision in the will, under such circumstances, is sometimes referred to as a bequest for maintenance, and it has been held that such a bequest dates from the death of the testator and that the beneficiary therein is entitled to receive the income from the property of the estate immediately upon the decedent's death. Estate of Dare, 196 Cal. 29, 235 P. 725.

[2] The proceedings at the hearing of the first and second annual accounts, in which the items in dispute were contained, are not before us. It must be presumed that the orders of the court approving these accounts were made upon proper and legal proof and that all legal requirements had been complied with. It appears that these items were paid by the executor under the claim that the will required their payment as maintenance for the widow during the administration of the estate, and they were, accordingly, included in its accounts. As such, they were proper items to be included in the executor's accounts and the orders thereafter approving said accounts were conclusive and binding upon the parties interested in the estate. It was error, therefore, on the part of the probate court to charge said executor with the items which had previously been allowed and approved by the court in the order settling the first and second annual accounts. These orders were conclusive against all parties in any way interested in the estate, saving, of course, persons laboring under any legal disability. Code Civ. Proc., § 1637.

As to the item of $322.76, claimed to be an error against appellant, made in computing the amount of cash in the hands of the executor, it is evident that a new decree of distribution will have to be made in the matter of this estate. In preparing such decree, any error in computation made in the previous decree, if any such error was made, can be readily corrected in such new decree.

That part of the decree of distribution appealed from on this appeal is reversed.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; FINLAYSON, J.; SEAWELL, J.; SULLIVAN, J.

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199 Cal. 747

In re RIDER'S ESTATE. (Sac. 3800.)

(Supreme Court of California. Dec. 7, 1926.)

Appeal and error ⟹781(4)—Question of wife's right to family allowance, pending administration of husband's estate, becomes moot on her death.

On death of surviving wife, questions involved on appeal from order of probate court, refusing her family allowance, pending administration of husband's estate, become moot.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Proceedings by Annie Rider, as surviving wife, for order of family allowance for her support during administration of the estate of George K. Rider, deceased. From an order refusing the allowance, petitioner appeals, Joseph H. Crosby, as executor of her estate, being substituted after her death. Appeal dismissed.

See, also, 251 P. 799, 805.

White, Miller, Needham & Harber, of Sacramento, for appellant.

Thomas B. Leeper and O. G. Hopkins, both of Sacramento, and Arthur C. Huston, of Woodland, for respondent Edward Rider.

CURTIS, J. This appeal was originally taken by Annie Rider, the surviving wife of George K. Rider, deceased, from an order of the probate court refusing to make a family allowance for her support during the administration of the estate of said deceased. Since the perfecting of said appeal, Annie Rider has died and Joseph H. Crosby, as the executor of her last will and testament, has been substituted in her place and stead as appellant herein.

Upon the death of said Annie Rider, the questions involved herein have become moot. It would accomplish no purpose to permit the executor to prosecute this appeal, for even if he should succeed in securing a reversal of the order appealed from, the probate court could not, after the death of said Annie Rider, act upon her petition for a family allowance, except to dismiss the same on account of her death.

This appeal is therefore dismissed.

We concur: WASTE, C. J; SHENK, J.; RICHARDS, J.; FINLAYSON, J.; SEAWELL, J.; SULLIVAN, J.

200 Cal. 44

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF ENGINEERING, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 12069.)

(Supreme Court of California. Dec. 18, 1926.)

1. Master and servant 🔑361—Under statutes requiring convicts to work for state without compensation, master and servant relation not created where convict's civil rights are suspended (Pen. Code, §§ 673, 1586, 1588).

Under Pen. Code, §§ 1586, 1588, providing for employment of convicts by state and requiring convicts to work, relationship of master and servant does not arise by implication, where work is compulsory and no compensation allowed, in view of section 673 suspending civil rights of prisoners.

2. Master and servant 🔑361—Statute, providing for employment of convicts on highways for compensation held to make convicts "employees" (Convicts Road Camp Bill; Workmen's Compensation Act).

Convicts Road Camp Bill (St. 1923, p. 667), providing for employment of convicts on highways and allowing compensation, termed "earnings," *held* to create relation of master and servant between convict so employed and state highway commission, and make convict "employee" under Workmen's Compensation Act (St. 1913, p. 279, as amended).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

3. Pardon 🔑1—Legislature may restore civil rights of prisoners which it has suspended.

Power of Legislature to deprive prisoner of civil rights includes corresponding power to restore such rights.

4. Master and servant 🔑361—"Employ," as used in statute providing for employment of convicts, should be construed according to ordinary usage (Convicts Road Camp Bill; Civ. Code, § 13).

Word "employ," as used in Convicts Road Camp Bill (St. 1923, p. 667), providing for employment of convicts on state roads, should be construed according to context and approved usage of language, under Civ. Code, § 13, unless different sense is obviously intended.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employ.]

5. Convicts 🔑8—Statute providing for employment of convicts on state highways should be liberally construed (Convicts Road Camp Bill).

Convicts Road Camp Bill (St. 1923, p. 667), providing for employment of convicts on state highways at compensation, should be liberally construed to carry out beneficent purpose of statute.

6. States 🔑119—Sums paid convicts working on state roads held not gift (Convicts Road Camp Bill; Const. art. 4, § 31).

Sums paid convicts under Convicts Road Camp Bill (St. 1923, p. 667), *held* not a gift, under Const. art. 4, § 31, inasmuch as Legislature had power to restore suspended civil rights of convicts and to compensate them for their labor.

7. Master and servant 🔑361—Convict injured while exercising option to work on roads held entitled to compensation as employee (Pen. Code, § 673; Convicts Road Camp Bill; Workmen's Compensation Act).

Convict injured while engaged in working on highways where such work was optional, though not paroled, under Pen. Code, § 673, *held* entitled to compensation under Workmen's Compensation Act (St. 1913, p. 279, as amended), as Convicts Road Camp Bill (St. 1923, p. 667), made such convict employee and restored civil rights.

In Bank.

Application by the California Highway Commission, Department of Engineering, for certiorari, to be directed to the Industrial Accident Commission and another, to review an order of the Commission awarding compensation for injuries to a convict engaged in highway work. Award affirmed.

Frank J. Creede and John J. Taheny, both of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Commission.

Milton L. Schmitt, of San Francisco, for respondent Smith.

PER CURIAM. The following opinion prepared by Mr. Presiding Justice John F. Tyler of the District Court of Appeal, First District, Division 1, while sitting as a justice pro tempore of this court, is adopted as the opinion of the court:

"Certiorari to review an award of the Industrial Accident Commission. The facts are simple and without dispute. Robert Smith was convicted of the crime of burglary in the first degree. On March 10, 1922, he was sentenced to state prison for a term of from one to 15 years. After serving the minimum sentence of one year the board of prison directors fixed his full sentence at five years. Shortly thereafter

Smith made application and was granted permission to perform work on the public highways of the state under the direction of the state highway commission, he being eligible for this privilege. One of the benefits enjoyed by prisoners assigned to this character of work is a credit on the sentence to be served of two days for every one day of service at highway work. Shortly after his assignment to a prison camp, chapter 316 of the Laws of 1923 became effective. This act provides, among other things, for the payment of compensation to a convict for work so performed by him, and Smith received the benefits conferred by the act. On March 17, 1924, while performing his duties as a road laborer he was struck by flying fragments from an accidental explosion of a blast, causing him various and serious bodily injuries, including injuries to both of his eyes. Smith was thereupon returned to the hospital at San Quentin for treatment. Upon his discharge from the hospital he remained within the prison until he was finally paroled on account of the severe injuries he had received. His credits materially reduced the term of his sentence, which was completed on June 25, 1925, at which time he was finally discharged from custody. On August 25th, following, he filed an application with the Industrial Accident Commission for disability benefits by reason of his injuries. The state insurance fund was the insurance carrier, and it was joined as a defendant in the proceeding. The commission made an award in favor of Smith. It provided for the payment to him forthwith of the sum of $791.52 as compensation for permanent disability, and, beginning with March 10, 1926, the further weekly sum of $7.76 for a period of 138 weeks, and after the expiration of that time, the weekly sum of $4.79 for the remainder of his life. The award was made upon the theory that the relation of master and servant existed between California highway commission and the applicant by reason of the provisions of the act of 1923, providing for the payment by the commission to convicts for services performed by them on the state highways. The sole question, therefore, that is here presented is whether or not a convict engaged in the performance of labor on a state highway under the provisions of chapter 316 of the Laws of 1923 is an employee within the meaning of the Constitution and the Workmen's Compensation Act (St. 1913, p. 279, as amended).

[1] "There is no provision either in the organic law or the statutes which directly includes or excludes them as such. The question, therefore, concerning what relationship exists between the state and an incarcerated convict so employed, involves the proper construction to be given to the various laws relating to the subject. Section 673 of the Penal Code declares that a sentence of imprisonment in a state prison for a term less than life suspends all the civil rights of the prisoner so sentenced during his term of imprisonment. Section 1586 of the same Code provides, in substance, that all convicts may be employed by authority of the prison directors under the charge of the wardens in performance of work for the state. Section 1588 charges the directors with the duty of requiring every able-bodied convict confined in a state prison to perform as many hours of faithful labor every day during the term of his imprisonment as shall be prescribed by the rules and regulations of the prison. Under this section, and before the passage of the indeterminate sentence law, which went into effect July 27, 1917, a convict who performed in a faithful manner the duties assigned to him was entitled as of right to a fixed credit for good conduct. That plan was done away with by the Legislature in adopting the plan of indeterminate sentence. In re Lee, 177 Cal. 690, 695, 171 P. 958. The board of prison directors thereafter, and solely as a prison regulation, adopted a plan by which, in the discretion of the board, deserving convicts were awarded credits. See In re Mann, 192 Cal. 165, 219 P. 71. It is manifest that under these sections the relationship of master and servant growing out of employment does not exist by implication for the reason that a convict confined within the prison walls is deprived of civil rights which his sentence suspends. Work performed by him is compulsory on his part and for it he receives no compensation. The incapacity thus imposed upon felons resembles in some respects the ancient ban of civiliter mortuus. Lewis v. State, 96 N. Y. 71, 48 Am. Rep. 607; Thompson v. Bronk, 126 Mich. 455, 85 N. W. 1084. Under the provisions of the Act of June 16, 1913 (Stats. 1913, p. 1048), a comprehensive parole system has been adopted under which a prisoner undergoing a first term of imprisonment other than for life is entitled, as a matter of right, upon the expiration of one year of his sentence, to make application for parole. If parole be granted, a prisoner so paroled may contract for his employment, for by section 673 of the Penal Code, the board of prison directors may restore to such prisoner certain civil rights. The scope and extent of the civil rights so restored are to be determined by the board at the time the parole is granted. The question of what contractual rights a paroled prisoner may acquire under this act, however, is a purely academic one so far as this case is concerned, for the applicant had not been granted a parole thereunder at the time of his injury. A discussion of the status of a paroled prisoner may be found in California Law Review, vol. 2, p. 401, and also in volume 5 of the same periodical at page 81. We are not here directly concerned with this question.

[2] "In the year 1923 the Legislature enacted what is generally known as the Convicts Road Camp Bill (Stats. 1923, c. 316, p. 667). This act, among other things, provides that the state highway commission may employ or cause to be employed on the highways of the state certain convicts confined in the state prisons, and that when so employed such convicts shall receive a specified compensation not exceeding 75 cents net per day for their labor. Provision is also made for authority of the prison directors to send the number of convicts to a prison camp as may be requisitioned by the commission. Under these conditions it is respondents' claim in support of the award that this act entirely changes the status of convicts who may be assigned to work on the highways and creates a new class of paroled prisoners between whom and the state a relationship is created, one of the incidents of which is a liability under the Workmen's Compensation Act for injuries. Respondents seem to concede that while engaged in work within the prison walls, this claimed relationship does not and cannot arise, but they insist that there is logically and necessarily a

real, definite, and distinct difference between the status of a convict within and one without the prison walls performing work upon the highways under the provisions of the act in question; that as to the latter it was the intention of the Legislature as evidenced by the use in the act of the words 'employ' and 'employment' to authorize the state highway commission to enter into a contract of employment with convicts released for such work. We are of a like opinion. It may be conceded that one serving a sentence of imprisonment in a state prison is, in contemplation of law, a prisoner therein, as well when at work outside, under surveillance of the prison guards, as when confined within its walls. Bradford v. Glenn, 188 Cal. 350, 205 P. 449. The power, however, to deprive a prisoner of his civil rights is one that resides in the Legislature.

[3-6] "The power to thus deprive a prisoner of such rights must include the corresponding power to restore them. This we think was the manifest intention and purpose of the Convicts Road Camp Bill. The legislation is in keeping with the modern idea that it is for the benefit of society to rehabilitate those possessing criminal instincts, and one of the means employed is to partially restore to them their civil rights to contract for their labor as an encouragement to that end. The act so expressly indicates, for it provides by the very first section thereof that the 'state highway commission may employ or cause to be employed, convicts confined in the state prisons,' etc. In the same section it is provided that all convicts so employed shall receive the compensation provided for, and such compensation is referred to as earnings. The word 'employ' has a definite legal meaning, and legal terms when used in a statute are to be construed according to the context and the approved usage of language unless a different sense is obviously intended. Civ. Code, § 13; Fidelity & Casualty Co. v. Ind. Acc. Comm., 191 Cal. 404, 216 P. 578, 43 A. L. R. 1304. There is nothing contained in the statute which indicates that a different meaning was intended. On the contrary, its manifest object was to authorize those who were afforded the privilege to enter into a contract of employment with the state highway commission to have restored to them the limited civil right which the reformative measure provides for. The statute as a whole should be liberally construed to carry out its beneficent purposes. Western Ind. Co. v. Pillsbury, 172 Cal. 807, 159 P. 721. It was in evidence and it is not disputed that it was optional with prisoners as to whether they would accept this labor or not. They were at liberty to refuse it, and in some instances it had been refused. Having accepted it, however, the applicant was entitled to all the rights under the act, one of which must be held to be the benefits enjoyed by employees under the Workmen's Compensation Act. The Legislature having the power to restore the suspended civil rights of a convict and having the further power to compensate them for the character of the work in question, it follows that the sums provided for do not constitute a gift under section 31 of article 4 of the Constitution, as suggested by petitioners.

[7] "We conclude, therefore, that under the terms of the Convicts Road Camp Bill the Legislature intended to restore to a convict assigned to work upon the public highways such limited civil rights as are necessary to create the relation of master and servant between him and the state highway commission, and, this being so, he must be held to be an employee within the meaning of the Workmen's Compensation Act. It follows that the applicant is entitled to all the benefits of this act, and the Industrial Accident Commission was correct in so concluding."

For the reasons given, the award is affirmed.

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80 Cal. App. 284

HULL v. RAY. (Civ. 3182.)

(District Court of Appeal, Third District, California. Dec. 15, 1926.)

1. Appeal and error 🔑1071(1)—Judgment must be reversed, where findings are irreconcilably in conflict.

Where findings are irreconcilably in conflict, judgment must be reversed, because it is impossible, under such circumstances, to determine which findings controlled court in rendering its judgment.

2. Trial 🔑404(1) — Liberal construction should be given findings to support judgment, if possible.

Findings should be liberally construed so as to support judgment, if possible.

3. Sales 🔑135—In action to rescind contract to purchase cattle, defendant held not to have breached contract by failure to procure transfer of cattle's registration.

In action to rescind contract to purchase cattle, defendant *held* not to have breached contract by failure to procure transfer of cattle's registration, not being required to procure actual transfer of record of ownership of blooded cattle on books of certain cattle club, such club not having been mentioned in sales contract and having no claim to title in stock in question, and there being sufficient compliance by defendant's tendering of certificate entitling plaintiff to procure such transfer upon application.

4. Sales 🔑143—Bill of sale is not required to be in particular form, so long as it contains language sufficiently describing property and importing actual transfer of title.

A bill of sale is not required to be under seal or couched in any particular form, so long as it sufficiently describes property sold and contains language importing actual transfer of title.

5. Sales 🔑141—"Bill of sale" is written agreement by which person transfers his title to goods or chattels to another person.

A "bill of sale" is a written agreement by which one person transfers his title to goods or chattels to another person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Sale.]

6. Sales 🔑135—In action to rescind contract to purchase cattle, defendant, agreeing to furnish good and sufficient bill of sale, held required to give clear title to unincumbered stock.

Where defendant to action to rescind contract to purchase cattle agreed to furnish plaintiff with good and sufficient bill of sale, he was required by implication to furnish title that was clear to unincumbered stock.

7. Sales 🔑135—In action to rescind contract to purchase cattle, defendant held to have failed to furnish required clear, unincumbered title (Civ. Code, § 1765).

In action to rescind contract to purchase cattle, defendant *held* to have failed to deliver clear, unincumbered title to stock, as required by contract, even though receipt and transfer of documents might be said to constitute bill of sale to registered cattle, under Civ. Code, § 1765, there being absolutely no document purporting to represent bill of sale to four unregistered cattle.

8. Sales 🔑199—Passage of title to personalty, being dependent upon intention of parties, must be determined from surrounding circumstances, mere delivery not being conclusive.

Mere delivery of personal property is not conclusive as to passing of title thereto, question as to title's passage being dependent upon intention of parties, which must be determined from facts and circumstances of case, delivery being only one circumstance.

9. Sales 🔑135—Party, contracting to deliver record as well as actual title, must deliver document purporting to convey title, in order to comply with contract.

One, who contracts to deliver not only actual title, but record evidence of that title as well, has not fulfilled his agreement until document purporting to convey title has been delivered, there being clear distinction between record title and actual title to either personal property or real estate.

10. Sales 🔑279—Warranty of title to personalty conferred by statute is not equivalent to written warranty of title (Civ. Code, § 1765).

Warranty of title to personal property, conferred by Civ. Code, § 1765, is not equivalent in every respect to written warranty of title.

11. Sales 🔑143—Failure to provide written warranty of title to personalty, as agreed, constitutes breach of contract, authorizing "rescission" (Civ. Code, § 1689).

Where there is an agreement to deliver written warranty of title to personalty upon sale hereof, refusal to comply with such agreement constitutes "rescission," pursuant to Civ. Code, § 1689.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rescission.]

Appeal from Superior Court, Orange County; F. C. Drumm, Judge.

Action by John S. Hull against Carl Ray to rescind a contract to purchase registered cattle. From a judgment for defendant, plaintiff appeals. Reversed.

Sloane & Sloane, of San Diego, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment rendered in favor of defendant, in a suit to rescind a contract to purchase certain registered cattle. Appellant asserts that the findings of the trial court are so conflicting and irreconcilable as to require the reversal of the judgment. The evidence adduced at the trial is not before this court.

The findings of the trial court were to the effect that on November 13, 1922, defendant agreed, in writing, to sell plaintiff 14 head of registered cattle and 4 head of unregistered stock for the sum of $3,500; that said pedigreed stock were registered with the American Jersey Cattle Club of New York, and that the defendant held the certificates of such registered stock in his own name; that by the terms of said contract defendant agreed to "execute and deliver to this plaintiff a good and sufficient bill of sale of said cattle, together with a warranty of title"; that, as part consideration for the purchase of said cattle, plaintiff relied on the fact that said cattle were blooded and registered, which would render them more valuable for breeding purposes and for resale; "that the defendant did not, and has not, at any time, failed or refused to furnish the plaintiff the warranty of title, and certificates of record, transfer of ownership of said registered cattle," but that the only instruments which defendant did supply to plaintiff, pursuant to said contract, were tendered on November 13, 1922, and consisted of the following:

> "Bill of Sale.
>
> "April 10, 1923.
>
> "Received of John S. Hull, payment in full for 20 head of Jerseys, bought of me on November 13, 1922. [Signed] Carl Ray."

And accompanying this document were separate printed declarations of ownership of said blooded stock and authorizations for said cattle club to transfer to plaintiff the registration thereof. Each of these documents were filled out with the name, number, history, and description of the said blooded animals, in the following language:

> "Transfer of Ownership.
>
> "Send this paper for record to the American Jersey Cattle Club, No. 324 West Twenty-Third St., New York. (See directions on back.)
>
> "I sold to John S. Hull of Nester, Cal., the following Jersey animal, ——— (male; female). Name, ———. Herd Register No. ———. Date of delivery to buyer, ———.
>
> "I hereby authorize the transfer of ownership

as above, to be registered on the books of the American Jersey Cattle Club.

"[Signed] Carl Ray, Lankersham, Cal."

The court further found that the defendant did furnish to plaintiff "warranty of title, and certificates of record, transfer of ownership, indorsed to the plaintiff, and authorizing the American Jersey Cattle Club to transfer said registered cattle into the name of plaintiff"; that the "defendant declined and refused to supply plaintiff with any other or different instruments"; that on April 4, 1923, "plaintiff had fully performed all of said contract on his part," and thereupon demanded of the defendant a good and sufficient bill of sale of all of said cattle, together with the warranty of title in compliance with their written agreement, and on May 5, 1923, plaintiff offered to restore to defendant all of said cattle and gave notice of rescission of said sale.

Upon these findings, the court rendered judgment for the defendant.

It is not pretended that any instrument tendered to the plaintiff referred to or described any of the unregistered cattle which were purchased, nor that the title to the cattle was actually defective.

Appellant contends that the findings are fatally conflicting and that the defendant has failed and refused to supply him with (1) a good and sufficient bill of sale, (2) warranty of title to said stock, or (3) certificates issued by the American Jersey Cattle Club of New York, transferring upon their books the title of said cattle to plaintiff, and that the judgment should therefore be reversed.

[1, 2] Where findings are irreconcilably in conflict, the judgment must be reversed, for the reason that it is impossible, under such circumstances, to determine which findings controlled the court in rendering its judgment. Los Angeles Land Co. v. Marr, 187 Cal. 126, 200 P. 1051; Estep v. Armstrong, 91 Cal. 659, 27 P. 1091; Learned v. Castle, 78 Cal. 454, 18 P. 872, 21 P. 11; Manly v. Howlett, 55 Cal. 94; Rand v. Columbian Realty Co., 13 Cal. App. 444, 110 P. 322. But findings should be liberally construed so as to support the judgment, if possible. Ames v. City of San Diego, 101 Cal. 390, 35 P. 1005; Goodwin v. Snyder, 70 Cal. App. 98, 232 P. 763.

[3] The plaintiff cannot complain because the defendant has failed or refused to procure the transfer or registration of the blooded stock upon the books of the American Jersey Cattle Club. Nowhere in the contract does it appear that the defendant agreed to obtain this transfer. The name of the cattle club is not even mentioned in the contract. This club had no title to the stock in question and no authority to transfer title. We assume that it merely purported to keep for its members an authentic record of the ownership, history, and description of blooded stock, which upon application it would certify, or transfer, upon the payment of customary fees, not as a public record, but rather as a private enterprise. The contract involved in this case had nothing to do with membership in this cattle club, nor with the procuring of a transfer of the record of ownership upon the books of that organization. But certificates were tendered to plaintiff which authorized him to procure the transfer upon application. We are of the opinion that this was a compliance with the contract, so far as that feature of the agreement is concerned. It therefore follows that the trial court properly found that the defendant was not required to procure the actual transfer of the record of ownership of the blooded cattle on the books of the American Jersey Cattle Club.

But the defendant did agree to "execute and deliver to the plaintiff a good and sufficient bill of sale" to all of said cattle, both registered and unregistered stock, and to furnish him with a "warranty of title."

[4, 5] A bill of sale is not required to be under seal, nor couched in any particular form (35 Cyc. 162), so long as it sufficiently describes the property sold and contains language importing actual transfer of title. A bill of sale is a written agreement by which one person transfers his title to goods or chattels to another person. Black's Law Dict. 134; Berry v. Robinson, 122 Ga. 575, 50 S. E. 378. In Putnam v. McDonald, 72 Vt. 4, 47 A. 159, it was held that a signed instrument in the following language, "Terms cash. P. to M. dr. one bicycle, $47.50, paid July 27, 1896," constituted a mere receipt, and was not a bill of sale. The court there said:

> "A bill of sale is a writing evidencing the transfer of personal property from one person to another. The nature of the writing would seem to require that it contain some statement of the fact of transfer."

In Houghton v. Carpenter, 40 Vt. 588, it was said that a bill of sale must contain the substantial elements of a contract, and one of the defects pointed out in this writing, was that it did not contain any words importing a transfer of title. Under the English rule which requires the registration of bills of sale, it is held that the receipt for the purchase money of goods sold, not amounting on the face of it to a grant or transfer, is not a bill of sale.

[6] In the instant case, the defendant agreed to furnish plaintiff with a "good and sufficient bill of sale, together with a warranty of title." The use of the term "good and sufficient" implies that the title was to be clear and the stock unincumbered. Chancellor Kent says:

> "A covenant to execute and deliver a good and sufficient deed of a piece of land does not mean merely a conveyance good in point of form. That would be a covenant without substance. But it means an operative conveyance; one that carries with it a good and sufficient ti-

tle to the lands to be conveyed." Clute v. Robinson, 2 Johns. [N. Y.] 595, 613; Story v. Conger, 36 N. Y. 673, 93 Am. Dec. 546.

[7] The respondent contends that the foregoing receipt, together with the transfer documents taken together, constitute a sufficient bill of sale in point of form, and that by the sale and delivery of the cattle, under the provisions of section 1765, Civil Code, the title was automatically warranted by law as completely as though the defendant had specifically incorporated a written warranty of title in the documents which he tendered to plaintiff. It is true that section 1765, Civil Codes, provides:

> "One who sells or agrees to sell personal property, as his own, thereby warrants that he has a good and unincumbered title thereto."

And it was said in Gross v. Kierski, 41 Cal. 111, 115:

> "The sale and delivery of the goods in possession, where nothing is said about the title, is, therefore, precisely equivalent to an express warranty of title, and, the facts being ascertained, the rights and liabilities of the parties are exactly the same."

[8] The document hereinbefore mentioned, termed a "bill of sale" is nothing more than an ordinary receipt for the purchase price of cattle. It does not purport to acknowledge the transfer of title to the stock. The form and language used in that document are insufficient to constitute a bill of sale. The second instrument hereinbefore mentioned, which is termed a "transfer of ownership," does not purport to be a present transfer of title, but seems to be merely on acknowledgment that the animal described in the document had been sold to John S. Hull, and authorizing the American Jersey Cattle Club of New York to transfer the record of ownership thereof on their books. Even though it may be said that the two documents, taken together, are sufficient in form to constitute a bill of sale as between the parties to such cattle as are described in these certificates of transfer, yet there was no such certificate executed with respect to any of the unregistered cattle. As to these four unregistered cattle, there is absolutely no document which even purports to represent a bill of sale. The mere delivery of personal property is not conclusive as to the passing of title thereto. The question as to whether the title to personal property actually passes to the purchaser upon its delivery depends upon the intention of the parties, which must be determined by the facts and circumstances of the case. While the actual delivery of personal property is a significant fact indicating an intention to transfer title, yet it is not conclusive. 35 Cyc. 308; South S. F. Packing, etc., Co. v. Jacobsen, 183 Cal. 131, 190 P. 628. If the transaction is evidenced by an instrument in writing, the intention of the parties is to be determined primarily by reference to the written document. 22 Cal. Jur. 948, § 34; Potts Drug Co. v. Benedict, 156 Cal. 324, 104 P. 432, 25 L. R. A. (N. S.) 609.

[9] There is a clear distinction between record title and actual title to either personal property or real estate. Regardless of the ownership of actual title, one who contracts to deliver not only the actual title, but record evidence of that title as well, has not fulfilled his agreement until the document purporting to convey the title has been delivered. In the case of Thompson v. Richards, 14 Mich. 172, 185, where plaintiff agreed to pay certain indebtedness, "when Richards signs off all his rights and title in said property," the court said:

> "We think the agreement * * * as to all tangible personal property * * * which would pass by mere delivery, be satisfied by a delivery to the defendants, so as to place the same in their full possession and control, and an acceptance of the same, unless written evidence of the transfer was specially requested. But if the defendants should refuse to accept such delivery without written evidence of the transfer of title, they would have the right to insist upon it, and might refuse to accept a delivery without it. * * *"

[10, 11] Nor is the warranty of title to personal property, which is conferred by section 1765 of the Civil Code, equivalent, in every respect, to a written warranty of title. The mere possession of the personal property in the hands of the purchaser is presumptive evidence of title, but it is not conclusive, for the reason that the actual transfer of title depends upon the intent of the parties. Where there is a written warranty of title, that document, in the absence of fraud or mutual mistake, will determine the intent of the parties. But where there is no written evidence of the warranty of title, the seller may show by oral testimony that in delivering possession of the property he had no intention of warranting the title. Miller v. Van Tassel, 24 Cal. 459; Johnson v. Powers, 65 Cal. 179, 3 P. 625. It is therefore apparent that an agreement to deliver a written warranty of title to personal property, upon the sale thereof, is a material and valuable consideration, the refusal to comply with which would constitute a breach of contract and authorize an action for rescission, pursuant to section 1689, Civil Code.

For the reason that the defendant has failed and refused to deliver a bill of sale to plaintiff for the four unregistered head of cattle and has failed and refused to deliver a written warranty of title to any of the property sold, he has not complied with his written contract of sale.

The findings are in conflict and incapable of being reconciled in that they certify that the only documents tendered by the defendant to plaintiff, pursuant to their contract of sale, consisted of the two instruments hereinbefore set out, which, we are of the opinion, fail to comply with the agreement to "execute and deliver a good and sufficient bill of sale, together with a warranty of title." And, upon the contrary, the trial court has found "that the defendant did not, and has not, at any time failed or refused to furnish the plaintiff the warranty of title and certificates of record, transfer of ownership of said registered cattle," while it is further found that "the defendant declined and refused to supply plaintiff with any other or different instruments." These findings are irreconcilable, and the judgment must therefore be and is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

79 Cal. App. 662

TURNER v. STOCK. (Civ. 5578.)

(District Court of Appeal, First District, Division 2, California. Dec. 8, 1926. Hearing Denied by Supreme Court Jan. 6, 1927.)

1. Appeal and error 🔑544(2)—Whether findings support judgment and whether judgment grants relief warranted by findings are only questions open on appeal on judgment roll alone.

Where appeal is on judgment roll alone, without a bill of exceptions, questions whether findings support judgment and whether judgment grants the relief warranted by the findings, if properly made, are the only questions open for review.

2. Appeal and error 🔑907(3)—On appeal on judgment roll alone, court must presume that evidence was sufficient to support findings (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, where appeal is on judgment roll alone, without bill of exceptions, appellate court must presume in support of judgment that evidence taken at trial was sufficient to support findings of trial court.

3. Appeal and error 🔑907(3)—On appeal on judgment roll alone, in suit for specific performance, court must assume that evidence cleared up uncertainties in writings and warranted decree.

Where appeal, in suit for specific performance, is taken on judgment roll alone, without bill of exceptions, court must presume that competent evidence was received to clear up uncertainties in the writings constituting the contract, and that such evidence warranted trial court in ordering specific performance.

4. Appeal and error 🔑931(7)—Where appeal is on judgment roll alone, court must assume that findings sufficient to support judgment were within issues framed.

Where appeal is on judgment roll alone, without bill of exceptions, appellate court must presume that findings sufficient to support judgment were within issues framed by the parties during the course of trial, and that they were proved by competent evidence admitted without objection.

5. Appeal and error 🔑1071(1)—Where appeal is on judgment roll alone and facts found support judgment, reversal is unwarranted, though findings were not within pleadings, no prejudice being shown.

Where appeal is on judgment roll alone and record shows that court found all facts essential to support judgment, though in some respects complaint did not sufficiently plead those facts, but does not show whether pleader asked leave to amend complaint to conform to proofs, judgment cannot be reversed unless appellant shows prejudicial error.

6. Appeal and error 🔑704(2)—Where objection is to particular finding or failure to find, evidence must be brought up.

Where objection is made that trial court has made an erroneous finding or has failed to find on a particular issue, appellant must bring up the evidence; otherwise, appellate court may assume that evidence supported finding, or that particular issue was abandoned, or requested finding thereon unwarranted.

7. Contracts 🔑23—Under statute, acceptance must be absolute and unqualified (Civ. Code, § 1585).

In view of Civ. Code, § 1585, acceptance to result in contract must be absolute and unqualified, a qualified acceptance being equivalent to a new proposal.

8. Evidence 🔑416—In suit for specific performance of contract, evidence explaining reference to "certificate" in telegram of acceptance held admissible, notwithstanding parol evidence rule.

Where contract sought to be specifically enforced consisted, in part, of letter referring to a prior letter and offering to sell property, and telegram accepting offer, with the direction "send deed and certificate for collection to bank," *held* evidence to show that reference to "certificate for collection" was not a new demand, but had to do with arrangements made in previous letter referred to, was admissible, notwithstanding parol evidence rule.

9. Specific performance 🔑28(2)—To warrant specific performance, contract must contain all material terms in sufficiently definite manner.

To warrant specific performance of contract for sale of real property, it must contain all the material terms expressed in a sufficiently definite manner.

10. Evidence 🔑452—Latent ambiguities in contract sought to be specifically enforced, arising from reference to extrinsic circumstances, may be remedied by same means.

Where contract, sought to be specifically enforced, contains latent ambiguities raised by reference to extrinsic circumstances, such ambiguities may be remedied by the same means, notwithstanding rule that contract must contain all material terms.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Action for specific performance of contract to sell real estate by William S. Turner against George Stock. Decree for plaintiff, and defendant appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

G. R. Dexter, Howard B. Henshey, and Bailie, Turner & Lake, all of Los Angeles, for respondent.

NOURSE, J. The petition for a rehearing is denied, but the opinion heretofore filed herein is modified to read as follows:

Plaintiff sued for the specific performance of a written contract for the sale of real property in Los Angeles county for the agreed sum of $6,000. The complaint alleged that the written contract was executed on August 18, 1921, and arose from two letters and a telegram passing between the parties; first, a letter dated June 8, 1921, sent from Detroit, Mich., by the defendant to the plaintiff, in which the defendant acknowledged receipt of plaintiff's letter of June 3, and offered to sell the property which is the subject of the action for the sum of $6,000; and, second, a letter dated August 6, 1921, and also sent by the defendant to the plaintiff from Detroit, in which the defendant stated that his former offer would stand until January 1, 1922; the third, a telegram dated August 18, 1921, sent by the plaintiff to the defendant in Detroit, in which the plaintiff stated that he would take the property for $6,000, and added:

"Send deed and certificate for collection to First National Bank Hollywood. Deed to run to me."

The defendant denied the execution of the contract on August 18, or at any other time, and set up a special defense, pleading that the plaintiff had taken an unfair advantage of him in the transaction, because of his knowledge of the increased value of the real property in and about Los Angeles. The trial court found that the parties executed a written agreement for the purchase and sale of the property involved for the sum of $6,000 on August 18, 1921, and gave judgment for the plaintiff as prayed. From this judgment, the defendant has appealed upon the judgment roll alone, without a bill of exceptions.

[1] On this appeal the appellant has advanced numerous points in his attack upon the judgment, as well as upon the finding of the trial court that the contract was executed as found. It is argued that the writings were incomplete and indefinite as to terms of payment and in other respects; that the minds of the parties did not really meet on all the essential elements; that there was a variance in the terms of the offer and the acceptance; that it was not shown that the contract was just and reasonable as to the appellant; and that the trial court failed to find on the special defense of unfair advantage claimed to have been taken by the plaintiff. No claim is made that the findings do not support the judgment, or that the judgment does not grant to the respondent the relief to which, in law and equity, he is entitled, if the findings have been properly made. These, we will endeavor to show, are the only questions open to the appellant on an appeal taken in this manner.

In support of the judgment the respondent insists that, inasmuch as the appeal is upon the judgment roll alone and without a bill of exceptions, it is not competent for this court to entertain the objections advanced by the appellant. The position of the respondent is that on this record the appellant has failed to show wherein any of the errors assigned by him have been prejudicial. The principle of law involved is that, under section 4½ of article 6 of the Constitution, an appellate court may not reverse a judgment unless, upon an examination of the entire cause, including the evidence, it is satisfied that the error complained of has resulted in a miscarriage of justice.

[2, 3] Because of this mandate we are compelled to presume in support of the judgment that the evidence taken at the trial was sufficient to support the findings of the trial court, and we are also compelled to presume that competent evidence was received to clear all the claimed uncertainties in the writings, and that this evidence was sufficient to warrant the trial court in ordering a specific performance of the contract. In Silvers v. Grossman, 183 Cal. 696, 702, 192 P. 534, 537, Mr. Justice Lennon, speaking for the court, said:

> "Where the appeal is upon the judgment roll alone, so that the record fails to disclose whether or not, at the trial, objections were interposed to evidence as not within the issues, it has been held that it will be presumed in support of the findings and judgment that the pleadings were treated as sufficient to raise the issues upon which the findings were made and that evidence in support of such issues was introduced and went in without objection." Platner v. Vincent, 194 Cal. 436, 442, 229 P. 24; Philbrook v. Randall, 195 Cal. 95, 104, 231 P. 739.

Thus, though the complaint may have been subject to demurrer, nevertheless, no demurrer having been filed and the parties having gone to trial, we are unable to say on this record that any error complained of has resulted in a miscarriage of justice. This is so, because, the action being in equity, the complaint is entitled to a more liberal construction (Brown v. Anderson-Cottonwood Irrigation District, 183 Cal. 186, 190 P. 797; Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84), and because on this record we are unable to say what occurred between the parties during the trial. They may have stipulated to any facts not pleaded, or permitted evidence to be received thereon without objection, or may have expressly waived any insufficiency in the pleadings.

[4] When the findings of fact and conclusion of law cover all the essential elements of the cause of action which should have been pleaded and the judgment is in accordance with such findings, we may assume, where the appeal is based upon the judgment roll alone, that any one or all of such transactions may have occurred during the course of the trial. Putting it in another way, when the findings are complete and sufficient to support the judgment, we must presume, in the absence of a showing to the contrary, that the facts so found were within the issues as framed by the parties during the course of the trial, and that they were proved by competent evidence admitted without objection.

[5] The proper method of procedure is to amend the pleadings to conform to the proof, but when the record, as presented on appeal, shows that the court found all the facts to be true which are essential to support the judgment entered, but that in some respects the complaint did not sufficiently plead those facts, and the record fails to show whether the pleader asked for leave to amend his complaint to conform to the proofs, we may not reverse the judgment unless the appellant shows that prejudicial error has occurred. Thus, if it be a fact that evidence was received without objection on an issue not properly pleaded and the respondent failed to ask leave to amend his complaint to conform to the proof, would the appellant be in any better position if such leave had been asked by the respondent and granted? If not, where is the prejudicial error?

[6] Upon the same principle, the appellant is not in a position to urge error in the failure of the trial court to find on his special defense. When the objection is that the trial court has made an erroneous finding (a finding not supported by the evidence), or that it has failed to find on a particular issue (that the evidence required a certain finding on that issue), it is incumbent upon the appellant to bring up the evidence so that the appellate court may determine whether error has occurred. Otherwise, we may assume that the evidence supported the finding made in the first instance, or, in the second instance, that the issue was abandoned, that the evidence would not support the finding asked for, or that it would have required a finding adverse to the appellant.

[7] At first glance, it appears that the telegram accepting the offer varied from the terms of the offer in that it added a demand upon the seller for a certificate of title. The rule is statutory that an acceptance must be absolute and unqualified, and that a qualified acceptance is a new proposal. Section 1585, Civ. Code. But here again we are confronted by appellant's failure to present a record disclosing error. The language used in the telegram of acceptance is:

> "Send deed and certificate for collection to First National Bank Hollywood."

[8] We are not satisfied that this is a demand upon the seller that he furnish a certificate of title at his own expense, or whether the respondent used the expression "certificate for collection," as referring to an authorization to the bank to receive and transmit the purchase money; and it does not appear from the letters alone what arrangements, if any, the parties had made as to a certificate of title in the respondent's letter of June 3. These are all matters which could have been cleared at the trial without infringement upon the rule covering the admission of parol testimony, and we must, upon this record, assume that that was done.

[9] The appellant strenuously insists that to affirm the judgment is to depart from the accepted rule regarding the specific performance of contracts of this nature. If the complaint had pleaded a contract which was void on its face a different situation would arise, but here the question is not one of the validity of the contract, but merely one of pleading and procedure. We have not questioned the general rule that to warrant the specific performance of a contract for the sale of real property it must contain all the material terms expressed in a sufficiently definite manner, or, to put it in a different way, that:

> "The memoranda must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must do describe the land that it can be identified." Breckinridge v. Crocker, 78 Cal. 529, 535, 21 P. 179, 181.

[10] There are, however, well-recognized exceptions to this general rule, and the one which is applicable here is appropriately stated by Mr. Justice Johnson in Barry v. Coombe, 1 Pet. 640, 652 (7 L. Ed. 295), where it is said:

> "Sir Francis Bacon, in his Elements of Common Law (Regula 23), is the author usually referred to on this distribution of ambiguities into patent and latent; the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, 'to be holpen by construction or election'; the latter raised by reference to extrinsic circumstances, and remediable by the same means. It would perhaps be a more convenient, and certainly, a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative, and mixed; the positive corresponding to the patent; and the relative to the latent ambigui-

ties of the authors who treat of the subject. The mixed would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed."

This case comes within the third classification above noted. In the first letter found in the complaint, the appellant offers to sell to the respondent "the property I own on the northeast corner of Santa Monica blvd. and Formosa avenue." This letter is in answer to respondent's letter of June 3. By reference to this letter of June 3, if for no other reason, that letter became admissible in evidence, and by reference to the property which the appellant owned on this northeast corner evidence was admissible to further identify the property covered by the contract. Because, as we have heretofore said, none of this evidence has been brought up, we are unable to say that all the material terms of the contract were not made definite and certain "by full and clear proof," within the rule of Reymond v. Laboudigue, 148 Cal. 691, 694, 84 P. 189, and Buckmaster v. Bertram, 186 Cal. 673, 676, 200 P. 610, and, as we must assume on this record that such proof was made, the judgment must be affirmed.

We concur: CABANISS, Presiding Justice pro tem.; STURTEVANT, J.

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81 Cal. App. 19

PEOPLE v. BACCIOCCO et al. (Cr. 1334.)*

(District Court of Appeal, First District, Division 1, California. Jan. 25, 1927. Rehearing Denied Feb. 24, 1927. Hearing Denied by Supreme Court March 24, 1927.)

1. Criminal law ⚿274—Refusal to vacate plea of guilty of first degree robbery and allow plea to lesser offense held not abuse of discretion.

Refusal to vacate judgment, entered on plea of guilty of robbery in the first degree, and allow plea of guilty to attempt to commit robbery, *held* not abuse of discretion, in view of trial court's statement that defendants were represented by counsel and plea was entered knowingly and on condition that other charges be dismissed.

2. Robbery ⚿24(1)—Evidence held to show defendants' guilt of robbery in the first degree and not merely guilt of attempt to commit robbery.

Evidence on plea of guilty *held* to show defendants' guilt of robbery in the first degree by holding up night watchman with revolver and taking keys from his person, notwithstanding keys were subsequently returned to him.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Nicholas Bacciocco and Charles Morrison pleaded guilty to robbery in the first degree. From an order denying motion to vacate judgment and sentence after plea, defendants appeal. Affirmed.

Nathan C. Coghlan, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Appeal from an order denying defendants' motion to vacate and set aside a judgment sentencing them to suffer the penalty prescribed for the commission of the crime of robbery in the first degree, after plea of guilty by them to the commission of such offense. In the same motion appellants moved the court for permission to withdraw their plea of guilty and to interpose in lieu thereof a plea of guilty to the crime of attempt to commit robbery. In support of the motion it was claimed, first, that the plea of guilty was interposed by them through inadvertence and mistake and in the belief that they were at the time entering a plea to a lesser offense; and, second, that the facts involved in the case show that the offense committed by defendants was not that of robbery, but was simply an attempt to commit robbery.

[1] The motions were denied. It is here claimed that the court abused the discretion conferred on it by law in its refusal to vacate the judgment and to allow the entry of the proper plea. The appeal as to appellant Morrison has been dismissed, and the alleged error is here urged on behalf of appellant Bacciocco alone. We see no merit in his contention. The record does not show what proceedings were had at the time the plea was entered other than the defendants pleaded guilty to the charge of robbery in the first degree. It does show, however, that the motions here made were denied by the same judge who accepted the plea. It further shows that he was familiar with all the circumstances of the plea at the time it was entered. Upon the hearing of the motions to vacate the judgment and to permit a plea to the lesser offense, the court stated that defendants at the time they entered their plea knew exactly what was going on; that they were represented by counsel, and the plea was entered upon condition that other charges would be dismissed; that such charges were dismissed in accordance with the arrangement and the plea accepted. He further stated, in substance, that he had asked defendants if they were going to plead guilty to first degree robbery, which involved the commission of the offense with the aid of a gun, and that there was no suggestion from either of them or their counsel that they would not plead guilty of robbery in the first degree. The court further stated that both men were of sufficient intelligence to know exactly what was going on, and he was satisfied that their plea was not entered through any mistaken notion that they were pleading guilty to another and lesser offense.

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*Rehearing denied. Hearing denied by Supreme Court.

Under such circumstances the court did not abuse its discretion in denying the motion to vacate and set aside the judgment.

[2] Equally without merit is the claim that the evidence shows that defendants were merely guilty of an attempt to commit the crime of robbery. As the defendants pleaded guilty the prosecution was not called upon to present all the evidence it had concerning the commission of the crime. Defendants had waived preliminary examination in the police court, and in consequence the only evidence there received consisted of the testimony of the prosecuting witness and a police officer, which, in a limited manner, described the circumstances under which the crime was committed. The transcript of the evidence taken at such examination showed that the prosecuting witness testified to the effect that he was a janitor employed at the New Fillmore Theater; that on the 23d day of February, 1926, at about 12 o'clock at night, and when he was performing his duties, he heard some one pounding on the door; that immediately thereafter he was confronted by two men, one of whom placed a revolver against his stomach, and the other tied him up; that they then took him upstairs, defendant Bacciocco in the meantime keeping the revolver placed at his side; that they took a bunch of keys from his person and stood him in a corner with his hands tied; that they later conducted him to a room and tied his feet together. It is claimed that the testimony of the police officer showed that the keys taken from the prosecuting witness were returned to him by defendants and that the temporary taking of them from the person of the prosecuting witness did not constitute robbery. The testimony, as recited, shows without conflict that the keys were forcibly and through fear taken from the person of the complaining witness. It is true the record does not clearly show under what circumstances they were returned to the prosecuting witness. Their original taking, however, in the manner indicated, constituted the offense, and it was not undone by the return of the stolen articles, even assuming that they were returned by defendants. 23 R. C. L. 1141. The evidence was, therefore, sufficient to show that defendants were guilty of the offense charged. The court, in denying the motions, read a communication received from the bureau of detectives concerning the defendants and the circumstances surrounding the commission of the offense. It informed the court, in substance, that from a careful examination of the case the evidence showed that three felonies had been committed by the defendants in the perpetration of the crime charged. It recited that defendant Bacciocco had carried a gun inside the waistband of his trousers where it was ready for instant use; that after tying up the janitor, defendants had proceeded to open the safe contained in the building; that they succeeded in breaking off the combination and drilling a hole therein with the aid of tools attached to the electric light for drilling purposes; that they had a complete set of safe burglar tools, which were found in front of the safe; that when the officers arrived at the scene of the crime and attempted to make an arrest, they had to shoot through the door, and fired several shots before defendants surrendered. The communication also contained the records of defendants, which the court omitted reading. While the letter was not considered by the court as part of the record in denying the motions, it showed the circumstances surrounding the commission of the crime, and it is upon these facts that the claim is made that in truth the evidence shows defendants to have been guilty of a mere attempt to commit the crime with which they are charged, and that the mere temporary taking of the keys from the janitor to aid them in their attempted acts did not complete the offense. What we have said disposes of this contention.

As above stated, the appeal of Morrison has been dismissed.

The order appealed from as to Bacciocco is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

80 Cal. App. 342

DAM v. BOND. (Civ. 3166.)*

(District Court of Appeal, Third District, California. Dec. 17, 1926.)

1. Trial ⟹367—Argument in trial by court is matter of discretion (Code Civ. Proc. §§ 607, 631 et seq.).

Under Code Civ. Proc. § 631 et seq., omitting subdivisions of section 607 as to right of argument in jury trials, argument in trial by court is matter of discretion, not of absolute right.

2. Appeal and error ⟹1015(2)—Appellate court cannot adjudge merely on affidavits that trial court's conclusion as to what was argued was erroneous.

Appellate court cannot adjudge, simply on face of affidavits as to matters argued before trial court, that latter's conclusion on such question was erroneous.

3. Appeal and error ⟹972—Strong showing of abuse of discretion in limiting argument in trial by court is necessary to set aside judgment on such ground.

Trial court sitting without jury may limit argument, and strong showing of abuse of discretion in doing so must be made before appellate court may set aside judgment on such ground.

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*Hearing denied by Supreme Court February 14, 1927.

4. New trial 🔑140(3)—Affidavits as to questions argued and time consumed therein held not to show abuse of discretion in limiting argument, before court sitting without jury.

Abuse of discretion in limiting argument before court sitting without jury is not shown by conflicting affidavits as to what questions were argued, or showing without contradiction that about two hours were consumed in argument.

5. Trial 🔑367—Abuse of discretion in limiting plaintiff's argument in automobile collision case to question of defendant's liability for independent contractor's acts held not shown.

Record *held* not to show abuse of discretion by trial court, sitting without jury, in limiting plaintiff's argument, in action for injuries in collision between automobiles, to question of defendant's liability for acts of independent contractor driving his car.

6. Appeal and error 🔑989—Whether findings are supported by evidence involves, not weight or preponderance of evidence, but existence of substantial supporting evidence.

Question whether trial court's findings are supported by evidence involves, not weight of evidence, or whether it preponderates in favor of plaintiff or defendant, but whether there is substantial evidence in record supporting findings.

7. Automobiles 🔑168(2)—Automobile driver must slow down to less than statutory speed limit for safety of others (Motor Vehicle Act 1915, § 22 [a], as amended by St. 1919, p. 220, § 13).

If conditions of highway are such that safety of persons and property require much lesser rate of speed in driving automobile than maximum fixed by Motor Vehicle Act (St. 1915, p. 409), § 22a, as amended by St. 1919, p. 220, § 13, it is driver's duty to slow down.

8. Automobiles 🔑244(42) — Evidence as to speed held to justify finding of contributory negligence of driver of automobile meeting another automobile.

In action for injuries in collision between automobiles, evidence *held* to warrant trial court's conclusion that plaintiff was guilty of contributory negligence, barring recovery as proximate cause of collision, in passing approaching cavalcade of horses and wagons at excessive speed, in reckless manner, and in disregard of person and property of others, where his view of highway beyond was limited to few feet.

9. Automobiles 🔑244(59)—Finding driver of automobile did not have last clear chance to avoid collision held supported by evidence.

In action for injuries in collision between automobiles on highway, evidence *held* to support trial court's conclusion that driver of defendant's car did not have a last clear chance to avoid collision.

Appeal from Superior Court, Yuba County; Claude F. Purkitt, Judge.

Action by C. H. Dam against Lon Bond. Judgment for defendant, and plaintiff appeals. Affirmed.

F. H. Dam, of San Francisco, for appellant.
Bond & Deirup, of Chico, and Richard Belcher, of Marysville, for respondent.

PLUMMER, J. The complaint sets forth, in substance, that on or about the 24th day of January, 1922, the plaintiff was driving an automobile, to wit, a Dodge Bros. commercial car, in a southerly direction along a public highway in the county of Yuba, state of California; that while plaintiff was then and there proceeding along by the side of several horse-drawn vehicles traveling in an opposite direction to plaintiff and while plaintiff was keeping on the westerly half of said highway, the defendant's car, driven by one J. W. Benner as the defendant's agent, was proceeding in an opposite direction to plaintiff along said highway, and then and there negligently attempted to overtake and pass said horse-drawn vehicles to his left or westerly side thereof, without having a clear and unobstructed passage ahead of said defendant for 100 yards, or for any distance at all; that plaintiff, seeing such attempt on the part of said Benner, then and there turned his machine to the right in order to get out of said defendant's way; that said Benner then and there was so negligently, carelessly, recklessly, and unlawfully driving and operating the defendant's automobile, to wit, a Buick car, that it ran into and collided with plaintiff's car, injuring the plaintiff and damaging his said car, all to the damage of plaintiff in the sum of $5,350.

The answer of the defendant denies negligence on the part of the driver of defendant's car, denies that Benner was the agent of the defendant, and alleges that Benner was an independent contractor and, also, that the plaintiff was guilty of contributory negligence and that the collision was the result solely of negligence on the part of the plaintiff.

The trial court found that the collision was due to the fact that the plaintiff was driving his automobile at an unlawful rate of speed and at a speed in excess of 30 miles per hour; that at the time the said J. W. Benner attempted to pass said cavalcade of horses, wagons, and a truck, not mentioned in plaintiff's complaint, following the same, the highway to the left was unobstructed for the required distance; that for some period of time before meeting the cavalcade of horses and wagons, the plaintiff had been traveling on the easterly or left-hand side of the highway and continued along said easterly or left-hand side of the highway until within a short distance (estimated by some witnesses from 30 to 50 feet) before turning to the westerly or right-hand side of said highway, and by reason thereof plaintiff's automobile was not visible to any one attempting to pass said cavalcade traveling in the same direction therewith and turning to the left in order to proceed along past said cavalcade on the westerly half of the paved highway. The trial court further found that the plaintiff did not slacken the speed of his automobile until the time of the collision and that plaintiff's automobile was equipped with defective brakes. The trial court also found that Benner was an independent contractor.

The cavalcade herein referred to consisted first of a four-horse team drawing a cook wagon, a spring wagon, and a cart; second, a two-horse team drawing a wagon to which two cows were tied in the rear and were being led; and, third, an automobile truck which at the time was following said cavalcade at a distance of about 50 feet in the rear of the horse-drawn vehicle to which the two cows were tied.

The action was tried by the court without a jury and judgment passed for the defendant as heretofore stated. The trial was concluded on the 9th day of March, 1923, and the opinion of the court directing findings to be prepared in favor of the defendant was filed on the 28th day of July, 1923. A motion for a new trial was made on account of an alleged irregularity of the trial court during the argument of the cause. Affidavits in support of the alleged irregularity were filed and presented to the court upon plaintiff's motion for a new trial, plaintiff's motion on said ground being denied.

The plaintiff set forth in his affidavit relating to the irregularity of the trial court: That, at the close of the evidence, the court stated substantially as follows: "The only question upon which I care to hear argument is whether the defendant is liable for the acts of an independent contractor, and that is a matter of law." That after the court had so stated counsel for appellant proceeded in an argument for over one hour to review the California decisions in support of appellant's position that Benner was a servant of the defendant and not an independent contractor. That affiant understood the statement of the court to mean that on the question of Benner's negligence, the mind of the court was made up in plaintiff's favor and that defendant could escape liability only if Benner was an independent contractor, and accordingly did not argue the question of Benner's negligence. That affiant was prepared to argue the question of Benner's negligence at great length, and in view of what affiant considers to be the overwhelming weight of the evidence, that counsel could have convinced the court beyond a shadow of a doubt that plaintiff's injuries were due to Benner's negligence. That after the counsel for the plaintiff had concluded his argument, counsel for the defendant argued the question of negligence for about 45 minutes of time. That counsel for plaintiff then followed the argument of counsel for the defendant and had made but a very short argument when the court interrupted counsel for the plaintiff and stated that it had promised other counsel to hear a certain cause, and that the hour designated by the court for the hearing thereof had already passed. That counsel for the plaintiff was forced to close his argument, although he had hardly "scratched the surface of the argument counsel was prepared to make on the question of negligence."

The affidavit filed on behalf of the defendant sets forth, in substance, that defendant has no recollection of any such statement being made by the court; that counsel for the plaintiff did argue the questions of fact at length concerning Benner's negligence and the negligence of the plaintiff and did discuss the credibility of the witnesses and did comment at length upon the contention that the witnesses for the defendant were not entitled to credit; that the testimony of some of the witnesses was unsatisfactory and contradictory; that counsel for the plaintiff did maintain that the witnesses for the plaintiff were entitled to full credit; that counsel for the plaintiff referred to the standing of the witnesses and referred to one or more of them as being sons of pioneers. At the conclusion of the argument the court directed the testimony of two witnesses to be written up—the testimony of the plaintiff and the testimony of the defendant.

Upon this appeal it is argued that the alleged irregularity of the court prevented the plaintiff from having a fair trial; that it was an abuse of discretion on the part of the trial court and prevented the plaintiff from having a fair trial and that the action of the court constituted a surprise which ordinary prudence could not have guarded against. A further ground of appeal is based upon the contention that the findings of the trial court are not supported by the testimony.

[1, 2] An examination of the various sections contained in chapter 5 of title 3 of the Code of Civil Procedure, beginning with section 631 thereof, relative to trials by the court sitting without a jury, discloses that the Code is silent as to any right of counsel to argue causes tried without a jury. The subdivisions of section 607, Code of Civil Procedure, refer solely to causes tried before a jury where the right and the opportunity of arguments are recognized and provided for as an aid to jurors in reaching a conclusion. By omitting such provisions when outlining the procedure for trials before the court alone, the only inference that can be drawn therefrom is that the question of argument is left to the judicial discretion of the trial court. In other words, it is a matter of discretion and not of absolute right, as stated in the case of Center v. Kelton, 20 Cal. App. 611, 129 P. 960.

[3-5] In the case at bar the court did not

refuse to hear any argument. It only sought to limit the argument of counsel. The affidavits to which we have referred presented to the court for decision the question as to what matters were argued before it, and it does not lie within the power of the appellate court, simply upon the face of the affidavits, to adjudge that the conclusion of the trial court was erroneous upon the question of what was argued. From the affidavits filed on behalf of the plaintiff and the defendant it appears that the cause was argued for approximately two hours. Whether the cause was argued upon questions which the trial court desired to hear is not a matter which we can pass upon, as presented to us upon this appeal. The right of the trial court to limit argument in cases where the court is sitting without a jury must be recognized as one clearly within the power of the trial court, in order that the business coming before it may be properly transacted. A very strong case showing abuse of discretion, where the matter of argument is one properly of discretion, must be made out before an appellate court would be warranted in setting aside a judgment on any such ground. Such abuse of discretion is not made out by conflicting affidavits as to what questions were actually argued, or showing without contradiction that approximately two hours of the time of the court were consumed in the argument of the cause represented by the respective counsel. It may be observed, however, that it does appear from the affidavits that counsel for plaintiff consumed the longer period of time in his argument, irrespective of what questions he may have argued. In passing upon these questions, we express no opinion as to whether the trial court did or did not allow counsel for the plaintiff all the time desired by him to present all the points involved in the case, or all the reasons that counsel for the plaintiff wished to urge upon the trial court, impelling a decision in favor of the plaintiff. All we decide is that the record does not present any such abuse of discretion on the part of the trial court justifying an appellate court to order a reversal of the judgment. This being a case tried before a court, where an argument is a matter of discretion and not a matter of right, it is not necessary to review the cases having to do with irregularity in the trial court in limiting or denying arguments in trials had before juries.

[6] Are the findings supported by the evidence? This question again involves not the weight of the evidence, not whether the evidence preponderates in favor of the plaintiff or in favor of the defendant, but whether there is substantial evidence in the record supporting the findings of the court. The testimony of the plaintiff was to the effect that as he was driving down the highway he was running at about 25 miles an hour; that at a point where the road curves slightly he saw an automobile following the caravan to which we have referred; that he continued to drive about the middle of the road a little to the left of the center until he got down to about 60 feet of the first team. On cross-examination he admitted having testified that as he approached the horses he was driving on the left side, had been driving on the left side for probably 300 yards, and that he drove on the left side until he came within 30 to 50 feet of the horses of the first team before he turned to the right; that when plaintiff was about 100 yards up the road Benner was about the same distance behind the last vehicle in the caravan; that while driving down the left side of the center of the highway he did not slow up; that the brakes on his car were a little weak; that when he saw the cook house in the caravan he was from 100 to 150 feet away, but did not go to the right side of the highway; that he did not slow down to 20 miles an hour; that he drove down directly toward the cook house until he came within 30 to 50 feet of the front of it and then swung to the right; that unless one were a little over the center of the road one could not see what was coming from the rear of the cook house; that when he swung around the cook house he was running at a rate of speed of 20 miles or better per hour; that a fraction after he swung out around the cook house Benner came out on the west side of the highway; that he put his foot on the brake just a little; that the foot brake was very weak; that he would not say that he did put on the brakes, that he did not use the emergency brakes; that he traveled a fraction slower as he was passing along by the horses and wagons. The testimony of the plaintiff also shows the following question and answer: "Q. You did not take any precautions yourself to avoid the collision other than swinging out into the dirt road? A. I don't know as I did."

The testimony of the witness A. Schorth, a driver of one of the teams, is to the effect that the plaintiff was traveling at about 36 to 37 miles per hour; that he did not think the plaintiff slowed up any.

The testimony of the witness Hurdle is to the effect that it looked to him as though the plaintiff was traveling between 35 and 40 miles per hour; that practically the same speed was maintained all the time by the plaintiff. The witness Hurdle was driving the truck heretofore mentioned. His testimony is to the effect that Benner had turned out and passed his truck and was in the act of passing the rear horse-drawn vehicle when the plaintiff swung into view at the head of the cavalcade, as he was coming down the highway from the north. The driver of the four-horse team drawing the cook wagon testified that he saw the plaintiff coming at a distance of 400 yards up the highway; that the plaintiff was circling back and forth on the highway; that he went to the left side of it; that he continued on the left side close to the head team; that he turned his leaders to the right over on the dirt, as the plaintiff was coming too close; that he had a colt in the lead team and was afraid it would be scared; that when the plaintiff passed the lead team he was about 4 feet distant; he just shaved the cook house as he passed; that the plaintiff was coming very fast. As compared to the ordinary speed of automobiles on the public highway, he thought he was going faster.

There was some testimony to the effect that when the plaintiff swung out past the cook house, he turned slightly to the left, and some testimony by one of the team drivers that the plaintiff and Benner were both making some "awful movements." There is also evidence in the transcript showing that Benner was at fault, but it need not be set forth herein, as so doing would only show the conflict of the testimony.

[7] At the time of the collision involved in this case, the Motor Vehicle Act, approved May 2, 1919, (St. 1919, p. 191), was in effect. Subdivision (a), § 20, of that act required the driver or operator of any vehicle on the public highway to travel on the right hand of such highway, unless the road ahead on the left-hand side was clear and unobstructed for at least 100 yards ahead, unless it was impracticable to drive on said right-hand side of the highway. Subdivision (a) of section 22 of the act approved May 2, 1919, limited the speed of motor vehicles to 30 miles an hour, except in the daytime when the road was clear and unobstructed for a distance of 400 feet. Subdivision (a) of section 22 of said act contained also the following provision:

> "Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property."

This court, in the case of Graybiel v. Auger, 64 Cal. App. 679, 222 P. 635, said:

> "This provision of the section is just as much a portion of the law as that which allows a speed of 35 miles per hour under certain specified conditions."

We may add that where the testimony shows that this provision of the law is not being complied with, the trial court is justified in coming to the conclusion that the operator of a motor vehicle is driving at a reckless rate of speed, even though he is not exceeding the speed limit of 35 miles per hour allowed upon an unobstructed highway. In other words, it is not the absolute speed at which an automobile is being driven that determines whether it is or is not being propelled at a reckless rate, but the conditions and circumstances of the highway at the instant of time must be taken into consideration, and if these conditions are such that the safety of persons and property require a much lesser rate of speed, it is the duty of the driver of the motor vehicle to slow down the speed of his car.

[8] The testimony which we have set forth, if believed by the trial court, is sufficient to show that the plaintiff drove on the left-hand side of the highway until within a very short distance of the head team of the cavalcade and then ran along the side thereof at a rate of speed in excess of 30 miles an hour and passed the cook wagon, where his view of the highway was limited to a very few feet. Under such circumstances, it is evident that a just regard for the safety of the person and property of others demanded a much slackened speed of the plaintiff's car, and this in view of the distance which an automobile travels in a second of time. When traveling only 20 miles an hour, it is estimated that a car will travel 29⅓ feet per second, so that if the speed be increased to 30 miles an hour, the automobile would cover practically 45 feet in the same length of time. Applying this to the testimony of the plaintiff when driving around the cook house drawn by the four-horse team, it would appear, if the court accepted the testimony which we have herein set out, that the plaintiff was violating the provisions of subdivision (a) of section 22 of the Motor Vehicle Act, and was propelling his machine in a reckless manner and in disregard of the person and property of others. Hence, if the collision occurred under such circumstances, the court was justified in concluding that plaintiff's contributory negligence barred recovery, as the proximate cause of the collision.

[9] Our attention has not been called to any testimony which would lead to the view that the conclusion of the trial court that Benner did not have a last clear chance to avoid the collision is unsupported. Whether Benner was guilty of negligence is really immaterial and does not need to be considered by this court, for the reason that the testimony which we have set forth, if believed by the trial court, is sufficient to support the conclusion of the trial court that the plaintiff was guilty of contributory negligence, nor do we need to consider the question as to whether Benner was or was not the agent of the defendant Bond. Appellant, in his brief, has called attention to some alleged errors by the trial court in the admission and exclusion of testimony, which we have examined, but none of them are of sufficient merit to in any wise affect the ultimate decision in this cause. The errors assigned not being deemed sufficient to justify a reversal herein, the judgment of the trial court is hereby affirmed.

We concur: **FINCH, P. J.**; **THOMPSON**, Justice pro tem.

80 Cal. App. 328

PEOPLE v. HARRIS. (Cr. 1347.)

(District Court of Appeal, Second District, Division 2, California. Dec. 16, 1926.)

1. Criminal law 🔑37—Where officers are procuring cause of crime, victim cannot be convicted.

Where officers are inducing cause of commission of acts constituting offense, victim thus entrapped cannot be convicted.

2. Criminal law 🔑569 — Evidence held insufficient to show that officers, simulating drunkenness, were inducing cause of sale of liquor.

Evidence *held* insufficient to show that officers were inducing cause of sale of liquor by defendant, though they simulated drunkenness in search for purveyors of illicit liquor.

3. Intoxicating liquors 🔑239(3) — Evidence held insufficient to justify instruction exonerating defendant, if he acted in selling liquor as officers' agent.

In prosecution for selling liquor, evidence *held* insufficient to justify instruction that, if defendant acted as agent for officers in purchase of liquor, he was guilty of no offense.

4. Criminal law 🔑561(3)—Good character may generate reasonable doubt of guilt, in prosecution for selling liquor.

Good character may, in connection with evidence, generate reasonable doubt and entitle defendant to acquittal, in prosecution for selling liquor, though without proof thereof there would be conviction.

5. Criminal law 🔑776(4)—Instruction that if jury believed defendant guilty beyond reasonable doubt they should so find, notwithstanding proof of good character, held erroneous.

Instruction that if jury believed defendant guilty beyond reasonable doubt they should so find, notwithstanding proof of good general reputation as peaceable and law-abiding citizen, *held* erroneous, where given without explanation, limitation, or qualification, and where instruction that evidence of good character may generate reasonable doubt was refused.

6. Criminal law 🔑721½(3)—In prosecution of deputy sheriff, argument that defendant failed to call superiors to testify to good character held to constitute misconduct.

In prosecution of deputy sheriff for selling liquor, district attorney's reference, in argument, to fact that defendant did not call sheriff, undersheriff, or chief deputy to testify to his good character *held* to constitute misconduct.

7. Criminal law 🔑1186(4)—Error held prejudicial, where acquittal on two counts indicated some doubt as to guilt (Const. art. 6, § 4½).

Error *held* prejudicial, under Const. art. 6, § 4½, where jury's acquittal on two of three counts indicated some doubt as to guilt.

8. Criminal law 🔑768(1)—Instruction that juror's membership in same lodge as defendant should not influence verdict held proper.

In prosecution of member of order of Elks, instruction that if any juror was member of such order his duty, as juror, transcended in importance any obligation he might feel toward defendant by reason of such membership *held* proper.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

William Edward Harris was convicted of selling intoxicating liquors, and he appeals. Reversed.

Howell W. Richardson and Thomas E. Parke, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

THOMPSON, J. In this action the appellant was charged in three counts with the sale of intoxicating liquors contrary to the Wright Act (St. 1921, p. 79). He was acquitted upon the first and third counts and convicted on the second. All three sales were alleged to have been made within 14 days—the first, on July 26, 1925; the second, the one for which defendant was convicted, on August 2, 1925; and the third on August 9, 1925. The testimony shows that the defendant was a deputy sheriff, running a lunch room at Topango Canyon, in the county of Los Angeles; that two members of the sheriff's office went to Topango Canyon for a couple of weeks in search of purveyors of illicit liquor and simulated drunkenness with the object of allaying suspicion as to their real purpose. Defendant's witnesses testified that the intoxication was not simulated, but existed in fact. Evidence was introduced to show that on July 26, one of the arresting officers, McDonald, purchased a pint bottle of liquor; that on August 2, McDonald and the other deputy, Frazier, purchased two pint bottles; that on August 9, they again purchased two pint bottles. Preliminary to the first purchase, McDonald asked the defendant "if he knew where" he "could get a little something to drink"; that he "wanted to get some whisky," to which the defendant replied:

> "I have got a little. I can let you have some."

A day or two prior to this McDonald had a conversation with the defendant in which, upon the initiative of McDonald, it was understood that both McDonald and the defendant belonged to the Benevolent and Protective Order of Elks. On the other two occasions of purchase, McDonald had asked the defendant a day or so before the alleged purchase, as a favor to him, to get some liquor. Several character witnesses were called, all of whom testified to the good reputation of the defendant as a peaceable and law-abiding citizen prior to the arrest. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

This résumé, we think, gives the essential testimony, including the evidence directed toward the first and third counts, so far as is necessary to a proper understanding of the points urged by appellant.

[1] We will first consider the assignment urged by appellant that it was error for the trial court to fail to give an instruction to the effect that where the officers are guilty of entrapment, no crime was in fact committed. The basis or fundamental reason for such a rule lies in the fact that in those cases where the officers have, by their actions, been the inducing cause of the commission of the acts constituting the offense, or, in other words, where they have been the procuring cause or instigators of the criminal intent, it would be contrary to a sound public policy to permit the victim thus entrapped to be convicted. Woo Wai v. United States (C. C. A.) 223 F. 412; United States v. Echols (D. C.) 253 F. 862; People v. Barkdoll, 36 Cal. App. 25, 171 P. 440; In re Moore, 70 Cal. App. 483, 233 P. 805; People v. Norcross, 71 Cal. App. 2, 234 P. 438.

[2] However, we do not see in the testimony here sufficient to justify the jury in saying that the defendant was inveigled into the commission of the crime. He was asked to procure the liquor for the purchasers. He may have believed them to be addicted to its use by their actions. But sales are made by some indication on the part of the buyer of his desire or willingness to buy. That is, in effect, all the testimony amounts to. There were no seeds planted by the officers from which might be germinated the idea in defendant's mind that the sale of intoxicating liquors offered an avenue for a lucrative income, such as was the case in Woo Wai v. United States, supra. Therefore, there was no error in refusing the instruction.

[3] Nor do we think this evidence was sufficient to justify the instruction, which the defendant asked for and which the court refused, to the effect that, if the defendant was acting as agent for the officers in the purchase of the liquor, he was guilty of no offense. The court rejected a claim of agency much more clearly established in the case of In re Moore, supra.

[4, 5] The next specification of error which we shall consider is the refusal of the court to give the instruction:

> "You, the jury, are instructed that good character itself may, in connection with the evidence, generate a reasonable doubt and entitle the defendant to an acquittal, even though without said proof of good character you should convict,"

—and the giving by the court of the following instruction in lieu thereof:

> "The court instructs the jury that if you believe from evidence beyond a reasonable doubt that the defendant is guilty, then you should so find, notwithstanding proof of his good general reputation as a peaceable and law-abiding citizen."

This last instruction was given by the court without further explanation, limitation, or qualification.

There can be no question but that the requested instruction was a correct statement of a proposition of law relative to character testimony. As was said by our Supreme Court in the case of People v. Ashe, 44 Cal. 288, quoting from State v. Henry, 50 N. C. 65, which last case quoted Sergeant Talfourd:

> "There may certainly be cases so made out that no character can make them doubtful, but there may be others in which evidence given against a person without character would amount to a conviction, in which a high character *would produce a reasonable doubt* [italics ours]—nay, in which character will actually outweigh evidence which might otherwise appear conclusive."

In commenting upon the attempt to say that character testimony is only useful in doubtful cases, it is also there said, quoting from the same source:

> "The sophism lies in the absolute division of cases into clear and doubtful, without considering character as an ingredient which may render that doubtful which would otherwise be clear."

In the case of People v. Bell, 49 Cal. 485, the court refused an instruction closely akin to the one refused here, to wit:

> "If the defendant be proved of good character as a man of peace, such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed but for such good character,"

—and gave in its place the following:

> "The good character of the defendant is a circumstance in the case for your consideration, in making up your verdict."

The Supreme Court held this to be error in the following language:

> "It is important in every criminal case, and especially so when the inculpatory proof is circumstantial in its character, that the jury should be instructed, if the prisoner so request, that in determining whether or not he is guilty beyond a reasonable doubt, his good reputation, if he has such, as to traits involved in the charge, should be weighed as any other fact established, and that it may be sufficient to create a reasonable doubt as to his guilt."

In the last-mentioned cause the judgment was reversed for this error. Here the jury were told, in effect, that they might disregard character testimony, if they were otherwise convinced of defendant's guilt. Such is not the law, and it has been so held in People v. Ashe, supra; People v. Raina, 45 Cal. 292; People v. Bell, supra; People v. Casey, 53 Cal. 360; People v. Doggett, 62 Cal. 27; and in People v. French, 137 Cal. 218, 69 P. 1063. If the court here had given the requested instruction, or had even gone so far as to instruct the jury that testimony of good character was to be considered as any other testimony for the purpose of determining whether or not the defendant was guilty, then the instruction would not have been erroneous. People v. Kalkman, 72 Cal. 212, 13 P. 500; People v. Mitchell, 129 Cal. 584, 62 P. 187; and People v. Von Perhacs, 20 Cal. App. 48, 127 P. 1048. But in this case the jury were not properly instructed and were erroneously instructed concerning the use to be made of the testimony relative to the good character of the defendant, and we must hold that the failure to instruct and the giving of the instruction constitutes error.

[6] Related to this specification of error is the error claimed by reason of alleged misconduct on the part of the district attorney, it having to do also with the character of the defendant. The district attorney, in his argument, referred to the fact that the defendant did not call to testify as to his good character either the sheriff, Chief Deputy Sheriff Biscailuz or Chief Deputy Harry Wright, who were his superior officers. Exception was taken to the argument, but the court stated it to be within the bounds of argument and did not advise the jury. It is true that in instruction No. 14 the court instructed the jury that neither the defendant nor the prosecution was required to call all persons shown to be present or who may appear to have some knowledge of the matters here on trial. In view of the instruction concerning the testimony with respect to good character, however, we are not of the opinion that the error, if it was error, was cured. In State v. Hawkins, 27 Wash. 375, 67 P. 814, it was held that the error was not cured by an instruction from the judge to disregard the comments. It has been held erroneous for the district attorney to discuss unfavorably the failure of the accused to produce witnesses if they were equally available to the state. Brown v. State, 98 Miss. 786, 54 So. 305, 34 L. R. A. (N. S.) 811, and note. And in People v. Smith, 121 Cal. 355, 53 P. 802, it was held to be prejudicially erroneous for the district attorney to comment upon the failure of the defendant to call a witness to the effect that it must be presumed that his testimony would have been adverse to the defense. The court there states:

> "The rule is universal that it is error to permit counsel, against objection, in argument before the jury, to make statements of or comments upon facts not in evidence; and, unless the court can see clearly that the error was as to some matter which could not in its nature have prejudiced the defendant's case, the judgment will be reversed."

And it seems to be well settled that, where the defendant in a criminal proceeding has not put his reputation in issue, it is improper for the prosecuting attorney to argue or infer therefrom that the character of the defendant is not good, or argue that the state cannot introduce evidence of bad character until the defendant has introduced evidence of good character. To this effect are Turner v. State, 94 Miss. 458, 48 So. 409, 19 Ann. Cas. 407; State v. Hawkins, supra; Cline v. State (Tex. Cr. R.) 71 S. W. 23; State v. Blodgett, 50 Or. 329, 92 P. 820. If counsel could properly argue that the sheriff, under sheriff, and chief deputy had not been called, why might he not with perfect propriety secure a list of all of the acquaintances of the defendant and so argue as to each and every one of them? And yet, of course, the number of character witnesses which may be called rests in the sound discretion of the trial court. We are of the opinion, therefore, that it was erroneous for the district attorney to so argue.

Referring now to the specification of error designated as G, which complains of the court's failure to instruct the jury that the defendant was entitled to the individual opinion of the jurors, we can probably add nothing to what was said or the admonition given to trial courts concerning the right of a defendant to an instruction that he is entitled to the individual opinion of the jurors in the cases of People v. Dole, 122 Cal. 486, 55 P. 581, 68 Am. St. Rep. 50; People v. Howard, 143 Cal. 316, 76 P. 1116; and People v. Singh, 20 Cal. App. 146, 128 P. 420.

[7] Standing alone, the last error did not constitute reversible error, but we have now to determine whether or not the errors heretofore pointed out constitute prejudicial error, under section 4½ of acticle 6 of the Constitution. We have carefully examined the transcript of the testimony, and, while from that reading, unaided by the opportunity to judge of the credibility of the witnesses, by seeing and hearing them, we are inclined to the belief that the defendant may have sold the liquor, we cannot say that there is no reasonable doubt upon the subject. The testimony for the people came from the two officers, who, according to several of defendant's witnesses, were drinking quite heavily during their operations at the beach. The defendant did not take the stand and deny the sale, but rested upon the presumption of innocence, and, while it was not assigned as error, there is in the argument of the district attorney a statement which the jury might well consider to have meant that the defendant did not take the stand and deny the sale. The defendant's brother, Wesley Harris, and his wife, Mrs. Carrie Harris, both testified they were around the store and room constantly; that they saw no liquor around the

place, and saw no sale to either of the officers. The testimony of the officers as to the sale on the 9th (the subject of the third count) was met by the testimony of the witness J. H. Weileb, who says he was in the room when the sale is claimed to have been made, and that he saw no liquor sold or delivered to the officers, and while it is true that the evidence appears sufficient in cold print to support a verdict, it is, at least, some indication that the jury entertained some doubt that they acquitted on the first and third counts, even though they were told to disregard the testimony of good character, of which there was an abundance. We cannot in doubtful cases say that section 4½ of article 6 of the Constitution has cast upon the appellate tribunal the duty of substituting itself for the jury in determining the guilt or innocence of the defendant. As was said by the Supreme Court very recently, in the case of Wright v. Broadway Department Store (Cal. Sup.) 250 P. 572, the error of the court "probably affected the * * * damages awarded" and "the evidence * * * was so evenly balanced," that without the erroneously admitted testimony "a contrary verdict might have been rendered." Our conclusion is, therefore, that the error complained of is prejudicial.

We do not consider it necessary to discuss at length the assignments of error in the refusal of the court to give the instruction, requested by the defendant, relating to the essentials of the offense, first, because the instruction requested by the defendant is not free from error, and, second, because upon a retrial the court will not probably content itself with referring to a sale "contrary to the provisions of the Wright Act of this state."

And, again, we find no occasion to pass upon the question of prejudicial error in the assignment designated as D. So far as it is concerned, the jury were properly instructed as to the matters and things they might take into consideration for the purpose of determining the credibility of the witnesses, and this instruction would give them the right to consider the intoxication of the officers at the time of purchase, if they were, in fact, intoxicated.

[8] Appellant also complains because the court instructed the jury that if any of them were members of the order of Elks, they should remember that their duty, as jurors, transcended in importance any obligations they might, under other circumstances, feel toward the defendant by reason of being a member of the same order. Appellant is probably correct in saying that if one of the jury did belong to this American order, his feeling would be one of resentment against the defendant if he believed him to be guilty, and that he had by his failure to observe its fundamental teaching of upholding the laws of the country brought reproach upon it, but the admonition of the court was in itself proper. It was but another way of saying that no relationship, fraternal or otherwise, should be permitted to influence them in arriving at a verdict.

The judgment and order are reversed.

We concur: WORKS, P. J.; CRAIG, J.

80 Cal. App. 275

PEOPLE v. WOOLLACOTT. (Cr. 1339.)*

(District Court of Appeal, Second District, Division 1, California. Dec. 14, 1926.)

1. Criminal law 🔑814(3)—In prosecution for embezzlement, refusal of instruction as to mere failure to pay, not supported by evidence, held not error.

In prosecution for embezzlement, refusal of instruction that mere neglect to pay over money or to hand over security or property was not sufficient evidence in itself of fraudulent conversion because there might be loss and failure to pay due to misunderstanding or other cause not criminal *held* not error, there being no evidence on which instruction could have been predicated, thus making it misleading.

2. Criminal law 🔑807(1)—Refusal of instruction, argumentative because stating court's reasons therefor, held not error.

In prosecution for embezzlement, refusal of instruction, argumentative in form because stating court's reasons in support of instruction, *held* not error, such reasons being not only surplusage but often confusing to jury.

3. Criminal law 🔑830—Entire instruction, if offered as whole, may be refused if any proposition contained therein should not be given.

Where requested instruction is offered as a whole and any proposition contained therein should not be given, court is justified in refusing whole instruction.

4. Embezzlement 🔑23—Though money may have been given and received to accomplish unlawful purpose, embezzlement by receiver is criminal.

Though money may have been given and received to accomplish an unlawful purpose, embezzlement of it by receiver is criminal, and instructions stating contrary proposition of law *held* correctly refused.

5. Embezzlement 🔑42—In prosecution for embezzlement of funds intrusted to defendant for grain deals, admission of files of corporation showing defendant's grain transactions with it held not error (Civ. Code, § 377).

In prosecution for embezzlement of funds to be used for grain deals, admission of documents taken from files and disclosing all of transactions in grain between defendant and company having files *held* not error, being verified by witness having custody of such files, be-

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*Hearing denied by Supreme Court February 10, 1927.

ing records required by Civ. Code, § 377, to be kept by all corporations for profit, and being unimpeached.

6. Criminal law 🔑323—Records of corporation's business transactions, required kept by law, presumed correct unless impeached (Civ. Code, § 377).

Records of business transactions of corporation, required by Civ. Code, § 377, to be kept by all corporations for profit, are presumed to be correct unless impeached.

7. Criminal law 🔑683(1)—In prosecution for embezzlement of funds intrusted to defendant for grain deals, admission of individual ledger account for rebuttal purposes held not error (Civ. Code, § 377).

In prosecution for embezzlement, admission of individual ledger account of certain company, with certain bank required kept by Civ. Code, § 377, *held* not error, such exhibit being in rebuttal of defendant's claim that he had money of complaining witness on deposit in that bank in name of that company.

8. Embezzlement 🔑10—That funds embezzled were intrusted to defendant by third person to be credited to corporation held not to render defendant innocent of embezzlement charged.

Where defendant to prosecution for embezzlement handled individual's funds as if intrusted to defendant personally, defendant personally would be held to have committed embezzlement of funds, fact that such funds were intrusted to him by third person to be deposited for credit of certain company not rendering defendant innocent of embezzlement charged.

9. Criminal law 🔑620(1)—That separate trial had been ordered for each of two offenses in embezzlement indictment could not be complained of (Pen. Code, § 954).

That court had not ordered separate trial of two offenses charged in indictment in accordance with Pen. Code, § 954, permitting indictment for two or more offenses of same class in separate counts, could not be complained of; court not being required to so act and complaint not being timely made.

10. Embezzlement 🔑44(1)—Evidence held to support conviction for embezzlement.

Evidence *held* to support conviction for embezzlement of funds intrusted to defendant for grain transactions.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

A. H. Woollacott was convicted of embezzlement, and he appeals. Affirmed.

Hewitt, Ford, Crump & Penn and Homer C. Mills, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

YORK, J. Count I of the indictment charged that the defendant embezzled $9,844.88, in money, personal property of S. N. Bonsall. In count V of the indictment the defendant was charged with having embezzled $3,850 in money, belonging to one S. C. McClung.

[1-3] The first point made on behalf of appellant is that the court erred in not giving defendant's instruction No. 2. The refusal to give this instruction was not error. The request was that the court instruct the jury that mere neglect to pay over money, or to hand over security or property, is not sufficient evidence in itself of fraudulent conversion thereof to one's own use, "for there may be losses and failure to pay where a failure is due to misfortune or from other causes not criminal." There was no evidence on which this instruction could have been predicated and, hence the instruction would have been misleading. The requested instruction is also objectionable in that it requests the court to give the reasons on which the requested instruction is based. The instructions to a jury should not be argumentative. The trial judge is responsible for the instructions, and it is not for the jury to review them—hence the judge's reasons in support of the instructions would not only be surplusage, but often confusing to the jury. Where a requested instruction is offered as a whole, and any proposition contained therein ought not to have been given, the court is justified in refusing the whole instruction. Williamson v. Tobey, 86 Cal. 497, 25 P. 65; Wiley v. Young, 178 Cal. 681, 683, 174 P. 316.

[4] Appellant's second point pertains to the refusal of a requested instruction as to the character of the transactions between appellant and McClung, and is based upon the unlawfulness of the transaction under the provisions of article 4, § 26, of our state Constitution. Whatever our opinion may be as to the merit of this proposed instruction, we hold that it is the settled law of this state that, although the money may have been given and received to accomplish an unlawful purpose, the embezzlement of it by the receiver is criminal. People v. Ward, 134 Cal. 301, 66 P. 372; People v. Martin, 102 Cal. 558, 36 P. 952. Appellant's third point is that the court erred in refusing to give appellant's instruction No. 6. This requested instruction is based upon the appellant's contention that the transaction between appellant and McClung was unlawful. The instruction was correctly refused on the doctrine announced in People v. Ward, supra.

[5-7] Appellant's fourth point is that the court erred in admitting Exhibit No. 22 in evidence. This was a document taken from the files of Hutton & Co. showing all transactions in grain had by appellant with that company. It had been proven that the ledger from which the exhibit was taken was kept in the custody of the witness verifying it, and constituted that company's record of all grain transactions with all its customers,

and was made under that witness' supervision, and that the entries were otherwise sufficiently verified. The ledger itself was present in court. Hutton & Co. were not parties to the action. The exhibits were records of the business transactions of a corporation required by law to be kept by all corporations for profit. Hurwitz v. Gross, 5 Cal. App. 620, 91 P. 109; section 377, Civ. Code. Having been so made, unless impeached, they are presumed to be correct. Therefore the court did not err in admitting the same. The same conclusion follows, in relation to appellant's fifth point, that the court erred in admitting in evidence Exhibit 23 purporting to be an individual ledger account of A. H. Woollacott Company with the Hellman Commercial Trust & Savings Bank. This was in rebuttal of appellant's claim that he had money of the complaining witness on deposit in that bank in the name of A. H. Woollacott Company. It had been proven that the ledger account was the original ledger showing the original ledger sheets of Woollacott Company which were kept in the vault of the bank. It had been shown that the complaining witness had been dealing indiscriminately with A. H. Woollacott and with A. H. Woollacott Company, and the account had been kept at the bank by A. H. Woollacott in the name of A. H. Woollacott Company.

[8] In reply to the brief filed in behalf of the state, a reply brief was filed in which other points in support of appellant's appeal were made. All the material points made in the reply brief had been made in the opening brief in a more condensed form. One of the additional points was made that there was no embezzlement by appellant, because the moneys alleged to have been embezzled by appellant were not intrusted to him, but to A. H. Woollacott Company, a corporation. But the evidence shows that the complaining witnesses dealt entirely with appellant in the transactions and that he controlled and handled the moneys they transferred to him, in the same manner as though A. H. Woollacott Company had had nothing to do with it. He was the person intrusted, and the only person who appeared to have anything to do with obtaining the moneys or disposing of them. We therefore hold that the embezzlement proven in this case was committed by defendant personally, and that he is as responsible for it as he would have been if A. H. Woollacott Company had not been mentioned in the transaction. It is apparent that the facts of this case do not bring it within the rule announced in Ballew v. State, 11 Okl. Cr. 598, 149 P. 1070. There it was charged that the defendant, cashier of a bank, embezzled funds of the bank's customer. The court held that the information was defective in that it alleged embezzlement of the funds of the customer, whereas it should have alleged embezzlement of the funds of the bank, because it appeared on the face of the information that the money embezzled was the bank's property, and was under defendant's control as cashier.

[9] Appellant contends that the indictment was not direct and certain in that it charges two distinct and separate offenses not in any manner connected or arising out of the same transaction, and brought by two complaining witnesses and each requiring two different lines of evidence and witnesses to support the same. In appellant's reply brief only has this point been raised. But section 954, Penal Code, provides that the indictment or information may charge two or more different offenses of the same class of crimes or offenses under separate counts. The court, under that section, could have ordered the two counts of the indictment tried separately, but was not required to do so, and it is now too late to complain that such order was not made.

[10] As to count I of the indictment, it appears from the evidence that on August 8, 1924, Bonsall gave appellant a check for $10,000 with instructions to immediately deposit the whole of said sum with E. F. Hutton & Co., in the name of A. H. Woollacott Company, for the purpose of opening up a special grain account and to secure any trades that Bonsall might make from time to time. Appellant was to buy and sell grain for Bonsall through this account, subject to the authorization of Bonsall. Thereafter, on October 8, 1924, Bonsall gave appellant a check in the sum of $2,000 to be deposited with E. F. Hutton & Co. in order to strengthen his grain account, and again on October 10, 1924, he gave appellant another check in the sum of $1,500 for the same purpose. Between August 8th and December 10th Bonsall instructed appellant to make 15 or 20 trades for him through E. F. Hutton & Co., and on or about the 12th of November Bonsall informed appellant that he (Bonsall) had discovered that no more than $5,000 of his money had been deposited as directed. Upon demand being made of appellant as to the whereabouts of the balance, amounting to approximately $10,000, appellant stated to Bonsall that this money was on deposit in the Hellman Bank. After conversation as to the bank account being attached, appellant informed Bonsall that the money was on deposit over at the Commercial Trust & Savings Bank and that that was unattached. Appellant also stated that $5,000 of Bonsall's money was attached at Hutton & Co., and then stated that there was $11,000 over at the said Commercial Trust & Savings Bank.

After Bonsall made an investigation and reported to appellant that there was no money at that bank, in any such account, Bonsall states that appellant told him that he had used the money. Bonsall made several trips to the office of appellant to receive the money, but it was never at any time paid to him. On each of these occasions appellant would request him to come back again. With the exception of a few dollars over $300, Bonsall never received any part of the $13,500 which he turned over to appellant. On November 30th appellant, in writing, admitted a credit to the account of Bonsall in the sum alleged to have been embezzled in count I of the indictment.

Deputy District Attorney Ryan, in his evidence, testified that when he asked appellant whether he owed Bonsall this money, that the appellant stated to him that he did owe it, but that he did not have it to return—that he had spent it in gambling in Tia Juana.

The original record of E. F. Hutton & Company, admitted in evidence after being identified by the employee of said company who made the same, showed that no more than $4,500 had been deposited by appellant. Receipts also were filed as exhibits herein, and after having been identified by the assistant cashier of E. F. Hutton & Co., after the statement that they were in his handwriting. These receipts were issued in the regular course of business and were part of the permanent records of E. F. Hutton & Co. In each instance where records of E. F. Hutton & Co. were introduced in evidence, they were either introduced by the man who made the same or by clerks who were employees of said company. The clerks, in each instance, testified that they were the original records of the company. An examination of these exhibits reveals that the appellant did not comply with Bonsall's instruction relative to deposit of the latter's money with E. F. Hutton & Co. According to the exhibits filed, appellant's balance at no time amounted to as much as $7.000. The original ledger sheets of appellant's account with the Hellman Bank were identified by the head bookkeeper for the bank and received in evidence. They show that on August 8, 1924, appellant deposited $10,000; on October 8, 1924, $2,000; on October 10, 1924, $1,500—these being the dates that Bonsall gave appellant checks for the sums of money identical with the amounts deposited.

It would make no difference that these amounts were deposited with appellant for the purpose of entering into an illegal transaction, or a strictly legal one, or whether it was for the purchase of grain on a margin, or whether it was for the purpose of buying or selling grain short, or whether it was buying stocks or grain on installments, for the money was still the money of Bonsall until it was expended as he directed. It has been held in People v. Ward, 134 Cal. 301, at page 309 (66 P. 372, 375):

> "It is also contended by appellant that as the authority given by the Union for the withdrawal of the money from the bank was for the fraudulent purpose of hindering and delaying its creditors, a conversion of it by the defendant did not constitute embezzlement, and that the court erred in not instructing the jury to that effect, as requested. The instruction was properly refused. The Union, by authorizing the withdrawal of the deposit, did not part with its ownership of the money, nor pretend or attempt to do so. As between it and its agent, to whom the money was intrusted, there can be no question as to its ownership. In Commonwealth v. Cooper, 130 Mass. 285, it was held to be no defense to an indictment for the embezzlement of the money that it was intrusted to the defendant for an illegal purpose. See, also, Commonwealth v. Smith, 129 Mass. 111; State v. Shadd, 80 Mo. 358; State v. May, 20 Iowa, 305; State v. Tumey, 81 Ind. 559; People v. Martin, 102 Cal. 558, 36 P. 952."

See, also, People v. Edwards, 72 Cal. App. 121, 122, 236 P. 944. One of the principal objections of the appellant which he is urging is that the court erred in refusing to give instructions directly contrary to the above rule as set forth.

The evidence in this case clearly discloses the fact that the appellant and A. H. Woollacott Company were substantially one and the same; that that was the name under which he was transacting business, using sometimes his own name and sometimes using the name of A. H. Woollacott Company without making any distinction between his own individual name and that of the corporation.

The same reasoning would apply to each of the objections made by the appellant to the introduction of evidence and the refusal of instructions as to count V of the indictment, excepting the conversation had with Ryan and Bonsall. From the conversation had between appellant and McClung, in reference to the money referred to in the fifth count of the indictment, it appears from the evidence that about April 1, 1925, appellant confessed to McClung that he had not bought the stocks in question, but instead had lost McClung's money in personal and unauthorized speculations. And again, in the first part of May, 1926, McClung and appellant discussed the dealings and appellant stated that he had been involved in similar trouble in 1920 and 1921 and did not wish to have McClung make him any further trouble now. Appellant stated to McClung at that time that he, McClung, had been very lenient with him up to that time, and that he appreciated it as he realized that he could have put him in jail at any time that he wanted to. McClung, however, in spite of the promises of appellant to reimburse him, never received any part or portion of the $3,850 which he acknowledged was due to McClung as representing the amount due from appellant to McClung on March 18, 1925. At the time that appellant admitted that he owed the sum of $3,850 to McClung, he represented to McClung that the stocks which had been attached, and which were referred to in the written acknowledgment—acknowledging the sum of $3,850 to be due—were all intact, and that it was only by reason of the attachment which he said had been levied that he was unable to make delivery of them. Later, however, on April 1, 1925, appellant confessed to McClung that he had not bought the stocks in question, but stated to him that he had lost McClung's money in personal and unauthorized speculations.

Therefore it appears to us that the evidence was sufficient to support the verdict, and there are no errors of law justifying a reversal.

Judgment and order affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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80 Cal. App. 1

OFFEMAN v. ROBERTSON-COLE STUDIOS, Inc. (Civ. 3147.) *

(District Court of Appeal, Third District, California. Nov. 26, 1926. Opinion Modified and Rehearing Denied Dec. 24, 1926.)

1. Master and servant 🔑39(2)—Plaintiff, not alleging nor proving disposal of interest in corporation, could not recover from employer on contract to reimburse.

Plaintiff, alleging that, by terms of contract of employment, as manager of defendant's studio, he was to dispose of his interest in another company controlled by him, and that defendant was to reimburse him for loss sustained thereby, may not recover for such loss, in absence of allegation or proof that he disposed of such interest.

2. Master and servant 🔑39(2)—Plaintiff, not alleging sale of furniture or loss thereby, could not recover from employer under contract to reimburse for loss in sale.

Plaintiff, alleging that defendant employer agreed to reimburse him for loss sustained by sale of furniture, may not recover for loss, in absence of allegations that he sold the furniture or sustained loss in the sale.

3. Master and servant 🔑40(3)—Finding employer agreed to purchase house of reasonable value, to become employee's property, held not sustained by evidence.

Finding that defendant employer agreed to purchase house of reasonable value, to become plaintiff employee's sole property, *held* not sustained by evidence that defendant would supply plaintiff with a house and furnish it.

4. Master and servant 🔑41(1)—Employee may not recover full value of residence, to be given him in part payment for three years' services, on performance of but part of services.

Under contract whereby employer is to give employee a residence in part payment of three years' services, employee may not recover full value of residence on performance of only part of such services.

5. Corporations 🔑1—Corporation and stockholders will be treated as identical, when necessary to redress fraud, to protect third persons, or to prevent palpable injustice.

When necessary to redress fraud, to protect rights of third persons, or to prevent palpable injustice, corporation and stockholders will be treated as identical entities, with identical duties and obligations.

6. Corporations 🔑428(7)—President, in accordance with duty, is presumed to report to trustees information concerning interests of corporation.

President is considered head of corporation and must report to trustees information concerning its interests and is presumed to do so, which presumption is usually conclusive.

7. Corporations 🔑428(1)—Within scope of employment, knowledge of officers is knowledge of corporation.

Knowledge of officers of corporation, within the scope of their duties and employment, is the knowledge of the corporation.

8. Corporations 🔑428(7) — Corporation is presumed to have been informed of terms of employment of general manager of motion picture corporation, where president was informed.

Where president was fully informed of terms of employment of general manager of motion picture corporation, it must be presumed that the corporation was so informed.

9. Frauds, statute of 🔑44(3)—Oral agreement for services as corporation manager for three years is unenforceable, under statute of frauds (Code Civ. Proc. § 1973; Civ. Code, § 1624).

Agreement for services by employee, for three years, as manager of corporation operating motion picture studio, being oral and not to be performed within a year from the making thereof, *held* unenforceable, under Code Civ. Proc. § 1973, and Civ. Code, § 1624.

10. Frauds, statute of 🔑125(3) — Contract contrary to statute of frauds is voidable, remedy only being affected.

Contract within and in contravention to statute of frauds is voidable not void, the remedy and not the validity of the contract being affected.

11. Trial 🔑203(1)—Instructions should permit recovery on but one theory.

Recovery on but one theory should be permitted by instructions.

12. Frauds, statute of 🔑138(4)—On breach by employer of contract, unenforceable under statute of frauds, whose validity employer is estopped to deny, employee may recover on contract or may recover reasonable value of services, treating contract as rescinded, but not on both theories.

In case employer is estopped to deny validity of oral contract, unenforceable under statute of frauds, which was breached by him, employee can recover either contract price

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★Hearing denied by Supreme Court January 24, 1927.

for services performed and damages for breach of contract or reasonable value for services performed, treating contract as rescinded, but not on both theories.

13. Frauds, statute of 🔑138(4)—Employee may recover reasonable value of services performed under contract, unenforceable under statute of frauds, but no interest prior to judgment.

Employee may recover reasonable value of services performed by him under contract, unenforceable under statute of frauds, though employer is not estopped to deny its validity, but not interest on such reasonable value prior to judgment.

14. Frauds, statute of 🔑158(4) — Estoppel by employer to deny validity of contract for services, unenforceable under statute of frauds, held not shown by evidence, as it did not show loss by employee.

Evidence *held* insufficient to establish estoppel of employer to deny that contract for services was unenforceable under statute of frauds, being insufficient to show loss by employee, and hence allowing interest prior to judgment was error, as no interest is allowable on recovery for reasonable value prior to judgment.

15. Master and servant 🔑40(1)—One changing residence, in accepting employment, held not presumed to suffer loss.

There is no presumption that one suffers loss by changing his place of residence from New York to Los Angeles, in accepting employment.

16. Appeal and error 🔑1139—Where finding would sustain verdict on theory of estoppel to deny validity of contract for services or on theory of implied contract to pay therefor, plaintiff, waiving other recovery on contract, but not otherwise, may have judgment, though it cannot be told which theory was adopted.

Since finding of reasonable value of employee's services to be same as contract price would sustain verdict on theory of estoppel of employer to deny validity of contract or on theory of implied contract to pay reasonable value of services, employee, waiving other recovery on contract, may have judgment for such sum, but not otherwise, as recovery cannot be had on both theories.

On Petition for Rehearing.

17. Frauds, statute of 🔑138(4)—Stipulations as to compensation in oral contract for services unenforceable under statute are admissible to show reasonable value, though not conclusive (Code Civ. Proc. §§ 1967–1969, 1973; Civ. Code, § 1624).

Where oral contract for services is unenforceable under statute of frauds, Civ. Code, § 1624, and Code Civ. Proc. § 1973, oral stipulations as to compensation are in the nature of admissions as to reasonable value of services, and are admissible, notwithstanding Code Civ. Proc. §§ 1967–1969, 1973, but not conclusive.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Emil Offeman against the Robertson-Cole Studios, Inc., for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed, on condition of remittitur.

Loeb, Walker & Loeb, of Los Angeles, for appellant.

Bicksler, Smith & Parke, of Los Angeles, for respondent.

FINCH, P. J. This is an appeal by the defendant from the judgment entered in the trial court in favor of the plaintiff. The complaint alleges:

"That on or about February 14, 1922, defendant, through its duly authorized agents, entered into a contract with plaintiff, whereby, in consideration that plaintiff immediately dispose of and/or give up his household goods and/or personal effects in and about the city of New York and dispose of his interest in the Reol Productions, Inc., controlled by plaintiff, at whatever loss sustained by plaintiff, by disposing of or giving up his household goods and/or personal effects and said business, and become general manager of Robertson-Cole Studios, Inc., in the county of Los Angeles, State of California, for a period of three years, beginning February 14, 1922, and ending February 14, 1925, defendant would compensate plaintiff as follows:

"(1) Pay to plaintiff the sum of $500 per week, payable at the end of each and every week, for and during said entire period beginning February 4, 1922, to and including February 4, 1925.

"(2) To issue and/or cause to be issued to plaintiff 10,000 shares of Class B common stock, of the par value of $10 each, in the R-C Pictures Corporation, upon and at the time of the entry of the employment by plaintiff of defendant pursuant to said contract.

"(3) To compensate and reimburse plaintiff for any loss sustained by plaintiff by the sale and disposal of his household goods and/or personal effects, his interest in said Reol Productions, Inc.; to pay the expenses of himself and family from New York to the city of Los Angeles, Cal., and return; to pay the purchase price of a house of reasonable value for plaintiff in or about Los Angeles, Cal., to be deeded to plaintiff and become plaintiff's sole property; and, further, to provide and pay to plaintiff for suitable living accommodations in and about the city of Los Angeles, Cal., until such time as said realty should be purchased for plaintiff by defendant.

"(4) To pay for and furnish plaintiff with reasonable and suitable household furnishings and furniture, to become the sole property of plaintiff, at or about the city of Los Angeles, Cal.

"(5) That a written contract would be forthwith entered into by and between plaintiff and defendant for said period of three years, and upon the consideration hereinbefore set forth.

* * *

"That confiding in, and relying upon the truth of the statements, representations, and contract of defendant, so made as aforesaid, plaintiff did, on or about February 4, 1922,

> enter upon his said employment, and the performance of said contract, and faithfully, fairly, fully, and completely fulfilled and performed all of the conditions of said contract by plaintiff to be fulfilled and performed, on his part, until defendant, as hereinafter alleged, discharged the plaintiff. That solely by reason of accepting said employment, in and by said contract, as aforesaid, plaintiff has lost the entire value of his interest in said business, to wit, Reol Productions, Inc., of the value of about $50,000, the value of which was known to defendant, its agents, and representatives, at the time the contract hereinbefore set forth was made with plaintiff.
>
> "That defendant did, on or about November 24, 1923, without any complaint having been made against plaintiff by the defendant, and without any cause whatever, discharge plaintiff from said employment; and defendant has ever since said date refused, and still refuses to allow and permit plaintiff to perform the duties and conditions of said contract on plaintiff's part to be performed."

In his first cause of action, the plaintiff alleges that there is a balance due him, for services rendered at $500 a week, the sum of $33,725. He also alleges therein that, "by reason of accepting said employment, * * * plaintiff has lost the entire value of his interest in said * * * Reol Productions, Inc., of the value of $50,000." The second cause of action is for damages in the sum of $31,000, the amount which he would have earned at $500 a week during the remainder of the term of his employment. The third cause of action is for damages in the sum of $100,000 because of the defendant's failure to deliver the shares of stock agreed upon. The third cause of action also contains the following allegation:

> "That defendant, at all of the times herein alleged, has refused and still refuses to purchase a reasonable priced residence for plaintiff, and plaintiff was compelled to and did purchase a residence of the value of $15,000, on or about the 2d day of June, 1923, in which sum plaintiff has been damaged, and that no part of said sum has been paid."

In the fourth cause of action it is alleged that the plaintiff performed said services "upon the special order and request of said defendant"; that the "defendant promised to pay to plaintiff the reasonable value thereof"; that $500 a week is such a reasonable value; and that a balance of $33,725 thereof remains due and unpaid.

The answer admits that "on or about February 4, 1922, this defendant entered into a contract with plaintiff wherein and whereby plaintiff was employed as general manager of studios of the defendant in the said county of Los Angeles, but denies that said employment was for a period of three years * * * or for any other period exceeding a period of one week, and thereafter from week to week, at the option of this defendant," and denies that the defendant agreed to pay plaintiff $500 a week "or any other sum in excess of $150 a week." The answer denies the other allegations of the complaint herein quoted, except the averment that plaintiff performed the alleged services, and, as a separate defense, alleges "that if any contract was ever made or entered into, as alleged, * * * there was no note or memorandum thereof in writing," and that therefore it was invalid. As a third and separate defense, the answer alleges "that this defendant employed plaintiff as general manager of studios, from week to week, at a salary of $150 a week, plus house rental," that the defendant has paid the plaintiff such salary and "also supplied plaintiff with house rental during said employment."

The jury returned a general verdict in favor of the plaintiff for $75,000. A special verdict also was returned, by which the jury found, in substance, that the defendant agreed to pay the plaintiff $500 a week for three years; to issue to him shares of stock, as alleged in the complaint; to reimburse plaintiff for loss sustained by him "by the sale and disposal of his household goods and/or personal effects, his interest in said Reol Productions, Inc.; * * * to pay the purchase price of a house of a reasonable value for plaintiff in or about Los Angeles, * * * to be deeded to plaintiff and become plaintiff's sole property"; to reduce the contract to writing; that the plaintiff left his business and employment in New York to accept said employment in Los Angeles and thereby suffered "loss to his interest in Reol Productions, Inc., and * * * in his personal effects and household goods"; that the plaintiff rendered services under the contract for 94 weeks; that $500 a week is the reasonable value of such services; that $15,000 is a reasonable value for a residence for plaintiff; and that by "giving up his business in New York and entering the employment of defendant" the plaintiff sustained a loss of $20,000.

The trial court granted a nonsuit as to plaintiff's claim for damages on account of defendant's failure to deliver the shares of stock alleged to have been agreed upon. The court granted a new trial "as to the issue that plaintiff has lost the entire value of his interest in said Reol Productions and was thereby damaged in the sum of $20,000, as found by the special verdict of the jury on that issue," thereby reducing the amount of plaintiff's recovery to $55,000.

In order that the picture presented by the record may be understood, it is necessary to describe the actors who have principal parts therein. At all times material to the questions raised by the appeal there were three corporations, all governed by "practically the same officers and the same directors" and occupying the same offices in New York City. The R-C Pictures Corporation was the parent company and the others were subsidiary corporations, the defendant being the picture producing company and the Robertson-Cole Distributing Corporation the distributing company. Grahams of London was a copartnership, not incorporated. The copartnership had various business interests in this country and owned all of the capital stock of the corporations named. Sir Erskine Crum was its business representative. He was "one of the London people of Grahams who usually handled the American accounts."

His particular authority to act for Grahams was not shown, but in the name of Grahams he executed a contract with Patrick A. Powers, hereinafter referred to, by which the latter was made the general manager of the three corporations, and which contract was carried into effect by such corporations. Crum authorized Powers to promise the delivery of a certain number of shares of Grahams' stock to some of the employees of the corporations as additional compensation. Powers accordingly promised stock to plaintiff and two other employees, named Berman and Schnitzer. Under date of April 30, 1922, in a letter to Schnitzer, Crum stated:

> "I write this on leaving for England to put on record the arrangements made with Mr. Powers for your interests in the R-C Pictures Corporation. Out of the 40,000 shares of treasury stock in the corporation of B. common stock, 10,000 shares of the par value of $10 each will be retained for you to be handed to you as follows."

The letter then proceeds to state the terms upon which shares of stock will be delivered to Schnitzer from time to time as preferred stock is retired. Powers testified that he was present at a meeting of the board of directors of the R-C Pictures Corporation in the fall of 1923, when H. C. S. Thomson presented to the board for approval contracts "entered into between Schnitzer and the Grahams and Mr. Berman and the Grahams," by the terms of which Schnitzer and Berman were to receive more shares of stock than had been promised them. The foregoing evidence tends to show that Crum had actual authority to enter into contracts in behalf of Grahams, and, since it was peculiarly within the power of the defendant to show with certainty the extent of Crum's authority and no evidence was offered to rebut the inference to be drawn from such evidence, the reasonable conclusion is that his acts were duly authorized. At the time the plaintiff was employed, the directors of the defendant corporation were Sir Erskine Crum, J. P. Kennedy, W. W. Lancaster, Rufus S. Cole, and R. J. Tobin. Cole was president of the corporation, and continued in that office until May 16, 1922, when he resigned, both as director and president, and Powers was elected to succeed him as managing director. Prior to that time, on the 17th of February, 1922, Powers had been elected managing director of the R-C Pictures Corporation. Tobin resigned as a director of defendant corporation March 10, 1922, and H. C. S. Thomson was elected to fill the vacancy. Thomson was chairman of the board of directors of the R-C Pictures Corporation from August, 1921, to October or November, 1923. He then became managing director in place of Powers.

Grahams had invested large sums of money in the moving picture enterprises of the corporations named and was receiving no returns therefrom. Powers was a man of affairs, with a wide experience in the moving picture industry. After various negotiations between Crum and Powers during January, 1922, a written agreement was executed on the 4th day of February, 1922, by Grahams, as party of the first part, and Powers, as party of the second part; Crum executing the agreement as attorney in fact of Grahams. Relative to this agreement, Powers testified:

> "I entered into an agreement with Crum, on behalf of Grahams & Co., of London, England, who were the entire owners * * * of the R-C Pictures Corporation and its subsidiary companies, to take over the management of the business."

Thomson testified that such agreement was the contract by which Powers was employed, and the agreement was offered in evidence by the defendant, but plaintiff's objection to its admission was sustained. The agreement is set forth at length in the record and there is nothing therein that could possibly strengthen the defendant's case. February 17, 1922, R-C Pictures Corporation amended its by-laws by creating the office of managing director and providing:

> "The managing director shall exercise general supervision of the business affairs and property of the corporation. He shall have the power and authority, subject at all times to the board of directors, to supervise the conduct, management and general policy of the corporation. * * * He shall consult and confer with the chairman of the board of the corporation upon any plan or action of substantial importance to be taken in connection with the affairs of the corporation and shall take no action of such character and shall have no power to bind, permit or otherwise involve the corporation in an amount in any way exceeding five thousand dollars, or to transfer or convey any of its property without first consulting with and receiving the approval of the chairman thereto."

On the same day the board of directors, as shown by the minutes, elected Powers "to the office of managing director of this corporation, to serve without compensation, in accordance with the provision of the by-laws. The vote in favor of the foregoing resolution was as follows: In favor: Sir Erskine Crum, W. W. Lancaster, H. C. S. Thomson. Oppose: Rufus S. Cole." The subsidiary corporations appear to have taken the same steps toward the amendment of their by-laws and the appointment of Powers as managing director.

During the month of January, 1922, Powers and the plaintiff arrived at an understanding to the effect that the plaintiff was to perform certain services in New York and then take charge of the defendant's studio in Los Angeles, as general manager thereof. February 4, 1922, Crum, Powers, and the plaintiff reached an understanding as to the terms of plaintiff's employment. Relative thereto, the plaintiff testified:

> "Mr. Powers said I would receive $500 a week from the company with a certain amount of stock to be set aside for myself; * * * that any losses I may sustain in leaving my own business in New York would be borne by the company, * * * would be reimbursed by the company; that they would supply me with a home here; * * * with a house, and furnish it. * * * He said he would buy a home and furnish it for me. * * * Sir Erskine Crum said * * * that all the terms Mr. Powers had just explained to him were perfectly satisfactory to him, that it was up to Mr. Powers who was managing director, who had charge of everything; * * * that all the terms of the agreement would be put in writing as soon as possible. * * * They asked me, Sir Erskine Crum and Mr. Powers, to immediately start with the work of reorganization of the R-C Pictures Corporation and its subsidiary companies. * * * Sir Erskine Crum told me two or three times, he says, 'We have millions at stake and the greatest leakage is in Los Angeles and * * * to go over there and stop it as soon as possible"; that about the middle of February Crum said, "You have got to go, time is the essence of everything, we are losing thousands of dollars every week; * * * never worry, go ahead, and we will take care of you."

The plaintiff left New York for Los Angeles on the 23d of the same month. Cole, who was then president of the defendant corporation, and Powers accompanied plaintiff on the trip. Testimony was introduced to the effect that, during the journey to Los Angeles, all the terms of plaintiff's employment were explained to Cole. Powers' testimony relative to the terms of plaintiff's employment were substantially the same as that of the plaintiff, except that Powers did not remember that anything was said in Crum's presence about buying a house for plaintiff. Crum died before the trial. Plaintiff was paid $150 a week for the services performed by him. He testified that in the aforesaid conversation in New York Crum told him to draw as much as he needed up to $500 a week, but that on account of the defendant's need of money it was understood between Cole, Powers, and the plaintiff that the latter "should draw as little as possible." Powers testified that such was the understanding. The defendant paid the expenses of the plaintiff and his family in going from New York to Los Angeles and paid the rental of their living quarters at the latter place for seven months at $250 a month. The plaintiff then purchased a residence in Los Angeles for $15,000, and the defendant expended about $3,500 in furnishing it and an additional sum in enlarging the house. Plaintiff testified that he sold his furniture in New York at a loss of about $4,000. He acted as general manager of defendant's studio in Los Angeles until his discharge, without cause, as alleged in the complaint. Shortly after his discharge, plaintiff commenced this action. No written agreement was entered into by the parties, although the plaintiff frequently asked Powers to cause the agreement to be reduced to writing, and Powers put him off from time to time, promising him, however, to have a written contract executed. Both Cole and Thomson testified that they were never informed of the terms of the oral agreement. It does not appear that plaintiff had any knowledge of the limitations on Powers' authority.

[1, 2] The trial court granted a new trial as to the issue of damages on account of plaintiff's alleged loss in giving up his business in New York, thus reducing the amount found by the jury to $55,000. The allegations of the complaint in this connection are, in substance, that the plaintiff was to "dispose of his interest in the Reol Productions" and that the defendant was to reimburse him for any loss sustained thereby. There is neither allegation nor proof that he disposed of such interest and, hence there is no basis for a recovery on account of any loss thereby. The jury found that the plaintiff was entitled to recover for salary earned and interest thereon, $36,462.01, and on account of the purchase price of a residence the sum of $15,000. Deducting these amounts from $55,000 leaves $3,537,99, which the jury must have awarded for the loss on the sale of the furniture in New York. The complaint does not allege that the plaintiff sustained any loss in the sale of his furniture in New York, or even that he sold the furniture. The judgment therefore must be reduced by the amount awarded for such loss.

[3, 4] Plaintiff's uncorroborated testimony that it was orally agreed "that they would supply me with a home here, * * * with a house, and furnish it, * * * would buy a house and furnish it for me," is too indefinite and uncertain to support the finding of the jury that the defendant agreed "to pay the purchase price of a house of a reasonable value, * * * to be deeded to plaintiff and become plaintiff's sole property." In any event, if the defendant was to give the plaintiff a residence in part payment for three years' services, he is not entitled to recover the full value of the residence upon performance of services for only a part of such period of time any more than he would be entitled to recover at the rate of $500 a week for the unexpired term of the employment.

[5-8] In considering the case, it must be kept in mind that Grahams was the sole own-

er of all the capital stock of the corporations involved in the foregoing transactions.

> "When necessary to redress fraud, protect the rights of third persons, or to prevent a palpable injustice, the law and equity will intervene and cast aside the legal fiction of independent corporate existence, as distinguished from those who hold and own the corporate capital stock, and deal with the corporation and stockholders as identical entities with identical duties and obligations." Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 696, 227 P. 723, 731.

Also, effect must be given to the fact that, at the time of plaintiff's employment and during a part of the time of the performance of his services, Cole was president of the defendant corporation and was fully informed of the oral contract under which such services were being performed.

> "The president is considered the head of the corporation, and it is his duty to report to the trustees information affecting the interests of the corporation. And the presumption is that he does so. Usually, this is a conclusive presumption." Balfour v. Fresno Canal, etc., Co., 123 Cal. 395, 397, 55 P. 1062, 1063; McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75. "As a corporation can have knowledge only through the information of its officers and agents, the knowledge of such officers within the scope of their duties and employment becomes the knowledge of the corporation." Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 597, 77 P. 1113, 1120.

It must be presumed, therefore, that the defendant was fully informed of the terms of plaintiff's employment and, with that knowledge, accepted and received the benefit of his services.

[9, 10] Admittedly, the agreement between the parties being oral and not to be performed within a year from the making thereof, it is unenforceable, under the provisions of section 1624 of the Civil Code and section 1973 of the Code of Civil Procedure. Appellant contends that it is void and ineffective for any purpose.

> "It is the general rule, however, that a contract falling within the operation of the statute, but made in contravention thereof, is not invalid in the sense that it is void. It is merely voidable. The statute is said to relate to the remedy only and not to affect the validity of the oral contract." O'Brien v. O'Brien (Cal. Sup.) 241 P. 861, 864.

In Producers' Fruit Co. v. Goddard (Cal. App.) 243 P. 686, 693, Mr. Justice Hart said:

> "An agreement not in writing, but which the statute requires shall be in writing to be enforceable, if legally unobjectionable in all other respects, is as effective as to all the purposes for which it has been made as is such an agreement whose terms have been committed to writing until its enforcement is voided upon the ground that it is not in writing." There are statements in some decisions in this state, especially the earlier ones, to the effect that a contract within the statute of frauds is void, but an examination of such cases discloses that the word "void" was used therein as synonymous with the word "unenforceable."

Appellant urges that it was error to admit proof of the terms of the oral agreement as evidence of the reasonable value of plaintiff's services. Particular reliance is placed upon Hanley v. Murphy, 70 Cal. App. 157, 232 P. 767, decided by this court in the year 1924. The invalid contract which was held in that case to be inadmissible in evidence, however, was not offered as proof of the value of the plaintiff's services, but to defeat plaintiff's cause of action, on the ground that such services had been performed under the invalid contract and not as alleged by the plaintiff. The invalid contract provided that the plaintiff was to be compensated by receiving a share of the wool and of the increase of a band of sheep, and it is clear that the terms of the contract would throw no light upon the value of plaintiff's services, in the absence of proof of the value of such wool and increase. Even though an oral contract may be unenforceable, the oral stipulations of the parties as to the compensation to be paid for services rendered under it are in the nature of admissions by them as to the reasonable value of such services and, while not conclusive, are admissible in evidence. In this case, the terms of the oral contract constitute the only evidence upon the question of the value of plaintiff's services. In a similar case it is said:

> "This value, in the absence of any other evidence on the subject, may be fairly assumed at what was stipulated for in the parol contract. Though not binding or conclusive, it may be regarded as admissible evidence for that purpose. Neither party though fit to adduce any other. * * * As a declaration of the parties, it is entitled to some credence." Clark v. United States, 95 U. S. 539, 543, 24 L. Ed. 518, 519. "In an action for services, evidence of the terms of the verbal agreement are admissible to establish * * * the value of the services, it is usually held [citing numerous cases], although there is authority to the contrary." 27 C. J. 380.

While no case in this state has been cited in which the facts are the same as in this, there are several analogous cases holding that an unenforceable contract is admissible in evidence to prove the reasonable value of services performed or materials furnished under the contract. Laidlaw v. Marye, 133 Cal. 170, 176, 65 P. 391; Condon v. Donohue, 160 Cal. 749, 754, 118 P. 113; Bringham v. Knox, 127 Cal. 40, 44, 59 P. 198; Joost v. Sullivan, 111 Cal. 286, 296, 43 P. 896; Booth v. Pendola, 88 Cal. 36, 41, 23 P. 200, 25 P. 1101; Castagnino v. Balletta, 82 Cal. 250, 23 P. 127; Reynolds v. Jourdan, 6 Cal. 109;

Hawaiian, etc., Co. v. Butler, 17 Cal. App. 764, 770, 121 P. 709; Naylor v. Adams, 15 Cal. App. 548, 556, 115 P. 335.

[11] Appellant complains of some of the instructions given by the court and of the court's refusal to give certain instructions requested by the defendant. The special verdict, however, is sufficient to support the judgment for $33,725, the largest amount for which the judgment can be affirmed, and, since neither the instructions given nor those refused could have influenced the jury in making the special findings which support the verdict and judgment to the extent mentioned, it is unnecessary to consider them further than to say that, in the event of a new trial, the instructions should be so framed as to permit a recovery on but one of the theories to be hereinafter considered.

[12, 13] If it be determined that the defendant is estopped to deny the validity of the oral contract, then the plaintiff will be entitled to recover the contract price for services performed and, also, such damages, if any, as he has suffered by reason of the defendant's breach thereof, or he may treat the contract as rescinded by such breach and recover the reasonable value of the services performed, but he cannot recover on both theories, or partly on the one and partly on the other. If it finally be determined that the defendant is not estopped, still the plaintiff may recover the reasonable value of the services performed by him. In such case, however, he cannot recover interest upon such reasonable value prior to judgment. Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375, 379, 44 P. 719; Macomber v. Bigelow, 123 Cal. 532, 535, 56 P. 449; Macomber v. Bigelow, 126 Cal. 9, 14, 58 P. 312. Since it is impossible to determine from the record whether the verdict is based upon the theory of estoppel or upon the implied promise of defendant to pay the reasonable value of the services performed, and since the evidence is insufficient to establish an estoppel, the award of interest cannot be upheld.

[14, 15] The only evidence tending to prove an estoppel is that the plaintiff sacrificed his business and his furniture in New York in reliance upon the oral agreement of employment. At most, the evidence only shows that plaintiff's business became valueless. It does not appear that it would not have become equally valueless if he had remained in New York, or that it was not conducted, after his departure, by persons as competent as himself. While there is testimony to the effect that he sustained a loss in the sale of his furniture in New York, the evidence is very unsatisfactory as to what the defendant agreed to do relative to such loss. The plaintiff's testimony in that connection is of the most general character. His wife sold the furniture in May, 1922, she having remained in New York up to that time. She testified that before the sale Powers told her to sell the furniture, to "just sell it and get all you can for it. He told me that they would replace my furniture." The defendant did replace the furniture by paying for other furniture for plaintiff's Los Angeles residence. There is no other evidence tending to show that the plaintiff sustained any loss by accepting the employment. There is no presumption that one suffers a loss by changing his place of residence from New York to Los Angeles. Standing v. Morosco, 43 Cal. App. 244, 184 P. 954.

[16] The jury expressly found from the uncontradicted evidence, the admissions of the parties in the oral agreement, that $500 a week is "a reasonable salary or a reasonable value of plaintiff's work and labor per week." This finding would be sufficient to justify the verdict to that extent upon the theory of estoppel, if an estoppel had been proved. It is also sufficient, upon the theory of an implied contract, to pay the reasonable value of such services. There appears to be no reason, therefore, why the judgment may not stand to the extent of such reasonable value, providing the plaintiff waive his alleged right to recover for the loss of his business and the value of his Los Angeles residence, but, if he desires to further prosecute the action for the recovery of the amount of such loss and value, then the whole case should be retried, because the plaintiff is not entitled to recover the reasonable value of his services in one trial, upon the theory of an implied contract, and upon the terms of the oral contract in another.

It is ordered and adjudged that if the respondent shall, within 30 days after the going down of the remittitur herein, file in the trial court a written release of the judgment to the extent of $21,275 and a written consent to the dismissal of all causes of action alleged in the complaint except that for the reasonable value of the alleged services actually performed by the plaintiff, then the judgment shall stand affirmed for the sum of $33,725 and costs in the trial court. If such release and consent be not so filed within said time, then the judgment shall stand reversed. In either case, the appellant to recover costs of appeal.

We concur: HART, J.; PLUMMER, J.

On Petition for Rehearing.

FINCH, P. J. [17] Appellant has filed a petition for a rehearing, in which it is urged that a contract which is unenforceable, because within the statute of frauds, is not admissible in evidence in an action of quantum meruit as tending to prove the reasonable value of services rendered. Reliance is placed on the provision of section 1973 of the Code of Civil Procedure, which is herein italicized as follows:

> "In the following cases the agreement is invalid, unless the same or some note or memorandum thereof be in writing, and subscribed by the party charged, or by his agent. *Evidence, therefore, of the agreement, cannot be received without the writing or secondary evidence of its contents:* 1. An agreement that by its terms is not to be performed within a year from the making thereof. * * *"

The heading of chapter 6, tit. 2, part 4, in which section 1973 appears, is "Indispensable Evidence." The first section in the chapter, 1967, provides:

> "The law makes certain evidence necessary to the validity of particular acts, or the proof of particular facts."

Section 1968 provides that:

> "Perjury and treason must be proved by testimony of more than one witness."

Section 1969 provides:

> "A last will and testament, except a nuncupative will, is invalid, unless it be in writing and executed with such formalities as are required by law. When, therefore, such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given."

The evident intent running through the provisions of chapter 6 is to specify the "indispensable evidence" which is "necessary to the validity of particular acts, or the proof of particular facts" which are enumerated in that chapter, and not to make such provisions applicable to the proof of other acts or facts. The provision of section 1969, that, when "such a will is to be shown, the instrument itself must be produced, or secondary evidence of its contents be given," is similar to the provision of section 1973 upon which appellant relies. An invalid will may be admitted in evidence as a declaration of a decedent in a suit by one named as beneficiary thereunder to recover for services rendered the decedent. Estate of Rohrer, 160 Cal. 574, 576, 117 P. 672, Ann. Cas. 1913A, 479; Mayborne v. Citizens' T. & S. Bank, 46 Cal. App. 178, 187, 188 P. 1034. "A written statement is none the less competent as an admission because it is contained in a document which is not itself effective for the purpose for which it was made, either by reason of illegality or incompetency of a party thereto." 22 C. J. 307. If the terms of an ineffective written contract may be proved as admissions, no substantial reason appears for holding that the terms of an ineffective oral contract may not be so proved.

In Elliott on Contracts, § 1213, it is said that courts differ as to the construction to be placed on the statute of frauds; that some "always insist on a literal interpretation and application of the statute, regardless of its manifest intent and purpose"; and that others construe the statute "so as to make it apply only in those cases which come within the intent of the statute." The California cases cited herein and those cited in the original opinion show that the courts of this state have adopted the latter rule. It clearly appears from the provisions of chapter 6 as a whole, also from the provisions of section 1973 standing alone, that the language upon which appellant relies was not intended to exclude proof of admissions against the interest of a party upon the mere ground that such admissions constitute the terms of an unenforceable contract, but to exclude such proof when offered for the purpose of establishing the contract in an action to enforce the same. "When the contract is offered as evidence merely and not for the purpose of founding a claim, it may be received." 27 C. J. 379.

In this case proof of the oral contract was admissible, not for the purpose of founding a claim thereon, but as constituting an admission by defendant as to the value of the services which plaintiff rendered. Such evidence, as stated, is not conclusive, as it would be if the contract were enforceable. In a case such as this the oral agreement is not the basis of the action, "but evidence of its terms is often necessary to establish the implied contract upon which recovery is sought." Baldridge v. Centgraf, 82 Kan. 240, 108 P. 83; Longhofer v. Herbel, 83 Kan. 278, 111 P. 483. To give section 1973 the meaning attributed to it by appellant would often prevent the establishment of such an implied contract.

Appellant relies also on the case of Fuller v. Reed, 38 Cal. 99, wherein it is said:

> "Evidence of the value of the land stipulated to be conveyed by the express void agreement is inadmissible as a measure of the value of services rendered by plaintiff. * * * To permit such testimony, for the purpose of establishing the reasonable value of services rendered by plaintiff, * * * would, in effect, allow a party in one breath to disaffirm a contract, and in the next to affirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract."

It appears throughout the opinion in that case that the court had in mind the question whether the stipulated compensation in the invalid contract was the measure of the value of the services rendered by the plaintiff rather than the admissibility of the terms of the contract as an admission or declaration of the defendant tending to show such value. That case was decided in 1869, prior to the enactment of section 1973 of the Code of Civil Procedure and section 1624 of the Civil Code. The statute then in force provided:

> "Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made." Stats. 1850, p. 266.

The decision in Dreidlein v. Manger, 69 Mont. 155, 220 P. 1107, cited by appellant, is based upon the theory that a contract within the statute of frauds is absolutely void. Long v. Long, 162 Cal. 427, 122 P. 1077, merely holds that part performance of an oral contract does not take it out of the statute of frauds in so far as the contract remains executory. While unguarded dicta to the contrary may appear in some decisions, the courts of this state have uniformly held, since the decision in the case of In re Balfour & Garrette, 14 Cal. App. 261, 111 P. 615, that contracts within the statute of frauds are not void, but unenforceable only. In that case Mr. Justice Hart says:

> "The original object of the statute was unquestionably to lay down in express terms certain rules by which, only, certain contracts, in themselves perfectly legal and valid, could be proved."

The cases cited in the opinion heretofore filed herein show that the present rule in this state is in harmony with the original object of the statute as stated by Mr. Justice Hart. If the oral contract is valid, though unenforceable, no logical reason appears why an admission or declaration therein against interest may not be shown as tending to prove some issue in an action which is not upon the contract between the parties to the contract. In discussing a somewhat similar question in Dupuy v. Macleod, 4 Cal. Unrep. Cas. 147, 150, 33 P. 1115, 1117, it is said:

> "A writing to satisfy the statute of frauds is one thing. A writing which is admissible in evidence as to some of the facts of a sale is, or may be, quite a different thing."

If at any time the defendant had made an oral statement as to the value of plaintiff's services, it would have been admissible in evidence against the defendant. The fact that the oral statement was one of the terms of the unenforceable oral contract does not, on any logical grounds, render it less admissible.

The petition for a rehearing is denied.

I concur: HART, J.

PLUMMER, J. I concur in so far as the foregoing is substituted for the former opinion filed herein. In my opinion, the petition for a rehearing should be granted.

80 Cal. App. 402

LANE v. FEATHER RIVER LUMBER CO. (Civ. 3165.)

(District Court of Appeal, Third District, California. Dec. 22, 1926. Hearing Denied by Supreme Court Feb. 17, 1927.)

1. Logs and logging 🔑8(5)—Where contract for falling logs provided that plaintiff should receive extra compensation under certain conditions, burden was on plaintiff to prove that conditions arose.

Where oral contract for falling and delivering logs provided that in case plaintiff and defendant were compelled to go to eight-hour day he should receive extra compensation, burden was on plaintiff, in suit to recover extra compensation and damages for breach of contract, to prove that that condition arose.

2. Logs and logging 🔑8(5)—Evidence held not to show that condition arose entitling plaintiff to extra compensation under contract for falling logs.

In suit to recover for extra compensation and breach of contract, under oral contract for falling logs, providing that plaintiff should be entitled to extra compensation if he and defendant were compelled to go to eight-hour day, evidence *held* not to show that condition arose entitling him to extra compensation.

3. Logs and logging 🔑8(3)—That defendant adopted eight-hour schedule one week did not entitle plaintiff to extra compensation for entire season under contract for falling logs.

Under agreement that plaintiff should receive extra compensation for falling logs if defendant and he had to adopt eight-hour schedule, fact that defendant adopted eight-hour schedule one week did not entitle plaintiff to extra compensation for entire season.

4. Accord and satisfaction 🔑25(1)—Defense of accord and satisfaction was not available where not pleaded.

Where defendant claimed that monthly payments made to plaintiff constituted progressive accords and satisfactions as to all demands prior to each, defense was not available where he had not pleaded it.

Appeal from Superior Court, Plumas County; J. O. Moncur, Judge.

Action by E. I. Lane against the Feather River Lumber Company for damages for the breach of an oral contract for cutting of timber. From a judgment for plaintiff, defendant appeals. Reversed.

L. H. Hughes, of Quincy, and McLaughlin, & McLaughlin, C. E. McLaughlin, and C. P. McLaughlin, all of Sacramento, for appellant.

H. B. Wolfe, of Quincy, Hinsdale & Metteer, of Sacramento, Charles A. Tuttle, of Fresno, and H. T. Hiatt, of Sacramento, for respondent.

FINCH, P. J. The plaintiff recovered judgment in the trial court, and the defendant has appealed.

About March 1, 1923, the parties entered into an oral contract "whereby plaintiff was to fall, limb, buck, and deliver on board the cars * * * logs from an agreed logging area * * * for the price or sum of $9 per thousand feet." The following allegations of the complaint are denied by the answer: It was agreed that "if as a result of the demand of the employees of plaintiff the working day was reduced from ten hours as theretofore in effect to eight hours, that the price per thousand feet should be $10 instead of $9. * * * After the commencement of logging operations under said contract the employees of plaintiff and the employees of defendant refused to continue their employment working ten hours a day, and from and after April 25, 1923, the employees of plaintiff did work only eight hours per day." The demand is for compensation at the rate of $10 per thousand feet. As a second cause of action it is alleged that it was agreed "that work under said contract was to be commenced as soon as weather conditions permitted in the spring of 1923, and was to continue so long as defendant operated its sawmill and thereafter and until the mill pond of said defendant was filled with logs; that pursuant to such contract * * * plaintiff commenced work thereon on or about the 10th day of March, 1923, and diligently and continuously prosecuted the same until on or about the 8th day of November, 1923, at which time defendant, contrary to the agreement, * * * stopped logging operations by this plaintiff and refused to permit plaintiff to continue operations under said contract although at this time weather conditions permitted logging operations and said sawmill of defendant continued in operation, and that such operation under said contract could have been carried on to and including the 3d day of December, 1923, to the damage of this plaintiff in the sum of $6,600." The court found in accordance with the allegations of the complaint and gave judgment on the first cause of action for the balance due the plaintiff for services performed, computed at the rate of $10 per thousand feet, and, on the second cause of action, damages in the sum of $3,821.15.

At the time the agreement was made George Laws was the manager of the defendant corporation. The terms of the agreement must be gathered from conversations between the plaintiff and Laws. Relative to the particular conversation upon which the plaintiff relies, he testified:

> "I says, 'I want $9 a thousand for all of the logs delivered under the present conditions, and if I am forced to go to an eight-hour day, I want a dollar a thousand more. * * * I have learned during the winter, or heard a great deal of agitation for the eight-hour day among the workers, and I am positive in my own mind that they are going to make a demand for the eight-hour day, and I think they will win, and I won't take a contract to deliver logs without some protection, because if we have to go to the eight-hour day, as you know, it will cost me more money than it will under a ten-hour day,' and he says he didn't think there would be an eight-hour day, and I says, 'Well; I am pretty close to the most of the men, and I am satisfied there will be.' He says, '* * * I suppose if your wobbly camp * * * asks for eight hours you will expect that dollar a thousand extra, or you will want that dollar a thousand extra.' I says, 'Yes, I will want it, Mr. Laws, but I know you well enough to know that I won't get it; but *if you go eight hours or any of the rest of them go eight hours, I want the dollar a thousand extra and will expect the dollar a thousand extra.*' He says, '*That is all right*, because I won't go eight hours. * * * You know well enough that I can't afford to go eight hours under the conditions here.' I says, 'I realize that very well, Mr. Laws, and I don't want to go to it any more than you do, but I think we will be forced to, and in that event I would go broke trying to log at a ten-hour price at an eight-hour day.' * * * He says, 'That will be all right. * * * Don't think there will be anything about the eight-hour day anyhow.'"

Those parts of the foregoing testimony which are herein italicized appear to constitute the agreement relative to the alleged extra compensation of $1 a thousand feet. While Laws testified that he did not agree to pay the plaintiff such extra compensation under any conditions, it must be presumed, for the purposes of this appeal, that the plaintiff's testimony is true and that the following statement in respondent's brief is a correct inference from the evidence: "The offer of respondent for additional compensation was conditioned upon appellant or the other lumber mills going to the eight-hour day."

Plaintiff commenced operations about March 10th. He testified:

> "I started camp, built lots of roads. The fallers started in falling timber on or about the 20th of March, I think, and done everything necessary to get going.
>
> "Q. And when did you start the delivery of logs? A. On the 8th day of May, 1923. * * * On the 25th of April, the morning of the 25th of April, my employees refused to go to work —quit in a body, every man except my foreman, and he stayed to take care of my horses. The rest of them all left camp, demanding an eight-hour day, among other things—an eight-hour day, sanitary conditions, etc.—and did not return to work again until the 7th day of May. * * * They came back under the eight-hour day.
>
> "Q. Was it possible thereafter, and during the season, for you to secure employees to work ten hours a day? A. It was not.
>
> "Q. What happened, if you know, at the Feather River Lumber Company, at the same time, concerning labor? A. They went on a strike the same day and went back to work the same day—the 6th of May. I heard that the Feather River had settled with them, granting them the eight-hour day, so I went down to see Mr. Laws, and he told me that he had settled, and that he was going to work Monday morning under the eight-hour day and for me to go back to work, which I did. * * *
>
> "Q. Did you later have agitation in your camp about the length of day? A. I did. My men heard that I was trying to go back to a ten-hour day and quit. * * * They stopped work one whole day over it. * * * Labor was very short. * * *
>
> "Q. Did Mr. Laws ever notify you that he

had gone back to a ten-hour day? A. He did not.

"Q. Did he ever make any demand on you that you go back or attempt to go back to the ten-hour day? A. He did not. * * *

"Q. Did you make any effort to secure other employees? A. Well, no particular effort, no, because Mr. Laws said to lay off until the thing was settled, and I laid off until he told me to go back to work under the eight-hour day.

"Q. Do you know of any other logging camp, Mr. Lane, in Plumas County, that operated eight hours a day during the season of 1923 for any length of time? A. Yes, sir; the Feather River Lumber Company. * * * I have heard that they worked ten hours on the eight-hour basis with the pay for overtime for the balance of the season. * * * Their camp ran approximately ten hours, but it was my understanding that they worked on an eight-hour day and got pay for overtime.

"Q. * * * Were you compelled to reduce the hours and wages, or did you do it voluntarily? A. I was compelled to. It would have been utterly impossible for me to get men to work ten hours a day and Mr. Laws, or the Feather River Mill, was working eight. * * * I reduced the hours of labor simply on Mr. Laws' say so. * * * My men, personally, made no demand on me. The demand came through the office of the Feather River Lumber Company, through their committee of strikers, delivered to me by Mr. English. * * * My men made no personal demands. * * * They said that it was a general strike, and they were going out and not going to work until they got their eight-hour day. * * *

"Q. When Mr. English gave you that copy of the strikers' demands, did he direct you to comply with it? A. He didn't; * * * he gave it to me as a demand that had been made on them."

Laws testified that he never asked plaintiff "to resume work on the basis of eight hours per day for his employees." Laws further testified, and this testimony stands uncontradicted:

"We had a strike in the mill; not in the woods. * * * The woods never stopped a minute. * * * We had plenty of men at all times. Our time book will show it."

Mr. English, who was chief clerk and bookkeeper of defendant, testified that the defendant's logging camp did not close down at all during the season; that it operated on the basis of eight hours a day only from May 7th to 12th; that there was no shortage of men during the season; that "we revised our wage schedule in the mill, in the factory, and our logging camp kept right on at the same rate"; and that the men in the logging camp were paid no more after the strike than before.

April 25, 1923, plaintiff received a letter from Laws containing the following:

"When I met you in San Francisco you spoke of wanting $1 per thousand feet more for logs, providing the mills went to eight hours, and I made you no answer to this question. Please be advised that no matter what the hours will be we will pay you $9 per thousand feet for logs on cars at Gullings and no more."

Plaintiff testified that on the 6th of May—

"I went to see Mr. Laws. * * * I says, 'I received your letter, Mr. Laws, but I didn't take it seriously, because you know that it wasn't according to our contract.' He says, 'Well; that is all you are going to get, anyhow. If you don't like it you can quit.' I says, 'Mr. Laws, you know I can't quit, I have got all these logs down; I have bought my trucks and went in debt about $14,000 and I can't quit now and you know it.' * * * He says, 'That is all you are going to get, anyhow.' I says, 'I am going ahead on this contract as agreed and if you don't pay me, I am going to sue you for the money, but I simply can't quit now,' and he accepted the logs after that, with the understanding."

June 16th the plaintiff signed a receipt for "balance in full to May 31st," computed on the basis of $9 per thousand feet. In explanation thereof the plaintiff testified:

"When I went to get my first payment on the 16th of June, they wouldn't give to me unless I signed a receipt in full. * * * I read it and refused to sign it. I went back to Portola and tried every way that I could to * * * get money to meet my payroll and other expenses, without collecting that money and found that it was utterly impossible, that I would go bankrupt if I didn't get that money and went back and signed the receipt under protest, telling Mr. Laws that I did so simply to keep from going bankrupt."

Plaintiff was not asked to sign a receipt for subsequent monthly payments, but each month he was given a detailed statement "showing his credits and his detailed debits," computing the amount due him for logs delivered at $9 a thousand. At the close of the season the defendant tendered the plaintiff a check for the balance due him, computed at $9 per thousand, on condition that the plaintiff sign a receipt in full. This the plaintiff refused to do and thereupon commenced this action. During the whole season the defendant conducted a logging camp of its own and delivered logs to the same mill pond at which the plaintiff's logs were delivered. It is conceded that this was not a violation of the terms of the contract.

[1-3] The burden was upon the plaintiff to prove that the condition arose which entitled him to the alleged extra compensation. The evidence fails to show that he was compelled to go to the eight-hour day. He testified that he made no effort to secure men who would work ten hours a day and that the defendant continued to operate its logging camp for ten hours a day. According to his own testimony, the condition upon which he was to receive the extra compensation was that the defendant "go eight hours or any of

the rest of them go eight hours." It is a fair inference that this condition had reference to the working hours in defendant's logging camp, because the work therein was of the same character as that in plaintiff's camp and defendant's mill employees were paid by the hour. The mere fact that the defendant reduced the daily working hours for a single week is not sufficient justification for awarding plaintiff the extra compensation for the whole season, particularly when he knew that the defendant had returned to the ten-hour day. Laws was without authority to order or direct the plaintiff to adopt the eight-hour day. If such direction was in fact given, the plaintiff could not have been misled thereby into the belief that it constituted an implied consent by the defendant to pay the extra compensation, because Laws expressly stated at the time that such extra compensation would not be paid, a statement which the plaintiff fully comprehended, for he then threatened that he would sue in the event of defendant's failure to make such payment. Neither was plaintiff misled into the permanent adoption of the eight-hour schedule for the remainder of the season, because, as stated, he knew that the defendant had returned to the ten-hour day.

Even if the other contentions of the plaintiff be conceded, he was not entitled to the extra compensation of $1 a thousand on all the logs delivered. While no logs were delivered prior to plaintiff's adoption of the eight-hour schedule, his employees worked ten hours a day from March 10th to April 25th in building roads, felling trees and preparing logs for shipment. In so far as this work contributed to the total production of the season, the plaintiff had the benefit of the ten-hour day, and this fact must be taken into consideration in determining what, if any, extra compensation he is entitled to recover.

[4] Appellant contends that the monthly payments made by the defendant to the plaintiff "constituted progressive accords and satisfactions as to all demands, statements, and logging done prior to each." That defense is not available here, however, because the defendant did not plead it. Berger v. Lane, 190 Cal. 443, 447, 213 P. 45.

What has been said applies with equal force to the second cause of action, the judgment for damages being based upon the theory that the plaintiff was entitled to $10 a thousand for all logs to be delivered by him.

It is deemed unnecessary to further discuss the alleged insufficiency of the evidence, because other or additional evidence may be produced on the retrial of the case.

The judgment is reversed.

We concur: PLUMMER, J.; THOMPSON Justice pro tem.

Hearing in Supreme Court.

PER CURIAM. The petition for hearing is denied, upon the ground stated in the opinion of the District Court of Appeal that plaintiff was not entitled to extra compensation upon all the logs delivered, for the reason that the men worked for more than a month upon the 10-hour schedule, and this fact should be taken into consideration in determining the extra compensation to be allowed, if any.

It is to be understood that, in denying a hearing in this court, we express no opinion as to the portion of the decision of the District Court of Appeal which discusses the evidence upon the making of the contract between the parties and its legal effect, in order that such portions of the decision may not be considered the law of the case upon a new trial.

80 Cal. App. 301

HENEY v. HENEY et al. (Civ. 5449.)*

(District Court of Appeal, First District, Division 1, California. Dec. 16, 1926.)

1. Principal and agent 🔑48—Agency under power of attorney is fiduciary relationship requiring high standard of good faith on agent's part.

Acceptance of agency under power of attorney establishes fiduciary relationship between principal and agent, requiring high standard of good faith on agent's part, and breach of his duties amounts to constructive fraud.

2. Principal and agent 🔑68—Where deceased mortgagor's wife authorized junior incumbrancer to sell wine to pay first mortgage, and wine was not sold, there was no constructive fraud based on fiduciary relationship.

Where deceased mortgagor's wife executed power of attorney to junior incumbrancer, her brother-in-law, to sell quantity of wine produced on property to pay first mortgage, and wine was not sold, no constructive fraud could be predicated alone upon violation of fiduciary duty arising by operation of law from agency.

3. Principal and agent 🔑23(1)—Evidence held not to show agency out of which arose constructive fraud by junior incumbrancer, after being authorized to sell wine to pay first mortgage in buying property at first mortgage foreclosure sale.

Where deceased mortgagor's wife executed power of attorney to junior incumbrancer, her brother-in-law, to sell wine to pay first mortgage, and he bid in property at sale under first mortgage foreclosure for himself, evidence *held* not to show agency out of which constructive fraud arose.

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*Opinion modified and rehearing denied January 15, 1927. Hearing denied by Supreme Court February 14, 1927.

4. Appeal and error 🔑1009(3)—Where evidence on equitable issues was conflicting, decision of trial court was controlling.

Where evidence on equitable issue of junior incumbrancer's intention in bidding in property at sale in first mortgage foreclosure was conflicting, decision of trial court thereon was controlling.

5. Principal and agent 🔑69(7)—Execution of power of attorney did not preclude junior incumbrancer from acquiring property at mortgage foreclosure sale, where he acted in good faith.

Execution of power of attorney to junior incumbrancer to sell wine produced on property did not preclude him from bidding in property at first mortgage foreclosure sale for himself, where he acted in good faith and fairly, after disclosing intention to do so, even though fiduciary relationship arose.

6. Mortgages 🔑607—Title acquired by junior incumbrancer at foreclosure sale under superior lien gives no right of redemption to debtor.

Since relation between mortgagee and mortgagor and between beneficiary of trust deed and maker thereof is not fiduciary, title acquired by junior incumbrancer at foreclosure sale under superior lien is not limited and gives no right of redemption to debtor.

7. Jury 🔑13(18)—Where issues tendered by defense in ejectment were purely equitable, defendants were not entitled to jury trial as matter of right.

Where issues tendered by defense in ejectment were purely equitable, defendants were not entitled, as matter of right, to jury trial thereon.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action in ejectment and for mesne profits and damages for waste by Francis J. Heney against Mary A. Heney and Edwin A. Heney, in which defendants filed cross-complaint. From a judgment on a directed verdict for plaintiff, defendants appeal. Affirmed.

Maurice E. Harrison, Brobeck, Phleger & Harrison, and Henry Brown, all of San Francisco, and C. C. Coolidge, of San Jose, for appellants.

Frank H. Benson, Louis Oneal, Wm. F. James, and E. M. Rea, all of San Jose (B. D. Townsend, of Denver, Colo., of counsel), for respondent.

KNIGHT, J. Appellants herein, Mary A. Heney and Edwin A. Heney, prosecute this appeal from an adverse judgment in an action in ejectment brought by respondent to obtain possession of a tract of land in the Santa Clara valley, and for the mesne profits thereof and damages on account of waste alleged to have been committed thereon. Appellants are the widow and surviving son, respectively, of Richard J. Heney, Jr., deceased, a half-brother to respondent. The land in question, containing 100 acres planted mostly to vineyard, was owned by Richard J. Heney, Jr., and operated by him for the production of wine from 1882 until the date of his death in 1919, at which time his surviving wife, the said Mary A. Heney, succeeded to his interests, and thereafter and until the date of the entry of judgment herein the property was managed by the said Edwin A. Heney.

Respondent purchased the property on August 9, 1922, for the sum of $37,496.39 at a trustee's sale conducted under the terms of a deed of trust held by R. M. Wright, as executor, to secure payment of a loan amounting to more than $35,000, respondent at the time of sale being the owner and holder of a junior deed of trust given to secure the payment to him of the sum of $61,119.91 and interest, upon which there was due upwards of $80,000. Respondent purchased the property with funds obtained from the First Federal Trust Company of San Francisco, through the medium of a loan made to him in the sum of $40,000, payment thereof being secured by the property about to be purchased. A few days subsequent to the foreclosure sale respondent consented to resell the property to Mrs. Heney, and on November 23, 1922, gave a written option to that effect, but afterwards revoked the option and commenced this action.

Appellants denied respondent's asserted title as owner, and by answer and cross-complaint set up equitable defenses charging respondent with having acquired the property through actual fraud growing out of an alleged trust relationship, the substance of the allegations relating thereto being that when the foreclosure of the Wright deed of trust became evident, respondent, a lawyer of prominence and experience, sustaining toward Richard, during his lifetime, and after his death toward the members of his family, fiduciary relations founded upon mutual confidence and an affectionate family association of many years' standing, lulled appellants into the security that with the aid of a personal friend, Mr. Rudolph Spreckels, a banker connected with the First Federal Trust Company, he would prevent a loss of the property to Mrs. Heney at trustee's sale by obtaining a bank loan for her; and that, furthermore, on June 12, 1922, due to the trust and confidence reposed in him by Mrs. Heney, obtained from her a power of attorney, authorizing him to sell a large quantity of bonded wine which had been produced on the property, and shown by the evidence to be of the estimated worth of $40,000, one-half of which was subject to a chattel mortgage given for the principal sum of $5,000 to one Steinfeld, and with the proceeds of the sale to pay the

Steinfeld and Wright indebtednesses, and any excess to Mrs. Heney; that shortly prior to the date of the foreclosure sale respondent falsely represented that owing to a question of title the bank required as a condition to granting said loan that the loan transaction be consummated with him personally, and that he take title at the sale in his name; but that respondent further represented that in doing so he would still be acting in the interests of Mrs. Heney with no intention of acquiring the property for himself and would convey the same to her on demand; that Mrs. Heney, being thus lulled into security, made no independent effort to obtain funds to avert a loss of the property, but, on the contrary, assisted respondent in obtaining said loan, and permitted him to purchase said property in his own name as sole bidder therefor, being unaware of his intention to permanently deprive her of the property until October 22, 1922. Appellants therefore claimed that respondent's title was merely that of a trustee, which gave appellants the right to continue in possession and also the right to redeem.

Respondent denied the accusations of fraud and the existence of confidential relations at the time of the impending sale. He also denied that he had practiced any deception or concealment whatever as to his intentions to acquire the property in his own interests, but alleged that, on the contrary, he had repeatedly warned appellants over a period of several months that if the Wright loan was not taken care of by them and a foreclosure sale resulted, he would be compelled, in order to protect his own rights under the second deed of trust, to borrow the money personally and bid in the property, in which event he would retain title and take possession. Regarding said power of attorney, respondent alleged that the debt secured by the Steinfeld chattel mortgage was about due and its payment was guaranteed by him; that since appellants had been unable to sell said wine his object in obtaining said power of attorney was to dispose of the same, if possible, prior to the foreclosure sale, with the hope of securing enough money to extinguish the Steinfeld and Wright indebtednesses, thereby giving his junior deed of trust priority as a first and superior lien; but, being unable to sell the wine, he so notified appellants on July 22, 1922, and thereafter borrowed the money on his own account to bid in the property.

The equitable issues thus presented were tried by the court sitting without a jury, and findings were made absolving respondent as to all charges of fraud, the court in its decision having followed substantially the denials and the allegations of the answer to the cross-complaint. Thereupon a jury trial was had of the legal issues, but, claims for waste and mesne profits having been abandoned, a directed verdict was rendered in favor of respondent for the possession of the premises, and judgment was entered in accordance with said findings and verdict.

Appellants concede that in so far as the question of actual fraud is concerned the decision of the trial court is conclusive, the findings exonerating respondent as to the allegations of specific misrepresentations being based upon conflicting evidence and therefore unassailable on appeal; but they now seek to segregate the transaction involving the execution of said power of attorney from the charge of actual fraud as pleaded by them, and again urge said transaction as the basis of a charge of constructive fraud, contending that the sole purpose of granting said power of attorney was to prevent a loss of the property to Mrs. Heney at foreclosure sale, and that therefore the effect of the execution of said instrument was to create an agency which by implication of law imposed upon respondent as agent the duty of protecting Mrs. Heney's interests alone as to all matters connected with the sale of said property and precluded him while said agency existed from acquiring the property in his own interests or from gaining any personal advantage as a result of said sale; that during the pendency of said agency respondent, contrary to the obligation of his trust, purchased said property at foreclosure sale in his own interests, the purchase being attended by circumstances showing, as appellants claim: "(1) a grossly inadequate price; (2) a lulling of the principal into security; (3) a failure until too late to report a lack of success in securing the object of the agency, and (4) the securing of an advantage at foreclosure sale by procuring a renewal" of the debt secured by his junior deed of trust, which respondent had inadvertently allowed to become outlawed. In other words, it is claimed in substance that without having terminated said agency by any clear disclaimer and without notifying Mrs. Heney of the failure to sell the wine until it was too late for her to save the property from foreclosure sale through her own efforts, by effecting a sale of said wine or the real property or both, respondent, under circumstances showing that Mrs. Heney was lulled into security, purchased said real property in his own interests, for a sum grossly disproportionate to its value; and as an additional advantage gained has been allowed to continue in force against Mrs. Heney the obligation to pay the full amount of indebtedness previously secured by the junior deed of trust. Appellants therefore contend that, regardless of the findings on the issues of actual fraud, a case of constructive fraud has been established as a matter of law, based upon the agency created by the execution of said power of attorney, which cast upon respondent the obligation to restore to

Mrs. Heney as prayed for in her cross-complaint the legal title to said property, subject to the imposition of the usual equitable conditions.

[1, 2] It is doubtless the law, as appellants contend, that the acceptance of an agency under a power of attorney in itself establishes a relationship fiduciary in character between the principal and agent, which holds the agent to a high standard of good faith, full disclosure, and absolute disinterestedness pertaining to the particular agency created, and that a breach of the duties thus imposed amounts to constructive fraud; but it is apparent that here a case of constructive fraud cannot be predicated alone upon the asserted violation of any fiduciary duty arising by operation of law from the agency defined by the express terms of the power of attorney now before us, because that instrument merely authorized respondent to sell a quantity of wine and with the proceeds derived from the sale to pay certain debts; and since the wine was not sold it cannot be held that there has been any breach of fiduciary duty relating to the subject matter of that particular agency.

[3] Appellants contend, however, that the result of the execution of said power of attorney was to create an agency more extensive in its scope than the one indicated by its terms—one whereby respondent, being Mrs. Heney's confidential advisor, lulled her into the security that by granting said power of attorney he would avert a loss of the property to her at said sale. It will therefore be seen that the agency now contended for by them as having been created as the result of the execution of said power of attorney, and which is now being urged as the basis of the case of constructive fraud, is to all intents and purposes identical in its scope with the one heretofore urged by them as the basis of the case of actual fraud, and, consequently, like in the latter case, must depend necessarily for its establishment upon extrinsic evidence. As already pointed out, the trial court concluded upon the evidence adduced that no such agency existed, basing its conclusion mainly upon findings that there were no confidential relations existing between the parties at the time of the foreclosure sale, and that Mrs. Heney was not lulled into the security that respondent's activities were being exercised entirely in her behalf and would result in the saving of the property for her at foreclosure sale; but, on the contrary, respondent made full and complete disclosure in good faith of his intention to acquire the property in his own interests in the event of a sale thereof. It follows that unless, as appellants claim, said findings are wholly contrary to the evidence, the theory of a constructive fraud is destroyed. This branch of the case therefore resolves itself into a question of whether there is substantial evidence in the record to sustain the findings mentioned, and we are convinced that there is.

The evidence bearing upon the questions of fact under consideration related to events covering a long period of time, the trial of the equitable issues having consumed several weeks, and, although we shall endeavor to notice herein only the important features of respondent's evidence which in our opinion tend to support the contested findings above mentioned, the relative positions of the parties at the time of the execution of said power of attorney, their feelings toward each other, and their intentions as to the enforcement of their respective rights cannot be fairly described without referring to much of the testimony.

As to respondent's financial interest in said property, about which there is little if any dispute, the evidence shows that it arose and afterwards increased in the manner following: From the beginning the operation of the vineyard for the manufacture of wine does not appear to have been a financial success, and soon after acquiring the property Richard began to borrow money, the debts steadily increasing until ultimately the property was sold under the Wright foreclosure proceedings. As early as 1884 he borrowed money from his father, the obligations due the latter being eventually inherited by his daughters, Helena and Elizabeth, who were half-sisters to Richard and full sisters to respondent, and they continued to lend Richard money. Loans were also obtained from other individuals and certain banks. From 1894 until the end of 1913 respondent made large cash advances to Richard, guaranteed loans made to him by others, and in 1906 assumed the burden of Richard's indebtedness to Helena and Elizabeth, amounting to $18,000, thereafter paying them interest on that sum monthly. Consequently, in 1913 the total indebtedness to respondent aggregated $48,974.89, and he was given a mortgage on the real property for the principal sum of $42,474.89 and a chattel mortgage on wine for the balance of $6,500, the mortgage on the real property being subordinate to the lien of a trust deed held by Wright securing payment of $20,000 and interest. Both liens on the real property were renewed in 1918 for increased amounts, the one to Wright for the sum of $28,000 and the one to respondent in the form of a junior deed of trust for the sum of $61,119.91, bearing simple interest at 7 per cent., which did not include the sum of $6,500 covered by the chattel mortgage; and when the Wright deed of trust was foreclosed in 1922 the amount due under respondent's junior trust deed amounted to approximately $85,000, of which sum $50,000 represented the amount of cash actually advanced by respondent for the benefit of Richard and his family.

Prior to 1914 respondent's personal relations with Richard and the members of his family were most affectionate and of a fiduciary character. Besides assisting Richard frequently in a financial way, respondent acted as his confidential advisor and agent. But early in 1914 a breach occurred, caused primarily, it appears, by the constant demands Richard was making upon respondent for further financial help when the latter, on account of sickness and other adversities, was unable to respond. Thereafter respondent refused to advance more money, and they dealt with each other in a formal way, each protecting his own interests, their business being transacted with frequent manifestations of anger and resentment. About this time, respondent had a violent quarrel with Richard's sons, Edwin and Seth, over the sale by the latter two of incumbered wine, and a few weeks later the estrangement was accentuated by the refusal of Richard to execute at respondent's request a crop mortgage, the effect of which would have been to deprive Richard of the management of the property, Richard becoming enraged at what he considered was an intrusion, and threatening the agent who presented the document for him to sign. As evidence of the strained relations then existing may be cited a letter written in February, 1914, by respondent to Richard in which he strenuously objected to further demands being made upon him for money, and complained bitterly because Richard had referred certain unsecured creditors to him for payment of their claims. In part the letter read:

> "It is bad enough for me to be compelled to borrow money and strain my financial credit to the breaking point to help you, without having all your unsecured creditors flock down on me * * * demanding that I should pay them. No one of them would have thought of doing such a thing if you had not told (them) to do so."

He further stated that Richard's sons were able to support the family, and it was their duty to help. The letter concluded:

> "I cannot be worried in this way any more, and I warn you now that I shall not stand for it. You are hurting me and hurting my credit by it, and you have no moral or other right to do so."

In 1915, respondent, then living near Los Angeles, believing foreclosure proceedings imminent under the Wright trust deed on account of default in payment of interest, made arrangements with Spreckels to bid in the property for him, conditioned upon taking possession of the property after the purchase. A few months later Edwin was informed of this arrangement when he called on respondent in Los Angeles to ask respondent to meet the payment of the delinquent interest on the Wright loan, which respondent refused to do, telling Edwin, so respondent testified, that in case Spreckels did bid in the property Edwin's father and mother "would have to get off" the place; and, furthermore, that it was useless for Edwin or any other member of the family to attempt "to get any money from him (respondent) for any purpose at any time thereafter," because he was "absolutely through doing business with them." During the years intervening between 1915 and 1921, respondent met neither Richard nor any member of his family, except Seth, whom he saw occasionally; nor did he afterwards visit the vineyard, as had been his custom to do, until shortly prior to the foreclosure sale of August, 1922; and, confirming his previously declared intentions, he informed Wright, in 1915 and also in 1917 in response to the latter's demand for interest money, that he did not intend to pay anything further at any time on behalf of Richard.

In 1918, the business connected with the renewal of respondent's security was conducted by respondent's agent under a letter of instruction from respondent declaring his distrust of Richard and his family, stating that they should be dealt with as strangers who he feared might take advantage of him, and also that he "was intending to go to San Francisco to see Rudolph Spreckels to have him buy the property in" for his, respondent's, benefit. When shown this letter, Richard was deeply affected, and during his last illness the year following expressed a friendly feeling toward respondent and a desire to see him, in response to which respondent sent Richard an affectionate message, but there appears to have been no reconciliation between them prior to Richard's death.

The evidence further demonstrates that following Richard's demise the strained family relations were not relaxed, but that, on the contrary, respondent evinced a stronger determination to enforce his rights under the deed of trust on account of the equitable interest held therein by his sisters. With respect thereto the proof shows that in the fall of 1920 negotiations were being carried on between Wright and Edwin to refinance the property, and respondent agreed to accept $18,000 within 40 days in full settlement of his demands. In the letter extending the option, which was sent to Wright, respondent said:

> "If this proposition is not accepted and fully consummated within the period specified herein, I shall be forced to take steps immediately thereafter to clean the matter up, as my three sisters, who are the equitable owners of more than half the indebtedness which is due under my aforesaid trust deed, are all too aged to earn a living for themselves, and are absolutely dependent for their support and living expenses (in large measures as to two of them, and entirely as to one of them) upon the interest which I have been paying to them regularly every month since 1904. * * *"

And as indicative of his personal feelings, respondent concluded the letter by saying that he knew Edwin had not represented the situation fairly, nor had he been inclined to give him, respondent, "a square deal, notwithstanding the many and great sacrifices" he had made in the past to save the family "from bankruptcy." The option was not acted upon, however, and later in San Francisco respondent charged Edwin with conniving to defeat the entire obligation. Respondent testified that he was willing at that time to settle in full for the lesser amount of $18,000 because he had exhausted his last available assets during recent sieges of sickness, even to borrowing on his life insurance policy, and, being fearful that his sisters would be left with practically nothing if anything happened to him, he concluded that if he could obtain $18,000 out of the settlement for them he would be willing to lose all that was coming to him personally.

During the latter part of the year following, 1921, owing to Wright's threats to foreclose because of default in payment of interest and Steinfeld's demand for payment of his loan, respondent held three conferences with Edwin in San Francisco to ascertain if the latter was taking any measures to raise the money to pay the debts mentioned. According to respondent's testimony he demanded at these conferences, as he had done many times before, that Edwin sell the grape crops, which were bringing big prices, and thereby pay off the loans, instead of continuing to manufacture wine as Edwin had been doing in anticipation of an early modification of existing prohibition laws, finally telling Edwin, so he claims, that unless the grapes were marketed instead of making them into wine he would proceed to sell the property under the terms of his security, adding: "You know what that means, Ed; you are going to lose the vineyard; your mother is going to lose it." Although Edwin promised at first to comply with respondent's demand, he subsequently declared his intention to manufacture wine, which he did, thereby apparently intensifying the hostility already existing.

Coming down to the year 1922, the evidence offered on behalf of respondent was to the following effect: On April 6 respondent forwarded to the county recorder for filing a notice of his intention to foreclose, assuming that Wright had filed a similar notice, and which respondent afterwards learned had been filed the preceding month. He immediately notified Edwin by letter of his action, stating that it was necessary for him to be in a position to sell at the time of the Wright sale, and inquiring as to what effort Edwin was making to raise funds to avoid a loss of the property. Edwin replied that Wright thought he would be able to take up the loan himself if given a little time, and that he would let respondent know as soon as he heard further from Wright. Subsequently, and on May 1, at a meeting between Edwin and respondent in San Francisco, respondent learned of the nature of Wright's proposition, which he declared unsatisfactory, and he again warned Edwin, according to his testimony, that if Edwin did not succeed in paying the Wright debt and respondent was required to borrow the money to buy in the property at a foreclosure sale, he "would take possession of it as owner" and that Edwin's folks would have to get off," stating further in this regard:

> "Now, Ed, keep this in mind; there is only one way for you to save the vineyard for your mother, and that is by you and Seth selling this wine in time to pay off Wright, because if I have to borrow enough money to buy this place in, I am going to buy it for myself and my sisters, and you folks will have to get off."

On June 6, having received a letter from Steinfeld demanding immediate payment of his loan, respondent notified Edwin by mail of that fact; also that under the notice given by Wright it was legally possible for Wright to sell the vineyard on or after July 12, 1922, stating:

> "Under these circumstances it is necessary for us to make haste if your mother is not to lose the vineyard, and if I am not to lose all that is owing to me."

In this letter suggestion was made as to the granting of the power of attorney in question, respondent saying in this regard that when in San Francisco last Spreckels informed him that if he secured a power of attorney from Mrs. Heney authorizing respondent to sell the wine, he, Spreckels, believed he could dispose of the same through a friend, the wine to be sold for sacramental purposes under government permit. Respondent therefore requested that such power of attorney be given and also that a statement be furnished of the quantity and quality of the wine, respondent admonishing Edwin in the letter that immediate action was necessary if anything was "to be saved out of the wreck." In reply Edwin furnished said statement and asked that the power of attorney be forwarded to his mother for execution, which was done, respondent's letter to Edwin accompanying said instrument stating in part:

> "I want to see the vineyard pulled out and saved, first for your mother, if that is possible, and, secondly, for myself for the protection of my sisters, if it is not possible to save it for your mother."

Respondent further stated in said letter that there was no assurance that Spreckels could dispose of the wine, but that respondent knew he would do the best he could in that behalf. On the same day respondent wrote Spreckels to the effect that the power of attorney was forthcoming, and gave him a statement as to the grade and quantity of the wine; and on June 20, 1922, again wrote to him that the power of the attorney was then in his possession, and suggesting that the 40,000 gallons of wine ought to bring enough to pay off the Wright loan. On account of sickness in respondent's family nothing further was done until July 12, when Edwin wired to respondent in Los Angeles: "Wright to advertise Friday, can you stop him?" and respondent replied: "No, cannot stop him. I arrive in San Jose next Thursday" (the 20th). Upon respondent's arrival in San Jose he ascertained from Wright that his plan to refinance the property, so far as it affected respondent, was to have Mrs. Heney give respondent a note for $20,000, secured by a crop mortgage, in full payment of his claims. Respondent rejected the proposal, stating that he would be entitled to the crop in any event if he bought in the place at foreclosure. The day following, in San Francisco, Spreckels informed respondent of his inability to dispose of the wine, and respondent thereupon stated that, inasmuch as the vineyard was about to be sold at foreclosure, he wanted to borrow $40,000 with which to buy it in. Spreckels agreed to grant the loan upon the condition, required by the bank, that respondent take possession of the property, which respondent agreed to do; and, after signing an application for the loan, a bank appraisal of the property was ordered. A few days later the bank demanded an abstract of title, which was forwarded to the bank by Edwin at respondent's request, after some difficulty in locating the same.

On the morning of July 22 respondent visited the vineyard for the first time since 1914, and, meeting Edwin, told him, according to respondent's testimony, of the failure to sell the wine, of Wright's unsatisfactory proposals, and of his application for the bank loan. Respondent's testimony regarding the conversation was as follows:

> "I said, 'I am going to buy this property in at the sale; if the First Federal Trust Company doesn't loan me the money I am going to try and borrow it from my friends and buy it in to protect myself and your aunts.' I asked him what his reply to that was, and it was an assent. He made no objection to it, and no criticism of it. I told him that if he and Seth would sell the wine before the sale day for enough to pay Wright that I fould be willing to have a first lien on the property, but that if I had to borrow any money to buy that property in, I was going to buy it in for myself, and that I would not take second place, because I had had experience enough on that with the first mortgage creeping up in amount on me, so that my security gradually got less."

The bank authorized the loan, and respondent and his wife executed the necessary documents therefor at the bank on August 4, 1922. On the same day respondent held an extended conference with Seth regarding the effect of the consummation of the loan. Although it appears that Seth had been taking an active interest in his mother's behalf, the evidence fails to show that he was authorized to represent her the same as Edwin was, and therefore the conversations held with him may be disregarded.

Respondent offered other evidence to show that following the sale he exercised acts of ownership over the property and that appellants recognized him as owner. Immediately after the sale he notified Edwin by letter that he would assume personal control of the property, which he did by harvesting the grape crop, negotiating the sale thereof, and selling it. He also asserted title to the proceeds from the sale of the prune crop, which Edwin had sold. Furthermore it was shown that Edwin dealt with respondent as owner in his effort to be retained as manager of the property and in trying to deter respondent from leasing the property to others; also by obtaining the option to repurchase.

[4] As opposed to the evidence contained in the foregoing narrative appellants offered much proof, but apparently no useful purpose can be accomplished by setting it forth in detail herein, because at most it does no more than raise a conflict on the vital issues under discussion. Said proof consisted largely of testimony of witnesses who gave entirely different versions as to the substance of the conversations in which respondent claims to have warned appellants of his intention to acquire the property in his own interests at the foreclosure sale. But in that state of the record the question of determining which of the two versions represented the truth was one exclusively within the province of the trial court. Appellants also point out that Edwin assisted in obtaining the loan by locating the abstract of title and forwarding it to the bank, and that on August 1, at respondent's request, he obtained from his mother a written acknowledgment of respondent's outlawed debt, neither of which services, appellants argue, would he have likely performed if he had known of respondent's intention to acquire the property in his own interests. Moreover, attention is called to the fact that respondent never did notify Mrs. Heney personally of his intention to acquire the property to her exclusion, notwithstanding that on July 31, 1922, he met her at her home for the first time since the breach in the family relations in 1914, greeted her affectionately, and that the social intercourse was most cordial; also that on the day of the sale respondent conveyed Mrs. Heney to San Jose in his automobile for the purpose of having her acknowledge before a notary public a second document relieving his debt from the effect of the operation of the statute of limitations. Furthermore appellants draw certain inferences from portions of respondent's letters hereinabove alluded to, written during the progress of the loan and the power of attorney transactions,

showing, as appellants claim, that Mrs. Heney was lulled into the security that respondent was acting in her interests and not in his own. But conceding the force of the facts and circumstances just related, and of others of like character but of less importance, which are not necessary to enumerate herein, the evident effect thereof is, as before stated, merely to produce a conflict in the evidence, and consequently, under the well-established rule, the decision of the trial court thereon must be taken as controlling.

[5] Finally on this point it may be stated as a legal proposition that the mere execution of a power of attorney does not prohibit an agent from dealing with the subject-matter of the agency, providing he shows affirmatively that he acted in good faith, fairly, and honestly, and made full disclosure of his intentions (Hemenway v. Abbott, 8 Cal. App. 450, 97 P. 190; Curry v. King, 6 Cal. App. 568, 92 P. 662); and therefore in the instant case, even assuming that the execution of the power of attorney of itself created the agency contended for by appellants, out of which a fiduciary relationship between the parties necessarily arose, respondent was not thereby precluded from acquiring the property in his own interests, having, as the trial court found and as the evidence shows, acted in good faith and fairly, after having made full and seasonable disclosure of his intentions to do so.

Regarding the contention that respondent acquired the property for a grossly inadequate price, and would be allowed also, if the judgment be affirmed, to continue in force against Mrs. Heney the obligation to pay the balance of the debt secured by his junior deed of trust, it should be observed that appellants, in making this contention, do not take into consideration the trial court's finding to the effect that ever since the foreclosure sale it "has been his (respondent's) bona fide intention to forgive Mary A. Heney her said indebtedness to him and to refrain from ever attempting to collect the same." The balance due on said indebtedness, after giving credit for the proceeds received from the sale of the grape crop, if added to the amount already paid at foreclosure sale, would bring the total amount of the purchase price to nearly as much as the value of the property as fixed by appellants. But assuming, as appellants contend, that the statements in the finding are not legally binding on respondent, the situation is not altered, because, in the absence of fraud, the advantages complained of were such as respondent was entitled to gain as a result of the exercise of his legal rights.

[6] Appellants further contend that, irrespective of the questions arising from the execution of the power of attorney, respondent, as holder of the second lien upon the property, owed a special duty to the owner with respect to the foreclosure sale, which placed him under the obligations of a fiduciary, and that therefore, having, as junior incumbrancer, purchased at foreclosure sale under the first lien, he cannot claim absolute title as the result of the purchase, but must accord the debtor the right to redeem. Taylor v. Heggie, 83 N. C. 244; Pritchard v. Smith, 160 N. C. 79, 75 S. E. 803. The rule adhered to in this state is, however, that "the relation between a mortgagee and mortgagor is not fiduciary. De Martin v. Phelan, 115 Cal. 538, 47 P. 356, 56 Am. St. Rep. 115. Neither is that between the beneficiary of a trust deed and the maker thereof. Copsey v. Sacramento Bank, 133 Cal. 659 [66 P. 7, 204, 85 Am. St. Rep. 238]." Lineker v. McColgan, 54 Cal. App. 771, 202 P. 936. To the same effect is Ferry v. Fisk, 54 Cal. App. 763, 202 P. 964. Therefore the title acquired by a junior incumbrancer at foreclosure sale under the superior lien is not limited and gives no right of redemption to the debtor.

[7] The issues tendered by appellants' defenses were, in our opinion, purely equitable, and therefore appellants were not entitled as a matter of right to a trial by jury thereon. Fish v. Benson, 71 Cal. 428, 12 P. 454; Angus v. Craven, 132 Cal. 691, 64 P. 1091.

For the reasons given, we believe the judgment should be affirmed. It is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

200 Cal. 132

In re PARKER'S ESTATE.

STEARNS et al. v. ABBOTT.

(L. A. 9141.)

(Supreme Court of California. Dec. 24, 1926.)

1. Executors and administrators 🔑111(1)—Trusts 🔑227—Executor, administrator, or testamentary trustee, who is attorney, may be entitled to allowance for other attorney's services.

Executor, administrator, or testamentary trustee, who is also attorney, may properly employ another attorney to render necessary legal services and may be entitled to allowance for value of such services.

2. Executors and administrators 🔑111(1)—Trusts 🔑227—Executor, administrator, or testamentary trustee, who is lawyer, is not entitled to allowance for legal services rendered by himself.

Executor, administrator, or testamentary trustee, who is a lawyer, is not entitled to allowance for legal services if he acts as his own attorney, in absence of statute.

3. Executors and administrators 🔑111(1)—Executor or administrator may be allowed credit for attorney's fees to firm of which he is member, if not sharing therein.

Executor or administrator, who is lawyer, may be allowed fees to be paid law firm of which he is member, only if it was agreed that he is not to share in fees.

4. Executors and administrators 🔑111(1)—Executor or administrator, employing law firm of which he is member, is presumed to share in fees.

Presumption is that executor or administrator, employing law firm of which he is member, shares in fees received by them from him.

5. Executors and administrators 🔑497—Statute, allowing payment for extraordinary services, held not to allow payment of attorney's fees to executor or to law firm of which he is member (Code Civ. Proc. § 1618).

Code Civ. Proc. § 1618, providing that executor may be allowed additional compensation for extraordinary services, *held* not to allow payment for legal services to executor who acted as his own attorney or to law firm of which he is member.

6. Trusts 🔑231(1)—One in fiduciary relation may not act in both individual and representative capacity.

Public policy forbids one in fiduciary relation to act in both individual and representative capacity, or in other position where tempted to betray trust.

7. Executors and administrators 🔑497—Where executor was member of law firm employed by him and had received all compensation allowed by law, allowing additional compensation to firm was error (Code Civ. Proc. §§ 1618, 1619).

Even if Code Civ. Proc. § 1618, allows executor who is own attorney compensation as such because allowing executor extra compensation for extraordinary services, where executor who employed law firm of which he was member had received all compensation allowed by statute, allowing additional compensation to firm was error, in view of section 1619.

8. Executors and administrators 🔑497—Statute, becoming effective after order decreeing distribution, held not to authorize allowance for legal services to firm of which executor was member (Code Civ. Proc. § 3, and § 1618, as amended by St. 1925, p. 624).

Code Civ. Proc. § 1618, as amended by St. 1925, p. 624, to remove limitation on amount of extra compensation that may be allowed executor for extraordinary services, *held* not to render proper allowance of compensation for legal services by law firm of which executor was member, where final account and distribution were ordered before amendment became effective, since Code Civ. Proc. § 3, forbids construction that statute is retroactive unless expressly so declared, and statute will not be given retroactive construction which will impose new liabilities.

9. Statutes ⚷266—Retroactive construction of statute, imposing new liabilities, will not be adopted.

Statute will not be given retroactive construction which will impose new liabilities.

10. Executors and administrators ⚷111(5)—Study of stock market to enable advantageous sale of shares of stock held not legal services, but ordinary duty of executor.

Study of stock market to enable advantageous sale of shares of stock belonging to estate *held* ordinary duty of executor, not professional service for which lawyer might charge estate.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Clark Parker, deceased. From the portion of the order settling final account of Leon M. Abbott, as executor of said estate, which allows extra compensation to his attorneys for extraordinary services, Henry A. Stearns and others appeal. Reversed and remanded.

Merriam, Rinehart & Merriam, of Pasadena, for appellants.

Bates, Nay, Abbott & Dane, of Boston, Mass., and Henry O. Wheeler, Jr., and Henry O. Wackerbarth, both of Los Angeles, for respondent.

FINLAYSON, J. Three residuary legatees under the will of Clark Parker, deceased, have appealed from that part of an order settling the executor's final account which allows $40,000 as extra compensation to the attorneys for extraordinary services alleged to have been rendered by them in the probate proceedings.

The respondent, Leon M. Abbott, is the executor of the will, appointed as such by the superior court for Los Angeles county. Mr. Abbott is a member of the law firm of Bates, Nay, Abbott & Dane, a firm of attorneys practicing law in the state of Massachusetts, with offices in the city of Boston. He employed his firm and two Los Angeles lawyers, Messrs. Henry O. Wheeler and Henry O. Wackerbarth, to act as his attorneys in the performance of all the legal services incident to the probate proceedings. When the estate was ready for distribution, respondent filed his final account, report, and petition for distribution. In the account he claimed credit for all of the statutory commissions and all of the extra compensation to which he possibly could be entitled as executor, under the statute as it then read; also, all of the statutory commissions to which his attorneys could be entitled, and an additional sum as extra compensation to the attorneys for extraordinary services alleged to have been performed by them. The specific amounts for which he thus claimed credit in his final account are: (1) $3,147.13, the regular commissions due him, under section 1618 of the Code of Civil Procedure, for ordinary executorial services; (2) $1,573.57 (one-half of the regular commissions) as extra compensation for extraordinary services performed by him as executor; (3) $3,147.13, the regular attorneys' commissions allowable, under sections 1618 and 1619, for legal services rendered in conducting the ordinary probate proceedings; and (4) $50,000 as further compensation to the attorneys for extraordinary legal services alleged to have been performed by them. In due time the residuary legatees who have taken this appeal appeared in the court below and objected to the allowance of any amount for extraordinary legal services. Thereafter the court made an order settling respondent's final account. The order allows the items of $3,147.13 and $1,573.57 as credits, respectively, for respondent's regular commissions and extra compensation for extraordinary services performed by him as executor, the item of $3,147.13 as attorneys' fees for the services of the attorneys in conducting the ordinary probate proceedings, and the sum of $40,000 as further compensation to the attorneys for extraordinary legal services performed by them. Included in this item of $40,000 is an undetermined amount representing the share of respondent's law firm in the extra compensation for extraordinary services. That is to say, the amounts due, respectively, to respondent's law firm and to the two local attorneys for such extraordinary services are not segregated but are lumped in one sum. It is from the allowance of this credit of $40,000 that this appeal is prosecuted.

At all the times when respondent performed his services as executor, and, indeed, at the time when the court made its order settling the final account and decreeing distribution, section 1618 of the Code of Civil Procedure provided that an executor, when no compensation is provided by the will or he renounces all claims thereto, shall be allowed, as compensation for his ordinary services, commissions at certain specified rates upon the amount of the estate accounted for by him, and that "such further allowance may be made as the court may deem just and reasonable for any extraordinary service," but that the total amount which the court may allow for extraordinary executorial services shall not exceed one-half the amount of commissions allowed the executor for his ordinary services. By section 1619 it is provided that attorneys for executors and administrators shall be allowed as fees for conducting the ordinary probate proceedings the same commissions that are allowed to executors and administrators under section 1618, and that for any "extraordinary services" rendered by the attorneys, such as sales or mortgages of real estate and other specifically designated kinds of professional services, "such further allowance may be made as the court may deem just and reasonable." By an amendment which became effective July 24, 1925 (St. 1925, p. 624), 2½ months after the entry of the order settling the final account and decreeing distribution, section 1618 was so amended that, as it now reads, no limitation is placed upon the amount of the extra compensation which may be allowed an executor for his extraordinary services.

[1, 2] An executor, administrator, or testamentary trustee who is himself an attorney at law may properly employ another attorney to render the necessary legal services for the estate, and he may be entitled to an allowance out of the estate for the value of such legal services. Estate of Graham, 187 Cal. 222, 201 P. 456, 18 A. L. R. 631. But if the executor, administrator, or testamentary trustee, being himself a practicing lawyer, elects to act as his own attorney in the performance of the legal services incident to the administration of the estate, the general rule is that he will not be entitled to an allowance against the estate for his professional services, in the absence of some statutory provision entitling him thereto. Collier v. Munn, 41 N. Y. 143; Lent v. Howard, 89 N. Y. 170; Parker v. Day, 155 N. Y. 383, 49 N. E. 1046; In re Wallach, 164 App. Div. 600, 150 N. Y. S. 302, affirmed in 215 N. Y. 622, 109 N. E. 1094; Willard v. Bassett, 27 Ill. 38, 79 Am. Dec. 393; Hough v. Harvey, 71 Ill. 72; Whittemore v. Coleman, 239 Ill. 450, 88 N. E. 228; Taylor v. Wright, 93 Ind. 121; Doss v. Stevens, 13 Colo. App. 535, 59 P. 67; Slusher v. Weller, 151 Ky. 203, 151 S. W. 684; Holding v. Allen, 150 Tenn. 669, 266 S. W. 772, 36 A. L. R. 743; notes to Estate of Graham, supra, in 18 A. L. R. pp. 635 et seq., and notes to Holding v. Allen, supra, in 36 A. L. R. pp. 748 et seq. See, also, Estate of Runyon, 125 Cal. 195, 197, 198, 57 P. 783, where the principle enunciated in the above cases is recognized with approval. This rule is supported by the weight of authority (Holding v. Allen, supra); and though there is considerable apparent and perhaps real conflict of authority upon the subject (24 C. J. p. 108), we deem it a sound and wholesome doctrine, founded upon reasons of public policy. In Estate of Graham, supra, this court says:

> "If he [an administrator] did perform such services which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy forbidding him to be his own employer."

In Stanes v. Parker, 9 Beav. 385, 50 Eng. Reprint 392, it was said:

> "The safety of the public has been justly thought to require the rule now clearly established, that, although a trustee, being a solicitor, may appoint another solicitor to execute the professional business relating to the trust, yet if he does it himself, he shall not be allowed to charge for his professional services."

See, also, In re Bank of Niagara, 6 Paige (N. Y.) 213, 215.

In Broughton v. Broughton, 5 De G. M. & G. 160, 43 Eng. Reprint 831, the Lord Chancellor said:

> "The rule applicable to the subject has been treated at the bar as if it were sufficiently enunciated by saying that a trustee shall not be able to make a profit of his trust, but that is not stating it so widely as it ought to be stated. The rule really is that no one who has a duty to perform shall place himself in a situation to have his interests conflicting with that duty; and a case for the application of the rule is that of a trustee himself doing acts which he might employ others to perform, and taking payment in some way for doing them. As the trustee might make the payment to others, this court says he shall not make it to himself; and it says the same in the case of agents, where they may employ others under them. The good sense of the rule is obvious, because it is one of the duties of a trustee to take care that no improper charges are made by persons employed for the estate. It has been often argued that a sufficient check is afforded by the power of taxing the charges, but the answer to this is that that check is not enough, and the creator of the trust has a right to have that, and also the check of the trustee. The result therefore is that no person in whom fiduciary duties are vested shall make a profit of them by employing himself, because in doing this he cannot perform one part of his trust; namely, that of seeing that no improper charges are made. The general rule applies to a solicitor acting as a trustee."

[3, 4] An executor or administrator, who is himself a lawyer, may be allowed a credit for fees to be paid a law firm of which he is a member, if it was agreed between him and his partners that he is not to share in the moneys to be received by the firm for its services. Estate of Schillaber, 1 Cof. Pro. Dec. 101. But if he is to participate in the compensation to be earned by his firm, then the same principles and policies which are opposed to the allowance of additional compensation to an executor or administrator for legal services rendered by him individually, as an attorney at law, are equally opposed to the allowance of compensation to his law firm. Taylor v. Wright, supra; Liles' Succession, 24 La. Ann. 490; Needham v. Needham, 34 Idaho, 193, 200 P. 346; Collins v. Carey, 2 Beav. 128, 48 Eng. Reprint 1128; Christophers v. White, 10 Beav. 523, 50 Eng. Reprint 683; Lyon v. Baker, 5 De G. & S. 622, 64 Eng. Reprint 1271. As was said by the Indiana Supreme Court in Taylor v. Wright, supra:

> "To hold that an executor or administrator, while he may not be compensated out of the

estate for his individual legal services, can share with a partner compensation for legal services rendered the estate by the firm, would be suggesting an easy method for evading the law."

The record before us is silent as to the existence of any express agreement between respondent and his partners as to whether he was or was not to participate in the compensation to be be received by his firm for its legal services. In the absence of any such showing, the presumption is that respondent was to share the compensation with his partners. Needham v. Needham, supra; Liles' Succession, supra.

[5, 6] From the foregoing it follows that the court erred in allowing the item of $40,000, unless justification therefor may be found in some provision of the statute. Section 1618 of the Code of Civil Procedure, as we have seen, provided, at the time of the rendition of the professional services, that an executor shall be allowed certain specified commissions for his ordinary services, and that, for any extraordinary service performed by him as executor, such "further allowance may be made as the court may deem just and reasonable," not exceeding one-half of the commissions allowable for his ordinary executorial services. Cases are to be found in some jurisdictions which hold that where it is provided by statute that executors or administrators may be allowed extra compensation for extraordinary services, an executor or administrator who, being an attorney, performed legal services for the estate may be allowed, in addition to the usual commissions attached to his office, a further compensation for his legal services. Sloan v. Duffy, 117 Wis. 480, 94 N. W. 342. See, also, In re Wilson's Estate, 83 Neb. 252, 119 N. W. 522, and Davidson v. Story, 106 Ga. 799, 32 S. E. 867.

In Sloan v. Duffy, supra, the Wisconsin court holds that legal services, performed by an executor who is an attorney, are "extraordinary services," within the meaning of a statute, providing that for all "extraordinary services" rendered by an executor the court shall make such an allowance over and above the statutory fees as might be adjudged reasonable. The theory underlying these cases, tacitly assumed rather than expressed, seems to be this: The only reason for ever holding that a lawyer executor may not charge the estate for legal services rendered by him is that, if the statute makes no provision for extra compensation, he would, in effect, be charging double commissions, or compensation over and above the statutory fees to which he is entitled as an executor, if he were to charge the estate for legal services rendered by him in his professional capacity. This theory completely ignores the fact that the fundamental basis for the rule which we have been considering is one of public policy —that, as was said by the Lord Chancellor in Broughton v. Broughton, supra, it is a rule which is grounded upon the principle that a trustee shall not "place himself in a situation to have his interest conflicting with" his duty as a fiduciary. The law, for wise reasons, forbids a person occupying a fiduciary relation to assume a position which might possibly be adverse to his duties. It is against public policy to permit such a person to be placed where he might be tempted to betray his trust. Western States Life Ins. Co. v. Lockwood, 166 Cal. 190, 191, 135 P. 496; Sims v. Petaluma Gas Light Co., 131 Cal. 659, 63 P. 1011; Pacific Vinegar, etc., Works v. Smith, 145 Cal. 365, 78 P. 550, 104 Am. St. Rep. 42.

"When one undertakes to deal with himself in different capacities—individual and representative—there is a manifest hostility in the position he occupies. His duty calls upon him to act for the best interests of his principal; his self-interest prompts him to make the best bargain for himself. Humanity is so constituted that when these conflicting interests arise the temptation is usually too great to be overcome; and duty is sacrificed to interest." Western States Life Ins. Co. v. Lockwood, supra.

It clearly is the duty of every executor, when engaging counsel to render professional services for the estate, to employ the best legal talent available for the stipulated compensation. But he would place himself in a position where there would be a clash between his own personal interest and his duty to employ the ablest counsel obtainable for the agreed compensation if, being himself a lawyer, he should undertake to perform that service himself with the intention of charging the estate therefor, or if, being a member of a law firm and sharing in the profits to be made, he should employ his firm to render the necessary professional services. Again, it is the duty of every executor to oppose any charge which the attorney or attorneys employed by him might make against the estate for extraordinary legal services, if there be no substantial ground for the claim that the services were indeed extraordinary. But his personal interest would conflict with this duty, if the services were rendered by his own law firm and he is to share in the earnings. These examples will suffice to show how an executor might be tempted to look with too friendly an eye upon improper claims for legal services if we were to relax the salutary rule announced in such cases as Collier v. Munn, supra, merely because our Code provides that an executor may be allowed extra compensation for extraordinary service. We are not to be understood as intimating that this respondent, in asking an allowance for extraordinary legal services performed by his law firm and the two local attorneys, was not acting in good faith, or that no extraordinary legal services were, in fact, performed by the attorneys. We have no reason to suspect bad faith in this case, and the examples which we have instanced of a possible conflict of duty with personal interest have been cited by us solely for the purpose of showing why it is that public policy should be regarded as the basic reason for the general rule that a lawyer executor may not charge the estate for his own or his firm's professional services.

[7] But even if public policy had nothing whatever to do with the rule, and even if it should be held that, where the statute allows an executor extra compensation for his extraordinary services, a lawyer executor may be allowed extra compensation for extraordinary legal services performed by him or by his law firm, nevertheless respondent still would fail to uphold the propriety of the credit for $40,000. As we already have stated, a portion of that sum—how much does not appear—represents the share claimed by respondent's law firm for its part in the extraordinary legal services, and the balance, whatever it may be, represents the share of the two local attorneys for their part in such services. If, therefore, this item of $40,000 were allowed, then respondent, as one who is entitled to participate in the profits earned by his law firm, would receive some part of this extra compensation. But in the item of $1,573.57 allowed him as extra compensation, over and above his commissions for ordinary executorial duties, he already has been allowed all of the extra compensation to which, as executor, he possibly can be entitled, under section 1618 as it read at the time when the services were rendered. It follows, therefore, that any allowance of compensation to his law firm for extraordinary legal services, or even for ordinary legal services, must inevitably result in respondent receiving more than was allowable to him, as executor, under section 1618 prior to its amendment in 1925. Therefore, even if we were to give to that Code section the same effect which the Wisconsin court in Sloan v. Duffy, supra, gave to a similar statutory provision, the allowance of this item of $40,000 would be improper, nevertheless.

[8, 9] Respondent seeks to avoid this conclusion by arguing that his right to extra compensation must be measured by section 1618 as it now reads, and that, since that section no longer places a limit upon the amount which may be allowed an executor or administrator as additional compensation for an extraordinary service performed by him, the extra compensation which already has been allowed respondent for his extraordinary services presents no obstacle to an allowance of the item of $40,000, if the reasoning of the Wisconsin case be followed. Respondent takes the position that if, subsequent to a judgment appealed from and prior to a decision by the appellate court, there be an alteration or repeal of the law applicable to the rights of the parties, the appeal must be decided according to the then existing law, citing United States v. Schooner Peggy, 5 U. S. (Cranch) 103, 2 L. Ed. 49, and a number of other analogous cases. The cases cited by respondent are not applicable to the situation here presented, and there is no merit in his contention. A decision on the rights of the parties to this appeal, in accord with the provisions of section 1618 as amended in 1925, would give to that amendment a retroactive effect. But that effect we may not give for the reason that no part of the Code of Civil Procedure "is retroactive unless expressly so declared." Code Civ. Proc., § 3; Central Pacific R. Co. v. Shackelford, 63 Cal. 264; Estate of Frees, 187 Cal. 155, 201 P. 112. The amendment in question, to the extent that it removes all limitation upon the amount which may be allowed to executors and administrators as extra compensation for extraordinary services performed by them, has the effect of imposing new and additional liabilities upon estates in probate. A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage.

> "Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions have been universally reprobated by civil and common-law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears." Pignaz v. Burnett, 119 Cal. 160, 51 P. 48.

In Estate of Daly, 180 App. Div. 307, 167 N. Y. Supp. 229, affirmed without opinion in 223 N. Y. 671, 119 N. E. 1037, it is held that an amendment to section 2753 of the New York Code of Civil Procedure requiring the surrogate to allow to an executor, who is also an attorney and who has rendered legal services, in connection with his executorial duties, reasonable compensation for those services, is not retroactive so as to permit an allowance for services rendered prior to the amendment.

Though the part of the order appealed from must be reversed for the reason that it allows the executor, indirectly, compensation which should not be charged against the estate, it does not necessarily follow that the local attorneys, Messrs. Henry O. Wheeler and Henry O. Wackerbach, are not entitled to extra compensation for any extraordinary legal services which they may have performed.

[10] In his petition for an allowance of extra compensation for the attorneys, respondent describes many different kinds of services, a number of which unquestionably cannot be classified as extraordinary legal services. Take one example for illustration. It is alleged that respondent and his counsel studied the stock market in order to be able to make an advantageous sale of certain shares of stock belonging to the estate. This is not a professional service for which a lawyer may make a charge payable out of the estate. It is but the performance of an ordinary duty of the executor in selling the

property of his testator. The order from which the appeal was taken does not show what services were made the basis for the allowance of the $40,000. From the record before us it is not possible to determine what part, if any, of the $40,000 was allowed for services which are not extraordinary legal services, within the meaning of section 1619 of the Code. That this situation, in the event of a second appeal, may not again arise, the lower court, on the going down of the remittitur, should, if counsel be so advised, entertain a motion to strike from the petition all references to services which are not "extraordinary" legal services, within the meaning of section 1619; or, as an alternative, that court, on the retrial of the issues involving the claim of the two local attorneys for extra compensation, should expressly find, either by appropriate recitals in the order or otherwise, the precise services performed by the local attorneys, if any, which it finds to be extraordinary.

The part of the order appealed from is reversed, and the matter is remanded to the lower court for a new trial, in accordance with this opinion, upon the issues presented by respondent's petition for extra compensation to the attorneys.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; RICHARDS, J.; SULLIVAN, J.; SEAWELL, J.

200 Cal. 77

HALL v. IMPERIAL WATER CO. NO. 3.

SAME v. IMPERIAL WATER CO. NO. 5.

(L. A. 9294, 9307.)

(Supreme Court of California. Dec. 23, 1926.)

1. Appeal and error ⚷110, 873(3)—Order denying motion for new trial is not appealable, but is reviewable on appeal from judgment (Code Civ. Proc. §§ 956, 963, as amended by St. 1915, pp. 209, 328).

Under Code Civ. Proc. § 963, as amended by St. 1915, p. 209, an order denying motion for new trial is not an appealable order, but is reviewable on appeal from judgment under section 956, as amended by St. 1915, p. 328.

2. Appeal and error ⚷113(2)—Orders denying motions to vacate and set aside judgments presenting matters reviewable on appeals from judgment held not appealable orders (Code Civ. Proc. § 660).

Where plaintiff's proceedings for new trial terminated by expiration of statutory period under Code Civ. Proc. § 660, and would be reviewable on appeal from judgments, orders denying plaintiff's motion to vacate and set aside judgments are not appealable since presenting matters reviewable on appeals from judgments.

3. Judgment ⚷386(1)—Motion to vacate judgment not void on its face must be made within six months from entry thereof (Code Civ. Proc. § 473).

Motion to vacate judgment not void on its face must, by analogy with Code Civ. Proc. § 473, be made within six months from entry thereof.

In Bank.

Appeals from Superior Court, Imperial County; M. S. Marsh, Judge.

Separate actions by Maude Hall against the Imperial Water Company No. 3 and the Imperial Water Company No. 5. Judgments were rendered for plaintiff, and from orders denying plaintiff's motion to vacate and set aside judgments, plaintiff appeals. On appellee's motion to dismiss appeals. Motion granted.

See, also, 250 P. 394.

Jesse George, of San Diego, for appellant.

Leon R. Yankwich and Luther G. Brown, both of Los Angeles, and J. Stewart Ross and R. B. Whitelaw, both of El Centro, for respondents.

PER CURIAM. This is a motion to dismiss each of two appeals herein on the ground that the orders appealed from are not appealable orders. By stipulation of the parties said two appeals have been consolidated.

On May 10, 1917, the appellant instituted a separate action against each of the above-named respondents in the superior court of the county of Imperial to recover damages for injuries to her land, alleged to have been caused by the seepage of water from the irrigation canals of said respondents. Judgment was entered in each of said actions on July 1, 1924, awarding damages to the appellant, and thereafter, on July 7, 1924, she filed a notice of motion for new trial in each cause. Among other grounds the notices stated that the respective motions would be based on the alleged disqualification of the trial judge to hear said causes. The motions for new trial, however, were never made in open court. The time within which appeals from the judgments might be perfected and within which proceedings on motion for new trial would have to be determined has elapsed without any steps having been taken by the appellant in those directions other than as above indicated. Subsequently, and on February 18, 1925, approximately 7½ months after said judgments were entered, appellant served and filed notices of motion to vacate and set aside each of said judgments on the ground that the judge who tried the causes was disqualified by reason of his owning real property in the Imperial irrigation district. These latter motions came on for hearing in the court below on March 27, 1925, and were denied on May 28,

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1925, by Hon. M. S. Marsh, judge of the superior court of the county of San Diego, sitting as a judge of the superior court of the county of Imperial. As already indicated, the appeals herein are from the orders denying said motions to vacate and set aside the judgments in the above-entitled causes.

Respondents move to dismiss the consolidated appeals on the ground that an order refusing to vacate and set aside a judgment is not an appealable order. It is contended that there are but two exceptions to this rule, namely, where the matter specified in the motion to vacate could not have been reviewed on an appeal from the judgment and where the judgment affects injuriously one who is not a formal party to the action, or, if a party, he has not received due notice so that the judgment as to him has been given improperly and ex parte. It is then urged that the instant appeals do not come within either of said exceptions, for the alleged disqualification of the trial judge "was the ground for the motion to vacate the judgment" and "was also the chief ground for her motion for a new trial," and "the question of disqualification, being before the court below, on motion for new trial, its ruling on the matter was reviewable on appeal from the judgment," thus precluding, it is asserted, the instant appeals from the orders refusing to vacate and set aside the judgments on said ground.

In opposition thereto the appellant urges, among other things, that to grant respondents' motion to dismiss the appeals herein "would be setting at naught the rule that the judgment and all of the acts of a judge disqualified for interest * * * are absolutely void and must be disregarded wherever the fact of disqualification is made to appear. * * *"

Preliminary to a consideration of the question presented herein the following pertinent and well-settled principles should be kept in mind:

[1] Since the 1915 amendment to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209), an order denying a motion for new trial is not an appealable order. Hughes v. De Mund, 195 Cal. 242, 246, 233 P. 94; section 963, Code Civ. Proc. The Legislature has provided, however, by means of an amendment to section 956 of the Code of Civil Procedure (Stats. 1915, p. 328), that such an order is reviewable on an appeal from the judgment. Hughes v. De Mund, supra; section 956, Code Civ. Proc.

[2] Under the general rule an order refusing to vacate and set aside a judgment is likewise not an appealable order. In re Yoder (Cal. Sup.) 251 P. 205; Bell v. Solomons, 162 Cal. 105, 109, 121 P. 377. An exception to this latter rule provides that an order denying a motion to vacate and set aside a judgment is appealable where the record on appeal from the judgment would not disclose the ground of the motion. In re Yoder, supra; Kent v. Williams, 146 Cal. 3, 11, 79 P. 527. As stated in Re Yoder, supra, such an order is an appealable order where the circumstances are such that an appeal from the judgment "would be vain for lack of a record showing the rights of the aggrieved party."

[3] In our opinion an application of the foregoing principles to the instant appeals requires that they be dismissed. As stated above, the appellant herein instituted proceedings for new trial in each cause by filing her notices of intention to move for such relief. And, though these motions were never made viva voce, the new trial proceedings were terminated in each cause by the expiration of the statutory period (section 660, Code Civ. Proc.) and would be reviewable on an appeal from the respective judgments. This being so, the orders denying appellant's motions to vacate and set aside the judgments are not appealable orders, for they present matters which would have been reviewable on appeals from the judgments.

Moreover, the motions to vacate the judgments were made, as indicated above, approximately 7½ months after the entry of said judgments. The authorities declare that a motion to vacate a judgment not void on its face, as is the case here, must by analogy with the provisions of section 473, Code of Civil Procedure, be made within six months from the entry thereof. Consolidated Constr. Co. v. Pac. E. Ry. Co., 184 Cal. 244, 247, 193 P. 238; People v. Davis, 143 Cal. 673, 675, 77 P. 651.

For the foregoing reasons, the motion to dismiss the consolidated appeals herein is hereby granted.

SHENK, J., being disqualified, does not participate in the foregoing.

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200 Cal. 50

SCHULTZ et al. v. CITY OF VENICE et al.
(L. A. 9177.)

(Supreme Court of California. Dec. 20, 1926.)

1. Appeal and error ⚷694(1)—Where bill of exceptions fails to set out evidence on litigated questions, its sufficiency to support findings cannot be considered (Code Civ. Proc. § 648).

Bill of exceptions having failed to contain any specification of insufficiency of evidence to sustain trial court's findings, as required by Code Civ. Proc. § 648, and findings of trial court having so far disposed of questions sought to be litigated as to require such specifications, insufficiency of evidence to support findings cannot be considered, and, no other questions being presented to appellate court, judgment of trial court would be affirmed.

2. Exceptions, bill of ⚷8—Provisions of Code relating to bills of exceptions are mandatory (Code Civ. Proc. § 648).

Provisions of Code Civ. Proc. § 648, relating to bills of exceptions, are mandatory.

3. Appeal and error ⚷931(7)—Where appeal record disclosed findings on certain issue, it will be presumed that pleadings sufficiently presented issue to require findings.

On appeal, record disclosing that trial court had made findings on certain issue, Supreme Court will presume that case was tried on theory that such issue was sufficiently tendered by pleadings, and that court was therefore required to make findings thereon.

In Bank.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Suit for injunction by Floyd A. Schultz and others against the City of Venice and others, to enjoin the carrying out of certain public improvements. From a judgment denying the injunction, plaintiffs appeal. Affirmed.

McClure, Griffin & Yokum, of Los Angeles, for appellants.

Jess E. Stephens, City Atty., and Lucius P. Green, Asst. City Atty., both of Los Angeles, for respondents.

George Acret, of Los Angeles, amicus curiæ.

RICHARDS, J. This is an appeal from a judgment of the superior court in and for the county of Los Angeles denying the plaintiffs an injunction. In their complaint praying for that relief the plaintiffs allege that they are residents of and owners of property within the corporate limits of a municipal corporation known as "The City of Venice" and situate within the county of Los Angeles; that the duly constituted municipal officers thereof have instituted and are about to carry forward certain public improvements therein under and by virtue of the Improvement Act of 1911 (St. 1911, p. 730), and the amendments thereto, which, if permitted to be consummated, will result in the assessment of the properties of said plaintiffs and each of them to pay the costs and expenses of said improvements. Said plaintiffs also sue in their capacity as members of the general public, contending that said proposed improvements are unlawful for the reasons hereinafter to be set forth. In support of their foregoing averments the plaintiffs aver in substance the following to be the facts of the case: During the years 1904–1905, and for some years thereafter, the Abbot Kinney Company, a corporation, was the owner and in possession of a tract of marsh land lying along the coast line near the city of Ocean Park, in the county of Los Angeles, which those in control of it conceived the idea of reclaiming and creating thereon a city to be known as "Venice of America," with a system of waterways and canals, resembling those of the city of Venice, Italy. In accordance with this conception the corporation caused the lands to be reclaimed and laid out in lots, blocks, streets, and intercommunicating waterways converging into an artificial lagoon and connected with the adjacent ocean, all in conformity with the outlines of a map of the tract which the corporation caused to be prepared and filed for record with the county recorder of said county. The corporation also caused the banks of these waterways, or so-called canals, to be cemented, and the strips of land adjacent thereto to be planted with trees, vines, and shrubbery, and to be ornamented with structures of Italian types of architecture, and also caused archways and bridges to be built in harmonious designs and at such elevations as would not interfere with the use of these waterways for boating, canoeing, and other aquatic purposes and pleasures. The lagoon into which these waterways converged was also provided with structures suitable for such public pleasure purposes as swimming, diving, water sports, and festivities. The streets intersecting these canals were also laid out and so improved as to be adapted for residential purposes, and the lands adjacent thereto were subdivided into residential lots and tracts, and when these designs and improvements were well under way were offered for sale upon a plan of advertising which emphasized the unique features of this particular dream city as the proposed "Venice of America," with the result that the lots and tracts within the same were largely sold to residential buyers, who thereafter built and occupied residences thereon. The plaintiffs herein, or their predecessors, were among those who were thus induced to purchase and improve and reside upon the lots and tracts therein thus advertised and sold. With respect to the foregoing facts, there appears to be no controversy between the parties hereto and they are fully set forth in the findings of the trial court.

The plaintiffs further allege that, by the foregoing acts and conduct of said corporation in the conception and carrying out of the plans and purpose of creating upon said tract the so-called "Venice of America" with its waterways, lagoon, and other artificial resemblances to the old world city, and by the adaptation thereof to those public purposes, sports, and pleasures which would constitute the natural and appropriate uses of such waterways and lagoon, and in the devotion of the same to such purposes through a series of years, and in the system of promotion and advertising by which the said corporation disposed of a large portion of the residential and other lots and tracts within the limits of said city, the said corporation had long prior to the year 1925 wrought a dedication of the areas covered by said waterways and lagoon, and the banks and strips of land adjacent thereto, to public purposes, and also that the uninterrupted public use thereof during all of these intervening years had so consummated and effectuated such dedication thereof to such uses as to result in the setting apart and devotion of said waterways and their immediately adjacent lands to such public uses and purposes forever.

The plaintiffs further allege that the said corporation, by its aforesaid representations made in the course of the advertisement and sale of the residential and other lots and tracts within the area of said city whereby the plaintiffs and the inhabitants generally within the same were induced to buy and build upon and occupy their several homes and properties therein, were such as to entitle the said plaintiffs representing themselves and all the other residents and property owners within said city to the full benefit of such dedication of said waterways and their immediately adjacent lands as delineated upon the recorded map of the same to such public purposes and to claim an estoppel of said corporation and of its successor or successors in interest from the assertion of any right to devote said dedicated areas to other than such specified purposes or to interfere with or destroy the utilization thereof for the purposes to which they had been fully dedicated and devoted during a long series of years, and the plaintiffs particularly allege that the defendants, by the proposed plan of improvement of said areas under the act of 1911 as contemplated and as in the course of being carried forward by them, will destroy the public uses to which said waterways and their said adjacent strips of land have thus been dedicated and devoted to the irreparable injury of the said plaintiffs and the public at large. Wherefore they sought the injunctive relief prayed for in their said complaint. The defendants, constituting the City of Venice, a municipal corporation, and also the officers and trustees, and also the Abbot Kinney Company, a corporation, duly appeared and answered herein: their said answer and the amendments thereafter offered thereto embracing certain admissions and denials to be hereinafter considered. Thereupon the respective parties to the action entered into certain stipulations relating to the procedure in the course of the trial of the action and the presentation of certain of the evidence to be produced by the respective parties in the form of affidavits. The cause then came on for trial, pursuant to the procedure outlined in said stipulations before the court sitting without a jury, and, having been thus tried and submitted, the trial court in due time filed its findings of fact and conclusions of law, and upon the basis thereof caused its judgment to be entered in favor of the defendants, denying to the plaintiffs any injunctive relief. Thereafter a bill of exceptions was duly prepared, certified, and filed and this appeal by the plaintiffs taken.

[1, 2] The primary question presented for our consideration upon this appeal relates to the sufficiency of the record herein to present the main question which the plaintiffs seek to have determined. The bill of exceptions presented herein, while it contains a considerable amount of the evidence presented at the trial in the form of affidavits in support or dispute of the issues embraced in the pleadings, does not contain any specification of the insufficiency of the evidence to sustain the findings of the trial court. Such specifications are expressly required by the provisions of section 648 of the Code of Civil Procedure relating to bills of exceptions, and it has been uniformly held that such provisions are mandatory and that in their absence the question of the sufficiency of the evidence to sustain the findings of the trial court cannot be considered by this court upon appeal from the judgment. Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Mills v. Brady, 185 Cal. 317, 196 P. 776, and cases cited.

The appellants herein contend, however, that the foregoing rule of procedure has only application to those matters which are put in issue by the pleadings, and that as to the question of the dedication of the waterways with their adjacent lands and premises to which this action particularly relates, arising out of the acts and conduct of the defendant Abbot Kinney Company in connection with its conception and execution of its designs for the creation of the unique community to be known as "Venice of America," and also as to the consummation of such dedication to the particular public uses to which said waterways and their adjacent premises were devoted through the public use thereof during a long series of years, the averments of the plaintiffs' pleadings have not been sufficiently denied by the defendants' answer or the amendments thereto, and hence were not in issue so as to require any findings on the part of the trial court, and that, this being so, no specification of the insufficiency of the evidence to sustain those undenied and thus admitted averments was required.

[3] When we examine the pleadings in the case in the light of this contention we are constrained to hold that there was, to say the least of it, some attempt on the part of the defendants to deny those averments of the plaintiffs' complaint which tendered the issue as to the original dedication of these waterways and their adjacent premises to the particularly alleged public uses, and also to deny the alleged consummation of such dedication to such uses through the public acceptance of the same. Whether these denials would have been deemed sufficient to have presented the particular issue if tested by demurrer to the defendants' answer or by motion for judgment upon the pleadings, we do not deem it

necessary to determine. When we look to the findings of the trial court for the purpose of ascertaining what issues in the case it deemed to be before it, and hence to require findings, we discover that court did in fact make findings upon this particular issue, and, this being so, we must conclude that the cause was tried before it upon the theory that such issue was sufficiently tendered by the pleadings and that the court was therefore required to make findings thereon.

The findings of the trial court expressly negative the dedication of the said premises either by the acts and conduct of the defendant corporation with relation thereto, or by the subsequent user thereof by the public. In that connection the findings of the court are to the effect that the plans and purposes of said corporation with relation to the laying out, construction, opening, and sale of the said tract of land were such as to merely amount to a dedication of the canals and waterways therein and of the lands immediately contiguous thereto to the public at large as public ways for all way purposes, and that the public use thereof continuously and for a long period without objection or limitation on the part of said corporation amounted to a public use thereof for all way purposes, and not otherwise.

The trial court further found that as to the plaintiffs herein their rights and interests in said waterways and canals were not other or different from those of the public at large. Based upon these findings of fact and upon the further finding that the said Abbot Kinney Company, having retained the title to lands upon which said waterways and canals were located, subject to the aforementioned public easement and use, had, by sufficient conveyance, transferred to the City of Venice, a municipal corporation, in the year 1912 its title in fee to said areas, and that the said City of Venice, after maintaining said waterways and canals as such public ways for a number of years, had finally determined that said public ways would be more useful to the public through their conversion into surface streets, and hence had initiated and was proceeding with the improvement of the areas thereof as such under the Improvement Act of 1911, the trial court as its conclusion of law found that the plaintiffs were not entitled to the relief prayed for in their complaint. Considering these findings as a whole and in the light of the record before us, we are constrained to hold that they so far dispose of the questions sought to be litigated by the parties to this action as to have required specifications of insufficiency of the evidence to sustain them in order to enable us to consider and dispose of that question upon this appeal. The appellants herein present no other question; nor do they in any manner assail the sufficiency of the proceedings had and taken under the act of 1911 for the public improvement of the premises in accordance with the provisions of said act and of the amendments thereto.

It follows that the judgment of the trial court, upholding such proceedings, and denying said plaintiffs the relief sought from the operation and effect thereof, was not erroneous, and that the same should be and is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; SULLIVAN, J.

200 Cal. 57

In re McDONOUGH'S ESTATE.

McDONOUGH v. JOYCE.

(S. F. 12018.)

(Supreme Court of California. Dec. 22, 1926.)

1. Wills 🔑55(7)—Evidence held insufficient to sustain finding of mental incompetency of 78 year old testator.

Evidence of physical infirmities attending old age, and testimony of intimate acquaintances admitted under Code Civ. Proc. § 1870, subd. 10, and other evidence, *held* insufficient to sustain jury's finding of mental incompetency of 78 year old testator.

2. Wills 🔑38(2)—Proof of hallucinations or delusions does not ordinarily show testator incompetent.

Proof of hallucinations or delusions does not show testator incompetent, unless bearing directly upon the testamentary act.

3. Evidence 🔑568(2)—Opinions of subscribing witnesses as to testator's capacity are entitled to more weight than those of passive witnesses.

The law presumes that subscribing witnesses noted the mental capacity of testator, and their opinions are entitled to more weight than those of passive witnesses.

4. Wills 🔑53(1)—Amount paid by testator for board, lodging, and care held not pertinent to issue of mental competency.

That aged testator, beginning some time after making will, paid $100 monthly for board, lodging, and care, *held* not pertinent to issue of competency.

5. Wills 🔑55(1)—Proponent's evidence must be considered in weighing contestant's case.

In determining whether evidence sustains verdict against testator's capacity, evidence of proponent as well as that of contestant must be considered.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Application by Elizabeth C. Joyce for the probate of the will of Christopher McDonough, deceased. From a judgment in favor of contestant, Daniel McDonough, revoking the probate on the ground of unsoundness of mind, Elizabeth C. Joyce appeals. Reversed.

Theodore J. Savage, of San Francisco, for appellant.

John C. Quinlan and James F. Brennan, both of San Francisco, for respondent.

SEAWELL, J. On August 29, 1922, Christopher McDonough made his last will and testament, and died June 5, 1924, one year and nine months thereafter. At the time of his death, he left surviving him his son, Daniel, the contestant herein, aged about 44 years and a resident of Massachusetts. The other children of the testator, according to the testimony of Daniel, had died without issue prior to the death of the testator. By his will he devised his estate, which at the time his will was executed consisted of a sum less than $8,000 in bank, except the sum of $100, to proponent, Elizabeth Joyce, the wife of Martin Joyce. The contestant by his action herein alleged two grounds of contest: First, undue influence; and, second, unsoundness of mind. A nonsuit was granted as to the first ground, and the finding of the jury that the testator was of unsound mind at the time he executed the will was sustained by the trial court, and judgment was accordingly entered thereon, annulling and revoking the probate of said will. The appeal is taken from the whole of said judgment.

There seems to be some uncertainty as to the exact age of testator at the time he made his will. It is probable that his age, as declared in the will to be 78 years, was approximately correct.

[1] The testator was a native of Ireland, unable to read or write, and by trade a street paver. The date of his arrival in this country does not appear from the record, but it does appear that he was a resident of the state of Massachusetts in 1887. At that time his wife was living, and he was the father of seven young children, contestant then being 7 or 8 years of age. It would seem that the home was destroyed by a cause not disclosed in the record, the parents went apart, and the custody of the young children fell to the father. The testimony of contestant, who was then but 7 or 8 years of age, was to the effect that his father, in 1887, placed said children in the care of an institution conducted by the Roman Catholic Church. He never saw his mother thereafter, and saw his father but once, for a short time in 1915, when the latter visited the son at his home in Massachusetts. The record is silent as to the date of the mother's death.

It seems that upon leaving Massachusetts McDonough resided for a time at Salt Lake City, and finally took up his residence in San Francisco in 1894, where he resided until the day of his death, a period of approximately 30 years. His early life was spent in the old world, where rigid economy was a rule of necessity, and saving became a fixed habit, which he practiced during the entire earning period of his life.

It is contestant's contention that, prior to going to live with the Joyce family, the testator lived in a condition of extreme squalor, which alone was sufficient to create a serious doubt as to his sanity. Much stress is laid upon his method of living covering a period of about three years. The first insight given of his methods of living begins with the year 1901. In that year he became a roomer at a rooming house conducted by Mrs. Anna McManus, where he remained until forced out by the fire and earthquake of 1906. Mrs. McManus re-established herself after the fire and the testator returned as a roomer. He remained at her house until 1915, at which time he made a visit to his son, who was residing in Massachusetts. After three months' absence in the East, he returned to San Francisco and again took a room at the McManus home. He remained there until July, 1917, when, against his wish, he was compelled to seek another rooming place, as Mrs. McManus needed the room for her own purposes. He then went to live with Michael Moran in South San Francisco. It is claimed by several witnesses offered by proponent that the "shack," as the building was described, presented a revolting picture of squalor and filth. Paradoxical as it may appear, several of the witnesses who expressed a pronounced feeling of disgust at the wretched conditions that prevailed at the Moran place nevertheless sought the companionship of McDonough and were very frequent visitors at the home of filth. The principal witness to the unsanitary and filthy condition of the premises admitted that his visits often continued as long as two or three hours at a time. McDonough and Moran, according to testimony offered by the proponent, lived in the state of wretchedness described by some of the witnesses for a period of about three years. McDonough, however, without apparently consulting his old associates, left the Moran place and established himself at the Joyce home. Giving full credit to the testimony of the witnesses as to the conditions existing at the Moran premises, it would seem that McDonough finally and fully awoke to a sense of realization of the degradation by which he was surrounded, as was evidenced by his resolve to enter a home where neatness and order prevailed, in which he might pass the remaining years of his life enjoying the comforts of a home and receiving the care and attention which only a woman's hands can administer. In quitting the Moran premises, he certainly acted wisely. He had laid aside a sum sufficient in the ordinary course of nature to secure him against want.

[2] Contestant produced witnesses who testified that testator was in the habit of picking up copper wire, mechanical bolts, nuts, broken pipes, and broken hairpins and safety pins, tin cans, and cigar and cigarette stubs, which he brought to his room. At times he complained of being dizzy and of seeing specks or spots in the air, and he also was heard to complain of pains in the back of his head, and had been heard to say, "I wish I was dead." He had been known to fail to recognize an acquaintance upon meeting him on the street until such person made himself known. His eyes upon a few occasions appeared to be "starey," and sometimes he would "glare." It is said that at times he had worn copper wire about his wrist as a sort of talisman against aches and pains, that upon certain occasions he had fallen and had to be assisted to his home, and that he had fallen asleep while reclining outdoors and awakened after the rain had started to fall. Mental lapses, repetitions in conversation, loss of sense of location for the moment, and failure to appreciate the passing of time, as well as acts which may or may not be evidence of mental weakness, were testified to by witnesses called by the contestant. Thirty years of the testator's life were brought into review, and the acts culled therefrom which it is claimed show a want of testamentary capacity are wholly insufficient to sustain the judgment. The witnesses for contestant, who testified as to the mental unsoundness of testator by virtue of the provisions of section 1870, subd. 10, Code of Civil Procedure, which permits an intimate acquaintance to give an opinion of the mental sanity of a person, the reason for the opinion being given, related certain acts and circumstances in support of their opinions which in point of time were somewhat remote from the exact time the will was executed. Much of the evidence amounts to nothing more than a conclusion, and the reasons for the opinions given lack convincing force. Not one of contestant's witnesses was willing to say that testator was suffering from settled insanity. When put to the test, scarcely one was willing to say that he believed him to be "crazy" in the general sense of the term. Those most unfavorable to the theory of sanity said there were times at which the testator appeared to be mentally all right and there were times at which he appeared not mentally at himself. The incidents which would indicate departures from the normal were the exceptions rather than continuous abnormal acts indicating a settled disturbed mental condition. The acts upon which the opinions rested may as well be attributed to habit, environment, idiosyncrasy, caprice, or infirmities of age as to mental disorder. That he was enfeebled by age during the latter months of his life there can be little doubt. No substantial evidence, however, tending to establish settled insanity or dementia or insane delusions or hallucinations on the part of the testator, was adduced. There is absolutely nothing in his relations with his son, whom he visited in 1915 with the intention of remaining a member of his household, that would in any wise support the theory that the testator, in concluding that he was not welcome, or at least that he would not be satisfied to remain with his son, was moved in so concluding by an insane delusion or hallucination. He made a trip across the continent on his own initiative to his son's home, investigated the situation, and decided that he would spend the remainder of his days in California. We have read the son's testimony describing the father's visit to him, and it contains nothing that would support an inference that he was mentally unsound. Proof of the existence of hallucinations or delusions is not alone sufficient to annul a will, unless such hallucinations or delusions bear directly upon the testamentary act. Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Presho, 196 Cal. 639, 238 P. 944; Estate of Gunther (Cal. Sup.) 248 P. 514; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Purcell, 164 Cal. 300, 128 P. 932.

[3] Tested by a long list of decisions of this court, the evidence in the instant case must be held to be insufficient as a matter of law to establish testamentary incapacity. Almost every act upon which contestant relies to establish incompetency has been considered by this court and its evidentiary weakness judicially pointed out. The opinions expressed by said witnesses founded upon facts and conditions described by them are not sufficient to overturn the uncontradicted evidence of the witnesses who testified to testator's sound mental condition at the very time the will was executed or at times very near thereto. As has been said by this court in many decisions, the question to be determined is not what might have been the mental condition of the testator, but what in fact was his mental condition at the time he made the will. Estate of Perkins, supra; Estate of Relph, 192 Cal. 451, 221 P. 361; Estate of Wilson, 117 Cal. 262, 49 P. 172, 711. The law presumes that the subscribing witnesses to the execution of a will had their attention drawn to and noted the mental capacity of the testator. The opinions of such witnesses are entitled to more weight than that of one who is merely passive. Estate of Holloway, 195 Cal. 711, 235 P. 1012. Besides the subscribing witnesses, there was also present the pastor and spiritual adviser of testator. No one attempted to question the honesty or standing of said witnesses, and no impeachment of their testimony was attempted. Paraphrasing the language in Estate of Carson (Cal. App.) 239 P. 364, it may be said here, as it was said with respect to the testator in that case, that McDonough was able to and did keep in mind all things necessary to qualify him to make a will, and was, as shown by the only evidence given as to his mental con-

dition at the very time the will was made, free and able to act in its execution. A résumé of the testimony of those present at the time the will was made and as to which there is no direct contradiction, if indeed there can be said to be any evidence to show mental incompetency, follows:

The Reverend Timothy Galvin, while not a subscribing witness to the will, was present at the time of its execution. He first met Christopher McDonough in July, 1922, and he saw him frequently until the day of his death, June 5, 1924. He visited him in the capacity of spiritual adviser at the residence of Mr. and Mrs. Joyce, and his relations with him were of an intimate character. From the first time he met him to the day he made the will—a period of about two months—he saw him five or six times. Thereafter he saw him at least once, and frequently twice, monthly. During the entire period of his acquaintance he never knew of his doing an unusual or unreasonable act or heard him say an unreasonable thing. He gave intelligent answers to questions asked him, and understood what he was doing, and had the free use of his will power. He was cheerful at all times, and was always glad to see him, and upon his departure invited him to return. At the time the will was executed, there were present in the room at Mr. and Mrs. Joyce's residence Theodore Savage, Denis O'Shea, Mr. McDonough, and himself. The will was drawn and subsequently read to the testator in the presence of the persons above mentioned, and Mr. McDonough was asked by Mr. Savage if he was satisfied with it and if it was his last will. He saw the testator sign it by affixing his mark to it, and he saw the witnesses sign it as such. Some time in July the testator told Rev. Galvin that Mrs. Joyce had taken him in and had been very good to him, and she intended to keep and care for him during the remainder of his life. He said he had some money and wished to leave it to her upon his demise. In a second conversation that took place about the 1st of August, four weeks before the testator executed the will, he repeated what he had previously said as to the kind treatment he had received at the hands of Mrs. Joyce, and stated that it was his intention to leave to her the money he had on deposit with the Hibernia Savings & Loan Society. He also spoke of a business transaction he had had with the Hibernia Savings & Loan Society that was not entirely satisfactory to him. The witness advised him to secure the services of a lawyer if he wished to make his will or transact important legal business. The witness informed Mrs. Joyce that the testator desired a lawyer to draft his will. The testator spoke of his family affairs, and said he had a son in one of the Eastern states—the witness did not remember the particular state—but he did not want anything to do with him, as he had visited him some years previous and received a poor welcome at his hands; that, in fact, his son "refused to give him a dinner; that he called one day and left on the next train." The testator did not appear to be more than 75 years of age, and did not seem to be feeble for a man of his years; in fact, he appeared well. He did not complain of suffering from any ailment.

Denis O'Shea, a neighborhood merchant, was one of the witnesses to the execution of the will. He first became acquainted with the testator in 1919, and knew him intimately from the time he came to live with the Joyce family until his death, June 5, 1924. He had many conversations with him on various topics, and had ample opportunity to observe him. There was nothing peculiar or unusual in his conversation or conduct at any of the times he met him, and he appeared at all times to be perfectly sane. He used a stick or cane when walking, and said that he had bad feet and could not trust himself on the hillsides. The Joyce home was in a hilly section of the city. He did not appear feeble or infirm, but was quite strong for a man of his age. The witness detailed a conversation he had with the testator on the increase of the cost of living above the ruling market prices of former years, in which he gave concrete illustrations of the shrinkage in the purchasing value of money within his experience, which would clearly indicate that he was well oriented as to the subject of the conversation. Other subjects were discussed, and no diseased mental condition or mental fault was observed in the testator at any of the times the witness was thrown into contact with him. The witness was called to the Joyce home on August 29 by Mrs. Joyce to witness the testator's will. When he arrived, the only persons he saw in the house were Father Galvin, Mr. Joyce, and Mr. McDonough. Mr. Savage and Mrs. Joyce came afterward. The attorney excluded every one from Mr. McDonough's room, closed the door, and spent some time with Mr. McDonough, without the hearing or presence of any other person. Mr. Savage finally came out of the room and proceeded to write the will. Upon completing it, he called the witness and Rev. Galvin into the room where Mr. McDonough was sitting in a chair and closed the door. Neither Mr. Joyce nor Mrs. Joyce was in the room. Mr. Savage read the will over twice and asked the testator if he knew what the paper was, and the testator replied that it was his will. He then signed it with a cross. The testator requested the witness to sign it, and he complied with the request. Mr. Savage also signed as a witness.

Theodore J. Savage, an attorney who has practiced his profession for 30 years in San Francisco, testified that he drew the will under the instructions of the testator. A day or two before the will was drawn, Mrs. Joyce, who was a total stranger to him, came to his office and stated that an old gentleman stopping at her house wished to make his will. She brought with her a card from Dr. George T. Brady, an acquaintance and an occasional client of the attorney. The attorney told Mrs. Joyce that he would be at the house either on the next or second day at a fixed hour, and instructed her to have present two persons who were acquainted with Mr. McDonough to serve as witnesses to the execution of the will. Upon his arrival, he found Father Galvin and Mr. O'Shea there. He was introduced to McDonough, who was fully dressed and seated in a chair. He talked with him at considerable length, and, after taking his instructions in detail, went into the dining room, from which all persons withdrew at his request, and he there drew the will which is assailed by contestant. He read the will aloud to the testator in the hearing of those present and discussed some of its provisions with him. The testator said he could neither read nor write, and requested that the will be read a second time. He asked the attorney to write his name at the place where he was to affix his mark, declared the instrument to be his will, made his mark, and requested the attorney and Mr. O'Shea to sign as witnesses to its execution. The attorney testified that in his opinion the testator was perfectly sane in mind at the time he made his will; his reasons therefore being founded upon the conversation held with him for the purpose of obtaining necessary information to prepare the will. He asked the testator many questions, which tested in a large degree his testamentary capacity. The testator stated that he was born in Ireland, and was 78 years of age, and he talked generally about the different places he had visited in this country. He said the only property he owned was about $8,000 deposited with the Hibernia Savings & Loan Society. Upon inquiry as to his family history, the testator said he had been separated from his family for a great many years and had no communication with any member. He said he had a son named Daniel, residing in the East; that he visited him some seven or eight years prior with the intention of remaining, but he was not welcome and so came back to California. He stated that he was the father of other children, but that Daniel told him all the other children were deceased, and that he did not know whether the issue of any deceased child was living. He wished to leave Father Galvin $100 to celebrate masses for the repose of his soul, and the balance he wished to leave to Mrs. Joyce, as he and the Joyces had been friends for a long time. Mr. Savage inquired as to his health, and the testator said he was all right except his feet and legs bothered him a great deal, and he could not get around as well as he should. When asked by the attorney if he wanted him to draw his will, his reply was that he did. His appearance was good, and he seemed bright and intelligent. There was nothing in his appearance to indicate that he was otherwise than perfectly competent to make a will. Asked if he had a place of deposit for his will, he said he once had a safe deposit box but had surrendered it. The attorney informed him that he had a safe at his office, and, if he wished, he would keep the will in his office and upon his death he would file it at the proper time with the county clerk. McDonough said that was very good, and requested the attorney to preserve the will and file it at the proper time. The attorney gave him his professional card, and told him that, if he should thereafter desire to make any change in his will, to call him up and he would come to him and make any change or changes which he might desire to make.

Dr. Thomas H. O'Connor was called to attend the testator during the latter days of August, 1922, close to the day on which the will was executed. The testator was at that time suffering from an eczemic condition in his lower limbs. He was able to walk about, and there was nothing to indicate feebleness in his condition. His body was neither emaciated nor poorly nourished. The physician was of the opinion that the testator was of sound mind. Six months thereafter the physician was again called to attend him on account of a cold he had contracted. He found McDonough's condition about the same as upon his previous visit. His arterial system then was, as no doubt the fact is with a vast majority of aged persons, in a condition of hardening. The testator, however, lived for more than a year thereafter and was frequently seen by neighbors and others upon the sidewalk and about the premises, and he appeared to be rational in both conversation and conduct. After the death of the testator, the witness prepared the medical certificate of death, wherein the cause of death was stated to be cerebral hemorrhage and the contributory cause arterio sclerosis. The physician testified in this connection that death was instantaneous upon the occurrence of the hemorrhage. Medical testimony was offered to establish as a fact that hardening of the arteries is common to most persons who have passed middle life. This knowledge is common to the laity. It is nature's inevitable law, and marks the beginning of the disintegration of the human body. It by no means follows, however, that testamentary capacity ceases with the approach of, or even with the most advanced stages of, arterial hardening. This condition or stage in life is but partial evidence to be considered in connection with other evidence in determining whether or not arterio sclerosis has shut off the blood supply to the brain to the extent that the mind is unable to correctly function. Any other theory would deprive almost every person who has passed middle life of the right to dispose of his estate by will.

We have epitomized the testimony of the four witnesses, three of whom were present at the exact time the will was executed, two being subscribing witnesses, to show the testamentary competency of decedent at the period of time which the law regards as being of prime importance in this class of cases. Two of these witnesses were intimate acquaintances and testified to the sound and disposing mind of the testator, not only at the time the will was executed, but at other times very near to the day the will was executed, both prior and subsequent thereto. As to the other two, one was his physician who had attended him but a few days before he executed the will, and the other was an attorney whose first duty to his profession required him to satisfy himself that the testator was fully competent to make a will before engaging in an act which possessed the potentials of excluding heirs from their inheritances. Besides the testimony of the spiritual adviser, the lawyer, and the layman, who were present at the time the will was executed, which was not contradicted by direct evidence, other witnesses, four of whom seemed to have had no pecuniary interest in the result of the trial, gave testimony as to testator's mental soundness at the very time the will was made as well as at other periods of time both near to and remote from the day in question. John J. Matthew's acquaintance with the testator covered a period of seventeen years. After the testator came to reside at the Joyce home, he saw him at least once, and sometimes twice, a month. His testimony was that he was bright and intelligent, seemed clear in mind and exhibited no peculiarities of conversation or conduct at any time. Miss Mary Ryan saw him while he was at the Joyce home at least once a week, conversed with him frequently, and pronounced him to be perfectly sane. Elizabeth Craig, a pupil attending the city public schools and a recent arrival from Ireland, the birthplace of herself and McDonough, visited the Joyce children practically every day, and conversed with McDonough almost daily from the time he came to the Joyce home until his last illness. In her opinion he was perfectly sane.

Mr. and Mrs. Joyce both testified at length as to the circumstances under which McDonough came to live in their family. Mr. Joyce had known McDonough for many years prior to his marriage, and the latter visited at the family home after said marriage. Mrs. Joyce was exceptionally kind to him during all the time he was at her home, and cared for him tenderly during his last illness, which was somewhat protracted. McDonough was greatly pleased with the care and treatment he was receiving, and expressed gratitude for the comforts of real home life. Both testified as to his competency.

Two medical witnesses were called in the case, one by the contestant and the other by the proponent. In response to a hypothetical question embracing substantially the same assumed statement of facts, one was of the opinion that the testator was of unsound mind, and the other was of the opinion that he was mentally sound.

[4] The fact that McDonough, beginning some time after he made his will, paid $100 monthly for the board, lodging, and care which he received, is not pertinent to the issue of his competency to make a will. The amount, however, was not unreasonable, under the circumstances of the case.

[5] Contestant has quoted at considerable length from Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230. That case considered the question as to the degree of unsoundness of mind that must be proved to authorize a judgment annulling a marriage contract. We are not here considering the mental capacity requisite to make a valid marriage contract, which presupposes an understanding on the part of the contracting parties of the duties, obligations, and responsibilities of the marital state. Here we are considering merely the ability of the testator to make a simple will. The capacity requisite to do so has been repeatedly defined by decisions of this court and it is not necessary to cite specific cases. In considering the question of a testator's competency, the rule by which the evidence must be measured is thus stated:

> "* * * The issue does not rest upon the contestant's evidence alone. The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may in the light of all the facts be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence." Estate of Casarotti, 184 Cal. 73, 192 P. 1085.

Measured by the law of this state, the evidence must be held to be insufficient to sustain the judgment.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; SULLIVAN, J.

200 Cal. 70

SISKIN v. ALLIANCE INS. CO. OF PHILADELPHIA. SAME v. NETHERLANDS FIRE & LIFE INS. CO. OF THE HAGUE, HOLLAND. SAME v. NIAGARA FIRE INS. CO. OF NEW YORK. (L. A. 7570.)

(Supreme Court of California. Dec. 23, 1926. Rehearing Denied Jan. 17, 1927.)

1. Insurance ⚷146(3)—Fire policy written by insurer's agents is to be liberally construed in favor of insured (Civ. Code, § 1654).

In view of Civ. Code, § 1654, terms of fire policies written by agents of insurer are to be construed liberally in favor of insured and strictly against insurer, any ambiguity or uncertainty having been caused by insurer.

2. Insurance ⚷165—Fire policy covering merchandise in building and its additions held to cover merchandise wherever situated in plant.

Fire policy "on merchandise contained in or attached to two-story brick building and its additions adjoining and communicating," certain address is intended to refer merely to location of merchandise at date of issuance of policies, and covers merchandise wherever situated in insured's plant in course of its progressive movement therein during process of manufacture.

In Bank

Appeals from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Separate actions by Harry Siskin, doing business as the Angelus Furniture Maufacturing Company against the Alliance Insurance Company of Philadelphia, against the Netherlands Fire & Life Insurance Company of The Hague, Holland, and against the Niagara Fire Insurance Company of New York, consolidated for trial. Judgments for plaintiff, and defendants appeal. Affirmed.

Chickering & Gregory, of San Francisco, Gibson, Dunn & Crutcher and H. F. Prince, all of Los Angeles (E. H. Conley, of Los Angeles, of counsel), for appellants.

Paul H. McPherrin and L. Frank Ottofy, both of Los Angeles, for respondent.

RICHARDS, J. The three cases, the appeal in each of which is before this court for determination, were consolidated and tried together upon an agreed statement of facts and certain other forms of evidence presented at such trial. Each of these actions was brought by plaintiff doing business under the name of the Angelus Furniture Manufacturing Company for the recovery of a sum of money alleged to be due by the defendant in each case, according to the terms of an insurance policy and as the result of a fire which occurred in the plaintiff's premises. The question presented in each case involves an interpretation of the covering clause in each of these insurance policies. From the stipulated facts in the case and from the findings of the court based thereon it appears that the plaintiff, at the time of the issuance to him of each of said policies and for several years prior thereto, had been engaged in the business of manufacturing furniture in the premises wherein the stock of merchandise and material covered by each of said policies was located at the time of the issuance thereof and of the occurrence of the fire. The building wherein the plaintiff's said business was originally conducted was a two-story brick building situate in the city of Los Angeles, between Stanford avenue and Paloma street, and described as Nos. 935–943 East Pico street. Some years, however, before the issuance of these insurance policies, the plaintiff had found that the increase in his business required the erection of an additional building, and he had accordingly caused the same to be erected immediately adjacent to the former structure and as a part thereof, to the extent that the west wall of the earlier building formed, to the height thereof, the east wall of the added structure, and that through said common wall large openings, supplied with metal doors, were so placed as to furnish such full and adequate means of intercommunication as the convenience or necessities of the increasing business of the plaintiff required. The various departments of the manufacturing plant were so located in different parts of his amplified building that the raw materials to be used in the process of manufacture would be located in the rear of the older unit and would pass therefrom during the progressive processes of manufacture through the various portions of the amplified structure until it was finally placed as a finished product in the storeroom thereof, from whence it passed out to the trade.

For several years prior to the issuance of the policies here in question the plaintiff had carried insurance upon the large stock of materials and merchandise which were thus in process of manufacture, and the defendant in each of these cases had been among the number of insurance companies with whom his insurance policies had been placed. On October 14, 1920, when the insurance policy which he had theretofore carried with the Alliance Insurance Company of Philadelphia was about to expire, the authorized agents of said insurance company applied to the plaintiff for a renewal of said policy, and, as the result of interviews between the agents of said company and the plaintiff, the insurance policy which forms the basis of the action against said insurance company was issued and the agreed premium paid thereon. On April 28, 1920, a similar transaction occurred with relation to the insurance theretofore carried by the Niagara Fire Insurance Company of New York, and, as a result thereof, a similar policy was issued and the agreed premium paid thereon. On July 20, 1920, a

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

like transaction occurred with relation to the insurance theretofore carried by the Netherlands Fire & Life Insurance Company of The Hague, Holland, and with the result that a like insurance policy was issued and the agreed premium paid thereon. Each of these insurance policies was in the standard form and in each of them the covering clause was substantially the same, reading as follows:

> "On stock of merchandise and materials * * * [describing same] all while contained in or attached to the two-story brick building and its additions, adjoining and communicating, situate Nos. 931–937, 929–933 rear East Pico street."

It is conceded that the stock of merchandise described in each of these policies was destroyed or damaged by the fire which occurred subsequently, on March 18, 1921, within the plaintiff's above-described premises; and it is also conceded that the loss and damage resulting to plaintiff from said fire was duly ascertained and agreed upon between the parties, as set forth in the agreed statement of facts; thus leaving as the only matter for determination the respective proportions of said loss to be borne by each of said insurance corporations, depending upon the interpretation to be placed upon the aforesaid covering clause in each of said policies. It was assumed by the respective parties to each of these actions upon the trial and also upon appeal that the terms of said covering clause are ambiguous, and hence are to be aided as to the interpretation thereof by the circumstances attending the issuance of said policies. Accordingly, upon the trial of said actions, certain affidavits, which had theretofore been made by the persons who had acted as the agents of each of said insurers in the interviews with said plaintiff preparatory to the issuance of said policies and in the preparation and issuance thereof pursuant to such interviews, were offered in evidence under the stipulation of the parties that they were to be considered as having the same effect as though the affiants had been present and testified to the facts therein stated. Upon the trial of said consolidated actions, as well as upon this appeal, the sole question which was and is presented for determination is as to whether the aforesaid covering clause in each of said policies amounted to blanket insurance upon the stock of merchandise described therein wherever situate in the premises of plaintiff at the time of the destruction thereof in said fire, or whether the said coverage was limited to the unit or section of said building designated as the rear thereof and to the portion of the stock of merchandise situate therein at the date of the fire.

[1] Before entering upon a consideration of the precise terms of the covering clause in each of said policies, certain principles of interpretation applicable to contracts of the character of those sued upon herein should be adverted to. It is a conceded fact herein that the insurance brokers or agents who conducted the preliminary interviews with the plaintiff herein, prior to the issuance of each of said policies, were the duly authorized agents of the respective insurance companies represented by each of them in said interviews, and that they were in no degree agents or representatives of the plaintiff in the procurement and issuance of said policies or in the preparation or inclusion therein of the terms of the covering clause in each which is presented for interpretation upon these appeals. This being so, it is a well-settled rule of interpretation that the terms of said clause in said policies are to be construed liberally in favor of the insured and strictly against the insurer, and this by reason of the fact that whatever ambiguity or uncertainty exists therein has been caused by the insurer. Mah See v. North Am. Acc. Ins. Co., 190 Cal. 424, 213 P. 42, 26 A. L. R. 123; Maryland Casualty Co. v. Industrial Acc. Com., 178 Cal. 494, 173 P. 993; Greer-Robbins Co. v. Insurance Co., 47 Cal. App. 63, 190 P. 187; Civ. Code, § 1654; 26 Corpus Juris, pp. 74, 75, and cases cited; Ætna Ins. Co. v. Sacramento Stockton S. S. Co. (C. C. A.) 273 F. 58.

Applying the foregoing principle to the facts of these cases as embodied in the agreed statement of facts presented at the trial thereof, and considering the same without reference to the affidavits above referred to as having been also read in evidence at said trial, we are unable to distinguish the facts of these cases from those presented and considered by the District Court of Appeal in the case of Greer-Robbins Co. v. Insurance Company, supra, wherein that court was called upon to interpret the provisions of an insurance policy substantially the same as those embraced in the coverage clauses of the three insurance policies here under review. The precise question presented in that case was whether goods, materials, and merchandise which were located in a rear room of the plaintiff's building at the time of the issuance of the insurance policy thereon remained covered by such insurance when removed therefrom to other portions of the plaintiff's building wherein they were located at the time of the occurrence of the fire. The insurance policy in that case referred to the property insured thereby as situate "in the rear" of plaintiff's building and purported to insure the same while contained in said building "and its additions"; and it was therein held in accordance with the rule of interpretation above set forth that, by use of the term "in the rear," the intent of the framers of the policy was merely to refer to the location of said property in said plaintiff's building at the date of the placing of the insurance thereon, and that the removal of said property to other portions of said building and its additions did not operate to take the same out of the insurance provisions of the policy.

[2] Approving the rule of interpretation therein declared, we are constrained to hold that, by the use of the word "rear," or of the clause "in the rear," in each of the policies here under review, it was the intention of the framers thereof to refer merely to the location of the stock of merchandise to be covered by such insurance at the date of the issuance of the policies of insurance thereon, and that by the use of the term "additions adjoining and communicating," in each of said policies, the framers thereof intended that the coverage clauses therein should apply to said stock of merchandise wherever situate in the plaintiff's plant in the course of its progressive movement therein during the processes of manufacture.

It is, however, contended by the appellants herein that the foregoing interpretation of these policies has been rendered impossible of application by virtue of what appears in the affidavits of the insurance brokers or agents of said defendants having relation to their preliminary interviews with the plaintiff prior to the drafting of said policies and to the form thereof and of the coverage clause placed therein as the result of such interviews. These affidavits disclose substantially the following facts; namely, that the plaintiff had for several years prior thereto carried blanket insurance upon the stock of merchandise in his plant and had placed the same through these brokers and agents of said respective defendants; that, upon the occasion of said interviews held prior to the issuance of these policies, the plaintiff had been informed by the defendants' representatives, who were each thoroughly familiar with the plaintiff's place of business and with the character and nature of his manufacturing activities conducted therein, that the board of fire underwriters of Los Angeles had recently notified their respective companies not to issue policies of insurance in blanket form unless the insured would submit to and accept the insertion of a 90 per cent. coinsurance clause in the policy; that the plaintiff expressed himself as opposed to the coinsurance clause plan, and that, upon his expressing such opposition, the agents of these respective insurance companies, being desirous of continuing to write insurance for said plaintiff, undertook to so write such insurance as to give the plaintiff the benefit of blanket insurance upon his said stock of merchandise, without appearing expressly so to do, in the form of the policies to be issued to him, and without the requirement of coinsurance; and that, in accordance with this understanding and with such purpose in view, these authorized agents of these respective defendants prepared and inserted in said policies their aforesaid coverage clauses, intending the same to have the effect of insuring the plaintiff's stock of merchandise not only while the same was located "in the rear" of his said plant, but wherever the same was to be placed in the "additions adjoining and communicating therewith," during the course of manufacture; and that in accordance with such understanding, purpose and intent the coverage clause in each of said policies was inserted therein with the approval not only of the insurance corporations issuing the same, but also of the board of fire underwriters.

The effect of the foregoing statements on the part of the defendants' representatives is, in our opinion, precisely the opposite of that for which the appellants herein contend with relation to the interpretation to be placed upon the coverage clauses of said policies and which were so inserted therein not only after a thorough understanding upon their part as to what sort of insurance the plaintiff desired, but also after their express admissions that these policies were so prepared with a view to conforming to the plaintiff's said desire. If anything further were needed to justify the interpretation which the trial court placed upon the coverage clause in each of said policies in awarding the plaintiff the full relief sought, such justification was supplied by the evidence of the defendants' agents and representatives as above set forth. We are therefore of the opinion that the trial court acted correctly in so interpreting said policies as to award the plaintiff the full recovery sought thereon.

The judgment in each of said cases is affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; SULLIVAN, J.

80 Cal. App. 561

HAUB v. TUTTLE et al. (Civ. 5148.)*

(District Court of Appeal, First District, Division 1, California. Dec. 31, 1926.)

1. Municipal corporations 🔑217(5)—Charter provision covering examination and appointment held to apply only to original appointments, not to promotions.

Power of civil service commission of San Jose to determine eligibility for promotion *held* granted by Charter of San Jose, § 106, to be exercised with in the limits thereof, but under rules and regulations adopted and approved pursuant to section 104 of said charter, section 105 applying only to original appointment and employment in service, there being evident intention, as shown by section 107, to have regulations concerning appointment and concerning promotion separated.

2. Statutes 🔑206—Statutes must be so construed as to give some effect to every word and especially to every provision.

In statutory construction, some effect, if possible, must be given to every word and especially to every distinct provision of an act.

3. Municipal corporations 🔑217(5)—Civil service commission held not authorized to base determination of eligibility for promotion in fire department upon competitive examinations.

Under the provisions of Charter of San Jose, § 106, of civil service commission *held* not authorized to base its determination of eligibility for promotions in fire department upon competitive examinations.

4. Municipal corporations 🔑216(1)—Civil service commission may not exercise power not given directly by charter, or necessarily implied.

Civil service commission, deriving its power from charter creating it, may not exercise any power not directly given or necessarily implied from prerogatives so conferred.

5. Municipal corporations 🔑217(5)—Charter grant of authority to appoint to classified service held not to make provision governing promotion dependent thereon to be operative.

Fact that section 105 of Charter of San Jose contains the only provision granting power to city manager to make appointments to positions in classified service *held* not to make section 106 of such charter dependent upon such section to be operative, section 104 providing for adoption by civil service commission of code of rules providing for appointment in classified service, which should have force and effect of law.

6. Municipal corporations 🔑60—Long continued exercise of powers by officers raises no presumption of grant to city of such powers.

Exercise of powers by city officers in excess of their authority for great length of time will raise no presumption of grant to city of such power.

7. Municipal corporations 🔑217(5)—Civil service commission of San Jose may require applicants for promotion to undergo mental and physical tests.

Under Charter of San Jose, § 106, civil service commission may require applicants for promotion to undergo mental and physical tests.

8. Municipal corporations 🔑217(5)—Action of civil service commission of San Jose on past examinations for promotion is not reviewable.

Where applicant has submitted to past examinations for promotion, action thereon by civil service commission of San Jose *held* not open to review.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Mandamus by Theo. C. Haub against Hiram D. Tuttle and others, to compel respondents, as members of the Civil Service Commission of the City of San Jose, to desist from requiring applicants for promotion in the fire department to take mental or physical tests to be eligible for promotion. From a judgment granting the writ, respondents appeal. Reversed.

Archer Bowden, City Atty., and Owen D. Richardson, both of San Jose, for appellants.

Frank H. Benson and Harry Houser, both of San Jose, for respondent.

KNIGHT, J. This is a proceeding in mandamus in which Theo. C. Haub, a member of the fire department of the city of San Jose, obtained a judgment in the trial court commanding the members of the civil service commission of said city and the secretary thereof to "certify all the applicants for promotion in the fire department of the city of San Jose on their records of merit, efficiency, character, conduct, and seniority, *and refrain and desist from compelling applicants for promotion in said department to undergo mental or physical tests in order to be eligible to promotion.*" (Italics ours.) From said judgment, the members of the commission and the secretary thereof have appealed and present for determination questions relating particularly to the italicized portions of said judgment.

The city of San Jose is governed under a freeholders' charter, providing, among other things, for a "city manager" form of government and a system of civil service to be administered by a commission, the powers and duties of said commission, so far as they are in question here, being defined by the following charter provisions:

"Rules.

"104. The commission, subject to the approval of the council, shall adopt, amend, and enforce a code of rules and regulations, providing for appointment and employment in all positions in the classified service, based on merit, efficiency, character, and industry, which shall have the force and effect of law. * * *

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court March 1, 1927; Waste, C. J., and Shenk, J., voting for a hearing.

"Examination and Appointment.

"105. The secretary shall provide examinations in accordance with the regulations of the commission and maintain lists of eligibles of each class of the service of those meeting the requirements of the said regulations. Positions in the classified service shall be filled by the city manager from a list of the three persons, if there be that number, on the eligible list who have received the highest standing on examination: *Provided*, that for good reason shown the city manager may reject all three and call for a new list.

"Promotion.

"106. The commission shall provide for promotion to all positions in the classified service, *based on records of merit, efficiency, character, conduct, and seniority.* (Italics ours.)

"Probation Period.

"107. An appointment or promotion shall not be deemed complete until a period of probation not to exceed six months has elapsed, and a probationer may be discharged or reduced at any time within the said period of six months."

Pursuant to section 104, said commission adopted and the city council approved a code of rules and regulations, one of which provided that positions in the classified service should be filled by the city manager from an eligible list certified by said commission, said list to contain three names, or double that number if more than one place was to be filled. Another rule provided that vacancies should be filled by the promotion of applicants from the next lower rank, and that "promotional examinations shall be competitive."

The following are the facts: Haub became a member of said fire department some time prior to the year 1916, and on October 23, 1918, having successfully passed a civil service examination, his name was placed upon the eligible list of the civil service in the grade of acting captain, where it remained for a period of two years, at which time said list lapsed by limitation of time. On December 31, 1920, however, under an emergency provision of said charter authorizing temporary appointments, the city manager appointed him lieutenant, to act until an eligible list was created by the civil service commission or until said appointment was revoked; and he was still acting in that capacity at the time of the trial of this proceeding. On July 12, 1922, said commission held a competitive examination to fill two lieutenancies, one being provisionally occupied by respondent. Eleven members of the department, including respondent, competed at such examination, the scope thereof as prepared by the commission and the allotment of the total number of 100 credits to be granted for a perfect examination being as follows:

"Merit, efficiency, character, and conduct to be ascertained by written examination in the following subjects: Fire Fighting, Duties of Lieutenant, Fire Limits, Location of Fire Water Hydrants and Boxes, Arithmetic, Care of Equipment, and Fire Prevention (designated by the commission as 'mental'), 60 credits; Physical Examination, 10 credits; merit, efficiency, character, and conduct (as shown by the records of the department), 20 credits; Seniority (½ credit for each year of service or fraction thereof, but not to exceed 10 credits), 10 credits."

The record of the examination shows that although respondent registered a perfect score in the physical examination and was second highest in seniority and in "merit, efficiency, character, and conduct," as shown by the department records, the markings he received in the written "mental" examination caused a reduction of total credits so that his name appeared fifth on the list of the six competitors certified by said commission, and the name of the applicant who had served the shortest period of time in the department—less than one year—appeared first on the eligible list, his markings being the highest on the written "mental" examination.

Respondent's cause of action, as set forth in the amended petition, was based upon allegations to the effect that although said commission had "caused to be kept records of merit, efficiency, character, conduct, and seniority" of the members of said department it "failed, neglected, and refused to provide for promotion" based upon such records; but, on the contrary, had "in the past, and unless restrained * * * will in the future compel applicants for promotion * * * to undergo certain mental and physical tests," and "will consider said tests in certifying members of said department for promotion"; also that said commission had in the past, and unless restrained, "will in the future certify all applications for promotion on a basis of 100 points, 60 of which will be determined by said mental and physical tests, and only 40 of which will depend upon the records of the members of said department"; and that by reason of the failure and refusal of said commission "to certify the members of said department for promotion on their records, and by reason of having compelled all applicants for promotion to undergo certain mental and physical tests," respondent "has not been certified as eligible to promotion from fireman to lieutenant. * * *" The trial court found the above allegations to be true, and gave judgment in accordance with the prayer of the petition.

The main question upon which the parties seek a determination is whether under the charter provisions quoted said commission is empowered to subject applicants for promotion to *competitive* examinations, and may determine their eligibility and grade therefrom. The answer to this question depends primarily upon the proposition of whether, as appellants contend, section 105, like section 106, applies to promotions, or whether, as respondent claims, section 105 governs in cases of original appointment only, and the commission's power to deal with promotions is derived exclusively from section 106.

[1, 2] Assuming that, under the circumstances stated, the remedy of mandamus is available to respondent a point made by appellants in the trial court but not stressed here and assuming further that, such remedy being available, the pleadings herein raise the issue of the right to hold competitive examinations for promotions we conclude that the commission's power to determine eligibility for promotions is granted by section 106, to be exercised within the limitations thereof, but under rules and regulations adopted and approved pursuant to section 104 of said charter; and that the provisions of section 105 apply only to original appointment and employment in the service. This conclusion is grounded mainly upon the fact that the charter treats the subject of promotions separately, under a distinct subtitle, the distinction between original appointments and promotions being further emphasized in section 107 by the use therein of the disjunctive "or"—"An appointment or promotion," etc. Moreover, if appellants' construction be adopted and it be held that section 105 was designed to cover the matter of promotions, then it must be held also that the enactment of section 106 was entirely unnecessary and constitutes surplusage, which we think may not be done in view of the rule of statutory construction "that some effect, if possible, must be given to every word, and certainly to every distinct provision of the act." Langenour v. French, 34 Cal. 92; Donlon v. Jewett, 88 Cal. 530, 26 P. 370; Hannon v. Southern Pacific R. R. Co., 12 Cal. App. 350, 107 P. 335.

[3, 4] Turning, then, to section 106, it would appear that the provisions thereof do not authorize the commission to base its determination of eligibility for promotions upon competitive examinations. A civil service commission derives its power from the charter creating it, and may not exercise any power not directly given or necessarily implied from the prerogatives so conferred (Cook v. Civil Service Commission, 160 Cal. 598, 117 P. 662); and section 106 is entirely void of any language which even inferentially justifies the commission in requiring competitive examinations, the language used therein being that the commission shall provide for promotions "based on records of merit," etc. If in framing the charter it was intended that promotions should depend, in whole or in part, on competitive examinations, provisions from which such inference might be drawn would, doubtless, have been incorporated in section 106 the same as has been done in other civil service laws. For example, section 13 of the state civil service law provides that:

> "Promotions shall be based upon merit and competition and upon the superior qualifications of the person promoted as shown by his records of efficiency." Stats. 1919, p. 1346.

Under the New York law, promotions are made "according to merit and fitness to be ascertained as far as practicable by competitive examinations." Hale v. Worstell, 185 N. Y. 247, 77 N. E. 1177, 113 Am. St. Rep. 895. The charter of the city and county of San Francisco declares that:

> "The commission shall provide for promotion in the classified service on the basis of ascertained merit and standing upon examination. * * * All examinations for promotion shall be competitive among such members of the next lower rank * * * as desire to submit to such examinations."

In Los Angeles the charter reads (section 237):

> "The commission shall by its rules provide for the promotion of such classified civil service on the basis of ascertained merit and seniority in service and examination. * * * All examinations for promotion shall be competitive among such members of the next lower class as desire to submit themselves to such examinations. * * *"

The charter of the city of San Diego (section 5, art. 11) requires that the commission shall provide rules "for promotion based upon competitive examination and records of efficiency, character, conduct, and seniority. * * *" And the Oakland charter reads (section 97, Stats. 1919, p. 1366):

> "Promotions in the fire department shall be based on ascertained merit, seniority of service and standing upon competitive examination; * * *"

It would therefore seem that in the framing of the charter before us, the requirement of competitive examinations for promotion in the classified service was purposely omitted.

[5] Appellants make the point that section 106, to be operative, must necessarily depend upon the provisions of section 105, because the latter section contains the only charter provision granting power to the city manager to make appointments to positions in the classified service. Section 104 of the charter declares, however, that said commission shall adopt, subject to the approval of the council, "a code of rules and regulations providing for appointment * * * in the classified service * * * which shall have the force and effect of law," and since the rule hereinabove referred to, embodying the grant of power mentioned, has been adopted and approved pursuant to said section, the authority to appoint does not appear to be lacking.

[6] The fact that said commission has operated for a number of years under the interpretation appellants are contending for here cannot be held to affect the present legal situation, for the reason that the exercise of powers by city officers, in excess of their authority, for a great length of time, will raise

no presumption of a grant to the city of such powers. Vernon Irrigation Co. v. City of Los Angeles, 106 Cal. 237, 39 P. 762. To the same effect is the case of City of Corona v. Merriam, 20 Cal. App. 231, 128 P. 769.

[7] We cannot agree, however, with respondent's contention that, under the provisions of section 106, said commission may not require applicants for promotion to undergo mental and physical tests; and, in view of the injunctive relief granted in the judgment to that effect, said judgment must be reversed.

The language used in the fore part of said section 106 is: "The commission *shall provide* for promotions * * *" (italics ours), which, reasonably construed, means that it may in accordance with section 104 provide rules and regulations for promotion; and that being so, the nature of those rules and regulations are left necessarily to the discretion of said commission, providing they do not have the manifest effect of nullifying the fundamental principle which said section 106 declares shall be followed in determining eligibility for promotion.

As to the extent of the discretion thus vested in a civil service commission, we quote from Pratt v. Rosenthal, 181 Cal. 158, 183 P. 542, as follows:

> "It is a well-established proposition that a commission with the powers conferred upon the civil service commission in the examination of applicants for public employment has a wide discretion with regard to the manner of performing its duties and exercising its powers. * * * 'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion and its abuse must appear very clearly before the courts will interfere.' Maxwell v. Civil Service Com., 169 Cal. 339 [146 P. 869]."

Upon the same subject it is said in Dillon on Municipal Corporations (vol. 1, § 339) that when power is given to the members of such commission "to test the qualifications of applicants for public office, the method of such examination, with the result arrived at, necessarily rests within their discretion and judgment upon the examination had, and is not a judicial determination of any question presented to them in such a sense that it may be reviewed by the courts on certiorari or mandamus or otherwise"; and in the case of Cook v. Civil Service Commission, 160 Cal. 589, 117 P. 663, it is held that the conducting by the civil service of an examination for promotion of captains in the fire department of that city to the rank of battalion chief, and the declaration by them of the percentages attained by the various candidates for promotion were not the exercise of a judicial function, and their action in such matters could not be reviewed on certiorari; that having jurisdiction to act, and not acting judicially in holding examinations, said commission, even if acting unfairly, could not have its actions subjected to examination by a writ of review.

"Physical fitness and health are prime requisites for a fireman, whatever his work in the service" (Maxwell v. Civil Service Commission, supra), but, under the terms of the judgment rendered herein, if allowed to stand, said commission would be precluded from causing any physical or mental tests whatever to be made of applicants for promotions, the effect of which would be to compel said commission to certify as eligible applicants whose records in the lower ranks of the service were excellent, even though it were manifest at the time of promotion that said applicants were totally unfit physically or mentally to occupy the higher and more responsible position.

[8] Regarding the argument made by appellants as to the effect of an adverse ruling herein on the question of competitive examinations, and as to the possible consequences which might flow from any judgment to be hereafter rendered by the trial court in this proceeding, it may be said that, according to the allegations of the amended petition herein, the purpose of this proceeding is not to annul any past transaction of said commission, nor has it been directed toward any particular threatened action in the future; and, in view of the foregoing authorities, it would seem clear that where an applicant has submitted to past examinations for promotion, the action of the commission thereon is not open to review, nor can it be annulled for the reason that, by virtue of said section 106, jurisdiction was vested in said commission to deal with the matter of promotions.

For the reasons hereinabove stated, the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

80 Cal. App. 427

BALL et al. v. WARNER et al. (Civ. 4656.)*

(District Court of Appeal, Second District, Division 1, California. Dec. 23, 1926.)

1. Vendor and purchaser 🔑42 — Purchaser waived vendors' misrepresentations as to capacity of well by performance and requests for modification of contract for payment of installments.

Requests by purchaser, after knowledge of vendor's misrepresentations as to capacity of well, for modifications of contract for payment of installments and performance of contract in part for over four years *held* to estop purchaser from raising question of fraud.

2. Trial 🔑397(5)—Purchaser having waived vendors' fraud with resultant damage, finding on issue of damages was not required.

Where purchaser of farm waived fraud of vendors in misrepresentation as to capacity of well, with its resultant damage, no necessity existed for making finding on issue of damages.

Appeal from Superior Court, Riverside County; Wm. H. Ellis, Judge.

Action by G. W. Ball and others against L. L. Warner and others. From a judgment for plaintiffs, defendant named and another appeal. Affirmed.

C. W. Benshoof and O. K. Morton, both of Riverside, for appellants.

Sarau & Thompson, of Riverside, for respondents.

HOUSER, J. This is an appeal from a decree of foreclosure of a mortgage on real property which was security for a promissory note.

The essential facts are that on May 21, 1917, the plaintiffs sold to appellants Warner certain real and personal property for the sum of $8,000, of which amount $2,000 was paid in cash, and a part of the balance, to wit, $5,000, secured by mortgage on the land, and the remainder thereof, to wit, $1,000, by chattel mortgage on the personal property. On June 13, 1917, the appellants Warner sold said property, subject to said mortgage, to the defendants Kamphefner. On August 29, 1917, defendant George D. Kamphefner acquired all the interests in the property belonging to the other defendants Kamphefner, and on the same day, for a consideration of $5,500, resold to defendant L. L. Warner an undivided one-half interest in the property, and ever since said 29th day of August, 1917, the said Kamphefner and the said Warner have been operating all of the property together and sharing the profits therefrom.

The sum of $1,000 secured by the chattel mortgage was paid, but the sum of $5,000 secured by the mortgage on the real property, together with interest due thereon from November 21, 1920, to May 21, 1921, not having been paid, a suit to foreclose the mortgage was commenced approximately four years after the property was originally sold to defendant L. L. Warner. That part of the affirmative defense of the defendants Warner which is of material consequence on this appeal, in substance, is that in the negotiations between the plaintiffs and the defendants Warner leading up to the original sale of the land, the plaintiff George W. Ball—

> "falsely and fraudulently told and represented to defendants Warner that there was a well on said property and that said well would produce 65 inches of water continuously for irrigating purposes, but that, in truth and in fact, said well never furnished over 15 inches of water, continuous pumping."

During the course of the trial the plaintiffs filed a supplemental answer to the several affirmative defenses set up by the defendants, which answer included allegations to the effect that by certain actions and conduct of the defendants they had waived the fraud with which the plaintiffs were charged, and that thereby and therefrom the defendants were estopped to raise the question of fraud as against the plaintiffs.

On the trial of the action the plaintiffs admitted that, in no event, could a deficiency judgment be rendered against any of the defendants other than defendants Warner.

In effect, the court found that the material allegations of the complaint were true; that the facts sustaining defendants' affirmative defense of fraud were true; but that, because of certain acts and conduct of said defendants, the said fraud of the plaintiffs was waived, and defendants were thereby estopped from in any manner raising the question of fraud or misrepresentation

[1] From the resultant judgment the defendants Warner have appealed to this court. While many different reasons are suggested by appellants for a reversal of the judgment, each of them is dependent upon the one question of whether there was a waiver by defendants of the fraud of the plaintiffs. As is stated by appellants in their brief:

> "The only point, therefore, necessary to be considered on the part of the defendants Warner on this appeal is, Did Warner waive the fraud? If he did waive it, then he has no right of action against the plaintiff."

Although the evidence is somewhat conflicting, for the purpose of enabling the trial judge to determine the finding of facts tending to establish the alleged waiver, it sufficiently appears that the interest due on the note in November, 1917, was promptly paid; that when the next interest payment became due, defendant L. L. Warner requested of plaintiffs an extension of time within which to make such payment—which request was granted; that at the time when the succeeding interest payment fell due in November,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court February 21, 1927.

1918, defendant L. L. Warner asked of the plaintiffs that, instead of paying the interest in cash, he be permitted to make payment in straw—to which request plaintiffs acceded and credited interest as paid to the amount of $117.07—the value of the straw; and that approximately two weeks after the note for $1,000 became due, because of the fact that at that time the grain crop raised on the property had not been sold by defendants, L. L. Warner asked plaintiffs for an extension of time within which to pay said note—which request was also granted.

It also appears directly from the testimony of defendant L. L. Warner that almost immediately after the property was purchased by him from the plaintiffs he saw the defendants Kamphefner unsuccessfully "trying to irrigate" a little garden by the use of the irrigating well on the property. He testified in part:

> "They would start the pump and it would run for a while, and the water would run about two or three hours and then stop. It would pull down to the limit of suction and quit."

And in answer to a question as to whether any test was made prior to the fall of 1918 to find out how much water the well would furnish, defendant L. L. Warner testified:

> "We never made any test, but in everyday pumping it would furnish but very little water."

The testimony given by defendant L. L. Warner further shows that he was an experienced farmer, and that for two years preceding the purchase by him of the property involved herein he "had quite a little to do with water and the measurement of water as zanjero" for two different water companies.

It is thus clear that defendant L. L. Warner had actual knowledge, or, at least, that he was in position to acquire complete information, regarding the capacity of the irrigating well in question long before any payment, whether on account of the principal or the interest on his indebtedness to the plaintiffs, became due; notwithstanding which fact he made several requests for modifications of the contract for payment of subsequent installments of principal or interest and as to each of which he was accommodated.

Although waiver is largely a question of intent, its determination must frequently rest upon deeds rather than words. In the instant case defendant L. L. Warner, being in full possession of every fact necessary to establish the misrepresentation of plaintiffs, in effect, indicated that he regarded it of no material consequence. It would seem that in such circumstances, by his continuing to perform the contract at least in part for a period of over four years, he ratified it; and by his repeated requests for modifications thereof and his being accorded favors by the plaintiffs, which he had no legal right to exact and to which requests plaintiffs were not bound to accede, a waiver of any claim for damages arising out of the fraud of plaintiffs necessarily followed.

While general definitions and abstract statements of the law may undoubtedly be found tending to support appellants' contention that the acts and general conduct of defendant L. L. Warner were not such as to warrant the conclusion that, with knowledge of the facts constituting the alleged fraud, he had deliberately and intentionally waived the fraud, together with the resultant damage to him, no authority, in which facts analogous to those here under consideration were present, has been attracted to the attention of this court. On the other hand, numerous authorities, both in this state and elsewhere, arising under facts similar in many respects to those involved in the instant case, attest the principle that in circumstances like those here present a waiver necessarily results.

In the case of Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54, the plaintiff sought to recover damages for an alleged false and fraudulent representation made by the defendant to the plaintiffs with respect to a certain lease executed between the parties. It appears that after the expiration of more than one year subsequent to the time that the plaintiffs acquired knowledge of the fraud practiced upon them, without giving to the defendant any intimation of the alleged fraud, they asked to have the rent of the premises reduced, and later solicited and obtained an extension of the time for the payment of the rent; also, that the plaintiffs failed to pay the rent as in the lease provided. In holding that the plaintiffs had thus waived the fraud, the Supreme Court cites several authorities and lays down the rule that:

> "If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud."

In Doherty v. Bell, 55 Ind. 205, 208, cited in the case of Schmidt v Mesmer, supra, it is said:

> "If the appellee, with full knowledge of all the facts, * * * agreed to pay the note, provided a certain extension of time was allowed him, and in consideration thereof such an extension was given him, we must regard him as having ratified the execution of the note, and as having waived whatever objection or defense he may have had to the manner of its execution."

In Negley v. Lindsay, 67 Pa. 217, 227 (5 Am. Rep. 427), the statement is made, quoting Judge Baldwin in a certain case, that:

> "If, after a party has acquired a knowledge of facts tending to affect a contract with fraud, he offers to perform it, on a condition which he has no right to exact, he thereby waives the fraud, and cannot set it up in an action on the contract. 'This,' said he, 'is a waiver of the objection to the contract on the ground of fraud, if he was informed of all matters which bore upon that question.'"

In the course of the opinion in the case of Burne v. Lee, 156 Cal. 221, 226, 104 P. 438, 440, the following language occurs:

> "* * * One of these limitations is that when a party claiming to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud."

In an action for the foreclosure of a mortgage which was given in a transaction involving an exchange of properties, it was held that where the defendants examined the property before making the exchange, lived on it for several months, and received extensions of time on payments due on the mortgage, they were precluded from raising the question of fraud. Hough v. Ferguson, 36 Cal. App. 120, 171 P. 804.

While, as a matter of first impression, it might seem unreasonable and out of harmony with right thinking that the mere asking of such usual and commonplace favors, as are hereinbefore indicated, would have the effect of working an absolute forfeiture of rights arising from an unquestioned fraudulent act—it must be concluded that, reasoning from the principle announced in each of the foregoing authorities, it would follow that the defendants waived the fraud of the plaintiffs and were estopped from raising the question.

In view of the direct testimony on the trial by defendant L. L. Warner, the question of the admissibility of certain evidence given by defendant George D. Kamphefner, relating to his knowledge of the alleged fraud and of his personal acts and conduct tending to establish a waiver as to defendant L. L. Warner, becomes of no importance. It is apparent that if it be conceded (without deciding the question) that such evidence was inadmissible, nevertheless on other unquestioned evidence the same conclusion would have been reached.

An examination of the record on appeal convinces this court that the evidence adduced on the trial of the action was sufficient to justify each of the findings made by the trial court.

[2] Appellants complain that the trial court made no finding as to the issue of damages alleged to have been suffered by the defendants; but, it is clear that if defendants waived the fraud of the plaintiffs with its resultant damage, no necessity existed for making such finding. No prejudice to any rights of the defendants appearing from the commission of the specified error, defendants are in no position to complain.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

SAN FRANCISCO & S. RY. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5700.)*

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1926. Hearing Granted by Supreme Court Feb. 24, 1927.)

Master and servant ⚷375(1)—Injury received while working outside scope of employment, without employer's consent and not in emergency, held not compensable.

Compensation cannot be allowed for death of captain of ferry, killed while engaged in technical and hazardous occupation of repairing electric lines entirely beyond scope of his employment, without knowledge or consent of employer, and not in emergency case.

Proceeding under the Workmen's Compensation Act for death of Captain Ough, employee, against the San Francisco & Sacramento Railway Company, employer, and others. To review an order of the Industrial Accident Commission awarding compensation for death, the employer and another bring certiorari. Award annulled.

Jesse H. Steinhart and R. P. Wisecarver, both of San Francisco, for petitioners.

G. C. Faulkner and W. F. Beem, both of San Francisco, for respondents.

NOURSE, J. Certiorari to review an award of the Industrial Accident Commission. The petitioner owns and operates the ferryboat Ramon, used for the purpose of transporting its electric trains over the San Joaquin river. These trains are operated by means of an overhead electric trolley terminating at each wharf in a V-shaped contact point, so that when the ferryboat is docked the train can readily take up the electric current and proceed on its way. These contact points had frequently been bent out of place through careless docking of the ferryboat, and the captains had been specifically instructed to "log" the damage and to immediately report it to the line repair staff for repair. Captain Ough was one of three captains working on separate shifts and, as such, was in full charge of the ferryboat during his period of service. One of these contact points

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing granted by Supreme Court February 24, 1927.

having been "jammed," Captain Ough left his boat and went on the wharf to repair it. He failed to taken the precaution of turning off the current, but climbed a ladder to the place where the live wires were attached, and, coming in contact with the current, was throw to the wharf and killed.

At the hearing before the commission the defendant (petitioner herein) contended that, because the work of repairing the electric lines was of a technical and hazardous character, it had provided a specially trained staff of electric linemen for that work; that the captain had been given express orders to call upon these linemen when repairs were needed; and that, when he left his ship and attempted to repair the contact point on the wharf, he was acting beyond the scope of his employment. At the close of the hearing, a continuance was granted at the request of those seeking compensation for the death of the captain to enable them to produce some evidence tending to show that the captain was acting within the scope of his employment when the accident occurred. Some time thereafter the parties reached an agreement of compromise for the sum of $1,000. When this was filed the commission forthwith ordered the cause submitted, and, without notice or hearing, entered judgment against the defendant for the sum of $5,150. A rehearing was denied the defendant, and it prosecutes this application on the ground that there is no evidence to sustain the award.

The evidence is without conflict and shows beyond question that the captain was killed while engaged in work entirely beyond the scope of his employment; that it was done without the knowledge or consent of the employer, and was not a case of emergency which called the captain in his employer's interest to go beyond the scope of his employment. The case is covered by the rule of Williamson v. Industrial Acc. Com., 177 Cal. 715, 718, 171 P. 797, 798, where the Supreme Court say:

> "It would be an unwarranted extension of the statute to give it application to acts done without the knowledge or consent of the employer, which, however, commendable from the viewpoint of loyalty to one's employer, are not only outside of the employee's specific employment and duty, but which are in themselves of such a hazardous character as that the employee ought not to be reasonably expected or required to do them."

The same principle is stated in a different way by Schneider on Workmen's Compensation Law, vol. 1, p. 696, where it is said:

> "Notice must be taken that a factory of today usually includes within the fields of its operations many fairly distinct lines of work, from that of the roustabout engaged in the ordinary labor that almost any one may perform, to that of the expert mechanic, which can be done safely by those only with skill and experience. The difference between these various kinds of work was always recognized by the common law, and it was held to be negligence for the master to require of the servant, without warning and instructing him, the performance of work outside and more dangerous than that which the latter had contracted to perform. Such classification of work exists in the very nature of things, and as much under the statute as at common law. Its recognition is required by any organization of a factory, not only for efficiency, but as well for the purpose of guarding against accident and injury. And if a workman, when there is no emergency, should of his own volition see fit to intermeddle with something entirely outside the work for which he is employed, he ought not to be allowed compensation upon the mere plea that he thought his act would be for the benefit of his employer."

Award annulled.

We concur: LANGDON, P. J.; STURTEVANT, J.

80 Cal. App. 337

WILLETT et al. v. SCHMEISER MFG. CO. et al. (Civ. 5129.)

(District Court of Appeal, First District, Division 1, California. Dec. 17, 1926.)

1. Exceptions, bill of 🔑43(2)—Ignorance of statute shortening time does not excuse neglect to present bill of exceptions within time prescribed (Code Civ. Proc. § 660, as amended by St. 1923, p. 233).

Counsel's ignorance of amendment of Code Civ. Proc. § 660, by St. 1923, p. 233, shortening time for serving and presenting bill of exceptions, cannot be deemed result of mistake, surprise, or inadvertence, excusing neglect to prepare and serve it within time prescribed.

2. Exceptions, bill of 🔑43(2)—Unusual press of business, preventing discovery of statute shortening time for presenting bill of exceptions, is no excuse for noncompliance therewith (Code Civ. Proc. § 660, as amended by St. 1923, p. 233).

Unusual press of business causing counsel's failure to discover amendment to Code Civ. Proc. § 660, by St. 1923, p. 233, shortening time for serving and presenting bill of exceptions, is no legal excuse for failure to comply therewith.

3. Exceptions, bill of 🔑40(7)—Discussion of compromise and failure to object to continuances held not equivalent to stipulation for extension of time to present bill of exceptions.

Discussion of possible compromise of judgment and failure of respondent's counsel to object to continuances *held* not equivalent to stipulation for extension of time to present bill of exceptions.

4. New trial 🔑120—Inability to obtain reporter's transcript in seasonable time held no excuse for failure to present motion for new trial within statutory time (Code Civ. Proc. § 660).

Inability to obtain reporter's transcript of evidence in proper season *held* no excuse for failure to present motion for new trial within time allowed by Code Civ. Proc. § 660, in view of requirement that reporter, failing to transcribe proceedings in time, attend hearing and read notes on request of court or either party.

5. Exceptions, bill of 🔑40(4)—Order, made after statutory period, extending time for settling bill of exceptions, is void, in absence of stipulation.

Appellant has right to have bill of exceptions settled within time limit provided or such further time as court may grant by order made before expiration of such time, and order made after expiration thereof is ineffectual and void, in absence of stipulation of attorneys for parties.

6. Appeal and error 🔑956(2)—Exceptions, bill of 🔑43(2)—Denial of relief from default in not presenting bill of exceptions in time is discretionary and will not be disturbed unless discretion was clearly abused (Code Civ. Proc. §§ 473, 660).

Granting or denying motion, under Code Civ. Proc. § 473, for relief from default in not presenting bill of exceptions within time allowed by section 660, is in trial court's discretion, which will not be interfered with unless clearly abused.

7. Exceptions, bill of 🔑43(2)—Denial of motion for relief from default in not presenting bill of exceptions in time held not abuse of discretion (Code Civ. Proc. § 473, and section 660, as amended by St. 1923, p. 233).

Denial of motion, under Code Civ. Proc. § 473, for relief from default in not presenting bill of exceptions within time allowed by section 660, as amended by St. 1923, p. 233, on ground of mistake and inadvertence in not discovering amendment of statute shortening time because of unusual press of business, *held* not abuse of discretion.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Walter M. Willett and another against the Schmeiser Manufacturing Company and another. From an order denying a motion for relief from a default in not presenting a bill of exceptions within the time allowed by law, plaintiffs appeal. Affirmed.

A. C. Lowell, of San Francisco, for appellants.

Grant & Bailey, of Woodland, for respondents.

CAMPBELL, Justice pro tem. This appeal is from an order of the trial court denying an application made under section 473 of the Code of Civil Procedure to be relieved from a default in failing to present a bill of exceptions within the time allowed by law.

Appellants' motion was made on the following grounds:

> (1) "That through mistake and inadvertence of plaintiffs' counsel they were not advised of the time when plaintiffs' time for serving and presenting such proposed bill of exceptions commenced to run," and (2) "that through mistake and excusable neglect plaintiffs were unable to obtain the reporter's transcript of the testimony taken upon the trial within the time for serving and presenting their proposed bill of exceptions, and were thereby prevented from preparing such proposed bill of exceptions within proper time."

In support of their motion for relief because of the asserted mistake, inadvertence, and excusable neglect of plaintiffs' counsel, the affidavit of such counsel was filed. The substance of this affidavit, after setting forth the professional engagements and press of business of affiant and letters in which respondent's counsel made no objection to the time being extended, is contained in the concluding paragraphs, as follows:

> "That the sole reason for plaintiffs' failure to present their motion for new trial in the above-entitled action within the time allowed by section 660 of the Code of Civil Procedure of the state of California was due to the inability of this affiant to obtain the transcript of the evidence in the trial of said action in proper season, together with the ignorance of affiant as to the change in said section 660 of the Code of Civil Procedure of the state of California, effective August 17, 1923, and that, in turn, affiant's ignorance of the amendment of said section 660 was due to the fact that affiant, at all times since said amendment became effective, has been overburdened with work so that it was impossible for him to properly acquaint himself with the amendments to the laws of California, effective August 17, 1923. That plaintiffs were absolutely unable to serve and present a bill of exceptions earlier than May 10, 1924, owing to the fact that, notwithstanding all affiants' efforts to obtain a transcript taken upon the trial of the action, they were unable to obtain a sufficient or any transcript prior to the 8th day of May, 1924."

Appellants' time for presenting their proposed bill of exceptions expired, under the provisions of section 660 of the Code of Civil Procedure, as amended (St. 1923, p. 233), on March 29, 1924. On April 14, 1924, the trial court made its order extending plaintiffs' time to serve and present to the court for settlement their proposed bill of exceptions, and on July 7, 1924, the court made its order denying plaintiffs' motion for relief from default entered against them for not presenting their proposed bill of exceptions within the time allowed by law. It will be seen from the foregoing that the bill of exceptions was not served nor presented within the time allowed by law, stipulation of the parties, nor by any order of court extending such time, made before the time allowed by law had expired.

[1] The first point urged by appellants, that through mistake and inadvertence they were not advised of the time when their time for serving and presenting the proposed bill of exceptions commenced to run—that is, that because of unusual press of business plaintiffs' counsel did not discover that section 660 of the Code of Civil Procedure had been amended, and the time for serving and presenting the bill of exceptions shortened from three months to two months, is without merit.

> "Ignorance of the time within which a statement or bill of exceptions must be prepared and served cannot be deemed the result of mistake or surprise or inadvertence, and the neglect to prepare and serve it within the time prescribed by the Code is not excusable." Ingrim v. Epperson, 137 Cal. 370, 70 P. 165; Blumer v. Meyhew, 17 Cal. App. 223, 119 P. 202; Kammerer v. Marino, 66 Cal. App. 720, 226 P. 980; Bennett v. Hillman, 37 Cal. App. 586, 174 P. 362; Garroway v. Jennings, 189 Cal. 97, 207 P. 554.

[2] Nor is unusual press of business a legal excuse. To accept this as a legal justification for the failure to comply with the statute would be to discourage diligence in the prosecution of appeals and establish a precedent that might lead to vexatious delays. Erving v. Napa Valley Brewing Co., 16 Cal. App. 43, 116 P. 331; Klarquist v. Security Trust & Sav. Bk., 61 Cal. App. 548, 215 P. 398.

[3] Nor is the fact that there was a possible compromise of the judgment discussed, or that counsel for respondent failed to object to continuances, equivalent to a stipulation for an extension of time. Klarquist v. Security Trust & Sav Bk., supra.

[4, 5] As to the second ground urged by appellants, that they were unable to obtain the reporter's transcript, it is sufficient to say that such transcript is not necessary on motion for a new trial; that, if the phonographic reporter fails to transcribe the proceedings in time, he must, upon request of the court, or either party, attend the hearing and read his notes, or such part thereof as is requested. Code Civ. Proc. § 660. The motion for a new trial, not being made within the two months prescribed by the statute, was, by its terms, automatically denied on March 19th, and the 10 days within which to present the proposed bill of exceptions expired on March 29th, and it was not until May 10th that the proposed bill of exceptions was presented to the clerk for the trial judge and served upon opposing counsel. If the transcript of the testimony could not be had within the 10 days within which the bill of exceptions is required to be served and presented, an order extending the time should have been obtained before the 10 days expired. The party appealing has the right to have his bill of exceptions settled within the time limit provided, and within such further time as the court might grant by an order made before expiration of such time. Tregambo v. Comanche M. &. M. Co., 57 Cal. 501. An order made after the expiration of the statutory period, in the absence of stipulation of the attorneys for the parties, is ineffectual and void. Estate of Clary, 112 Cal. 292, 44 P. 569.

[6] The granting or denying motions of this character is in the discretion of the trial court, and such discretion will not be interfered with and its order reversed unless it is clear that the trial court has abused its discretion. Ingram v. Epperson, 137 Cal. 370, 70 P. 165; Alferitz v. Cahen, 145 Cal. 397, 78 P. 878; Horne v. Standard Auto Sales Co., 62 Cal. App. 478, 216 P. 970. The record here does not clearly show such an abuse of discretion.

[7] Appellants in their brief call our attention to the cases of Nicoll v. Weldon, 130 Cal. 666, 63 P. 63, and Mitchell v. California, etc., S. S. Co., 156 Cal. 576, 105 P. 590, as authority for their contention that, in the instant case, the trial court abused its discretion in denying their application for relief from their default. In Nicoll v. Weldon the court held that the terms imposed by the trial court as a condition to granting a motion of the defendant to set aside a default must, in the absence of a contrary showing, be held to be ample compensation to the plaintiff for any injury he may have suffered by the delay occasioned by the motion, and that the discretion of the trial court is best exercised when it tends to bring about a judgment upon the merits. In Mitchell v. California, etc., S. S. Co. the affidavit of the attorney was to the effect that he was busily engaged and sick a part of the time, and that he relied upon his clerk, who informed him from time to time that he had obtained more time to present his bill of exceptions, and that he believed his subordinate was getting extensions of time from plaintiff attorneys by stipulation, instead of which he had obtained orders from the court and the last order extended the time beyond the 30 days in which the court was permitted to extend the time, without the stipulation of the parties, as provided by section 1054 of the Code of Civil Procedure, and the court held that the mistake of the attorney was one of fact. In the instant case, it will be noted that the time had expired before the matter was in any manner brought to the attention of the court. We cannot say that the trial court abused its discretion in denying appellants' motion. On the contrary, it appears that the court was amply justified in ruling as it did.

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 433

SAN FRANCISCO BREWERIES, Limited, v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5729.)

(District Court of Appeal, First District, Division 2, California. Dec. 24, 1926.)

1. Mandamus 🔑187(9)—It must be assumed in view of allegations that court granted motion to abate, that proper order for abatement was entered.

Where record is silent as to order or judgment, but where petitioner for mandamus alleged that court granted motion to abate action and respondent alleged that court ordered action abated, it must be assumed that proper order for abatement was in fact made and entered.

2. Judgment 🔑217—Judgment abating action is final and terminated action; "final judgment."

Judgment granting motion to abate action *held* "final judgment," terminating action, which court could not thereafter set aside and revive action or set it for further hearing except on motion for new trial or application for relief, under Code Civ. Proc. § 473.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

3. Mandamus 🔑26—Mandamus will not issue to correct errors in passing on questions regularly submitted.

Mandamus cannot be used to correct errors of court in passing on questions regularly submitted in course of judicial proceedings.

4. Mandamus 🔑3(13), 4(1)—Where trial court rendered final judgment, plaintiff's remedy was by mandamus, if appeal or new trial were unavailable (Code Civ. Proc. § 473).

Where judgment abating action was final, it was immaterial whether trial court arrived at correct conclusion, and, if plaintiff could not obtain relief by motion for new trial or under Code Civ. Proc. § 473, its remedy was by appeal and not by mandamus.

5. Corporations 🔑661(6)—Foreign corporation, not having paid taxes after year 1923, held precluded from maintaining action in state courts (St. 1915, p. 422, as amended by St. 1917, p. 370).

Corporation, created under laws of foreign country not having paid state corporation taxes after year 1923, *held,* in view of St. 1915, p. 422, as amended by St. 1917, p. 370, precluded from maintaining action in state courts.

6. Mandamus 🔑187(9)—In absence of contrary testimony, reviewing court must assume that corporation continued to do business while action instituted by it was pending (Code Civ. Proc. § 1963, subd. 32).

Where it was alleged that corporation, organized under laws of foreign country, was doing business in California during 1923, in absence of testimony to contrary, reviewing court must assume, in view of Code Civ. Proc. § 1963, subd. 32, that it continued to do business during years 1924–1926, while action instituted by it was pending in superior court.

7. Evidence 🔑67(1)—Status once established is presumed to remain until contrary appears.

It is a disputable presumption that status once established is presumed to remain until contrary appears.

8. Mandamus 🔑187(9)—Where two grounds for abatement existed, it must be assumed that trial court refused to proceed further on proper and legal grounds.

Where two grounds existed on which court could have abated action instituted by foreign corporation for failure to comply with St. 1923, p. 1034, and to pay taxes, if proofs warranted, and evidence is not reported, it must be assumed that court refused to proceed further on proper and legal grounds.

Original application for writ of mandate by the San Francisco Breweries, Limited, a corporation, against the Superior Court in and for the City and County of San Francisco and another. Writ denied.

L. M. Hoefler, Finlay Cook, and C. K. Bonestell, all of San Francisco, for petitioner.

Joseph E. Bien and Werner Olds, both of San Francisco, for respondents.

PRESTON, Presiding Justice pro tem. This is an original proceeding in mandamus. The petitioner seeks an order of this court compelling the superior court of the city and county of San Francisco and Hon. J. J. Van Nostrand, judge thereof, to set for further hearing and trial the case of San Francisco Breweries, Limited, a Corporation, Plaintiff, v. Leon Morgen, Defendant, now pending in said superior court, and numbered 140167 in the files of said court.

It appears from the record before us that petitioner herein, the San Francisco Breweries, Limited, is, and was during all of the times herein mentioned, a corporation formed and existing under and by virtue of the laws of the United Kingdom of Great Britain and Ireland.

On October 3, 1923, the petitioner herein, as plaintiff, commenced an action in the superior court of the city and county of San Francisco against one Leon Morgen, defendant, to recover the sum of $44,800, claimed to be due as rent of certain premises in San Francisco, owned by the petitioner herein, and claimed to have been leased to the said defendant Morgen.

Thereafter, and on the 17th day of December, 1923, the defendant Morgen served and filed his answer to the complaint in said action, in which he denied said indebtedness and pleaded the statute of limitations against plaintiff's cause of action. On the 14th of April, 1924, the trial of said action was commenced in said superior court before the above-named judge thereof, sitting without a jury, and certain evidence was offered and received on behalf of the said plaintiff therein, and thereafter the trial was continued from time to time until the 15th of June, 1925, at which time the plaintiff therein (the petitioner here) was granted leave to amend its said complaint to conform to the proofs in certain particulars. Thereafter, on the 18th of June, 1925, the trial of said action was again resumed and said plaintiff therein, on the same day, rested its case. A motion for a nonsuit was made by said defendant Morgen and denied by the court. Immediately after the denial of said nonsuit the defendant Morgen was granted leave to file an amended answer and on the 29th of June, 1925, the said defendant Morgen served and filed his said amended answer in said action. On December 10, 1925, the trial of said action was again resumed, at which time the defendant Morgen moved the court to abate the said action. Thereafter, and on March 10, 1926, the court granted the motion to abate said action.

Petitioner and respondent do not agree as to what evidence was offered or received in support of or in opposition to the motion made by the defendant Morgen to abate the action; neither do they agree upon what ground the court granted the motion. The petitioner contends that the plea in abatement was granted upon the ground that plaintiff was a foreign corporation and had failed to pay the license tax to the state of California for the year beginning January 1, 1924, and had thereby forfeited its right to maintain said action, and in support of this motion petitioner contends that the defendant Morgen presented a certificate from the secretary of state of the state of California, showing that the San Francisco Breweries, Limited, the petitioner herein and the plaintiff in said action, had been recorded by the secretary of state as "suspended" for failure to pay its license tax for the year 1924, in accordance with the provisions of section 9 of an act of the Legislature of the state of California, approved May 10, 1915, and amended in 1917 and 1923, prescribing terms and conditions upon which corporations may transact business in this state, and providing penalties and forfeitures for noncompliance.

Petitioner does not refer us, either in its petition or briefs, to any other evidence, nor does it state that no other testimony was in fact taken on said motion. Neither are we furnished with a copy of the said certificate from the secretary of state. The respondent, on the other hand, contends that *other* evidence was actually taken upon the hearing of the said motion, and that the motion to abate said action, made by defendant Morgen on December 10, 1925, was a motion made under the third and last defense pleaded in the answer on file in said action in the court below, which defense as set forth is as follows:

> "That plaintiff is a foreign corporation, to wit, is a corporation organized under and by virtue of the laws of the United Kingdom of Great Britain and Ireland; that plaintiff is not authorized under the laws of the state of California, and particularly under chapter 215 of the Statutes of 1917, p. 371 et seq. thereof, or any amendments thereof or otherwise, to maintain this action; that plaintiff's charter has, for more than one year last past, been suspended; that Thomas Alton, who was designated as the agent of the plaintiff upon whom process issued by authority of law may be served, died approximately in the year 1922 and prior to the commencement of this action, and plaintiff did not, within 40 days after his death, or at all, make a new designation of an agent and has not now such a designated agent in the state of California; that the transaction upon which suit was brought grew out of business done by plaintiff in the state of California; and that plaintiff, as alleged in said complaint, is doing business in the state of California."

The respondent further contends that the court, after an examination of the pleadings and records in said cause, and after the submission of said motion on proofs, on March 10, 1926, granted said motion for the abatement of said action. The respondent, however, does not furnish us with a record of what evidence it claims was actually offered and received on behalf of the motion.

The petitioner herein, in paragraph VII of the petition, referring to the motion of defendant to abate the action, alleges:

> "That thereafter, to wit, on the 10th day of March, 1926, the said court granted said motion of said defendant for the abatement of said action."

Thereafter, on the 9th day of April, 1926, the petitioner herein, as such plaintiff, moved the said court for an order setting said action down for further hearing and trial, and the court denied said motion and refused further hearing or trial of said action, and at that time signed and filed the following order, to wit:

> "The motion of the plaintiff herein for an order setting this action on the calendar for further hearing this day coming on regularly for hearing in open court upon notice duly given, Finlay Cook, Esq., and C. K. Bonestell, Esq., appearing as attorneys for the plaintiff, and Werner Olds, Esq., appearing as attorney for the defendant, and it appearing to the satisfaction of the court that, upon the trial of this cause heretofore had, defendant, after plaintiff had presented its evidence and had rested its case, moved the court to abate the action on the ground that plaintiff, a foreign corporation, had failed to pay state license tax and could therefore no longer maintain the action, and that the court had thereupon granted said motion; wherefore it is ordered, that plaintiff's said motion to set said cause for further trial and hearing be and the same is hereby denied for lack of jurisdiction in the court to proceed further with said action."

No testimony was offered by either side on the hearing before this court. Under this condition of the record before us petitioner contends that the trial court has refused to make any order or render any judgment in said action of San Francisco Breweries, Limited, against Leon Morgen.

[1] Thus we have a situation presented where the record is silent as to what order or judgment the trial court did actually make, if it made any, but where petitioner alleges, in its petition for writ of mandate, that the trial court *granted defendant's motion for the abatement of said action*, and the respondent does not deny that the court made such an order, but affirmatively alleges that the trial court *did make an order abating said action*.

[2] It seems clear that under such a condition we must take the allegations of the pleadings as stating the facts and assume that a proper order for the abatement of said action was in fact made and entered by the court. Therefore it was a final judgment and terminated the action, and the trial court had therefore no authority to set aside said order or to revive said action, or set it for further hearing, except upon motion for a new trial, or upon application for relief under section 473 of the Code of Civil Procedure. Watterson v. Owens River Canal Co., 190 Cal. 88, 210 P. 625, and cases therein cited. Petitioner did not attempt to avail itself of either of these remedies, but merely moved the court to set the cause for further trial, with the order of abatement still in force. This motion the court had no power to grant, and it was properly denied.

[3, 4] The rule is well established that the writ of mandamus cannot be used to correct the errors of a court in passing upon questions regularly submitted to it in the course of judicial proceedings. Gesford v. Superior Court, 114 Cal. 466, 46 P. 383; Lapique v. Superior Court, 24 Cal. App. 314, 141 P. 223. It is therefore immaterial, as far as this proceeding is concerned, whether the trial court arrived at a correct or an erroneous conclusion, so long as it rendered a judgment, and, if petitioner could not obtain relief by a motion for a new trial, or by a motion under section 473 of the Code of Civil Procedure, its remedy was by an appeal, and mandamus will not lie.

[5] Irrespective of whether or not the trial court did in fact make an order abating said action, under the record before us, we are of the opinion that such an order should have been made for at least two reasons: First, it is alleged in both counts of the original complaint and in both counts of the amended complaint of plaintiff (petitioner here) that plaintiff was a corporation created and existing under the laws of the United Kingdom of Great Britain and Ireland, and *lawfully* doing business in the state of California. Defendant Morgen answered this complaint and admitted that plaintiff was a corporation created under the laws of the United Kingdom of Great Britain and Ireland, and doing business in the state of California, but *denied* that it was doing business *lawfully* in the state of California, and further alleged that said corporation had not complied with the laws of this state to entitle a foreign corporation to do intrastate business in the state of California.

[6, 7] These pleadings therefore establish two things without the necessity of any proof, viz.: (a) That the San Francisco Breweries, Limited, is a foreign corporation created under the laws of the United Kingdom of Great Britain and Ireland; (b) that it was doing business in the state of California during the year 1923, when it commenced the action against Leon Morgen in the superior court of the city and county of San Francisco. In the absence of any testimony to the contrary, we must assume that said corporation continued to do business in California during the years 1924, 1925, and 1926, while said action was pending in said superior court; for it is a well-known disputable presumption of law that a status once established is presumed to remain until the contrary appears (Kidder v. Stevens, 60 Cal. 414; Eltzroth v. Ryan, 89 Cal. 140, 26 P. 647; Metteer v. Smith, 156 Cal. 572, 105 P. 735), or, as expressed in section 1963, subd. 32, of the Code of Civil Procedure, "that a thing once proved to exist continues as long as is usual with things of that nature." Indulging, therefore, in this presumption, it follows that the San Francisco Breweries, Limited, was doing business in the state of California for the years 1924, 1925, and 1926, and the only controverted issue would be whether said corporation was doing business *lawfully* during this time. On this question it is admitted by the said corporation that it never paid any corporation taxes to the state of California after the year 1923. It follows then that, under these presumptions and admissions in the pleadings, said corporation was doing business in California when the trial court refused to proceed with the trial of San Francisco Breweries, Limited, v. Morgen in direct contravention of the statute (Stats. 1915, p. 422, and amendments thereto; Stats. 1917, p. 370), and should be precluded from maintaining the action in the court below. On this ground alone the superior court might properly have granted the order of abatement.

[8] Second. One of the special defenses set forth by defendant Morgen in his verified answer, which answer is made part of the petition herein, is that one Thomas Alton, who was designated as the agent of the petitioner upon whom process might be served, died in the year 1922, and that petitioner failed to designate another agent within 40 days and has never made, and has not now, a designated agent in the state of California. Section 1 of the act prescribing terms and conditions upon which foreign corporations may transact business in this state, and pro-

viding penalties and forfeitures for noncompliance, as amended in 1923 (Stats. 1923, p. 1034), provides in part that every foreign corporation shall file with the secretary of state a designation of some person residing within this state upon whom process may be served as the representative of such corporation, and, within 40 days after the death or removal from the state of any person so designated, such corporation must make a new designation, or *be subject to the provisions and penalties of this section.* One of the provisions of said section is that any foreign corporation that has not complied with said section shall not be entitled to the benefits thereof, nor can any such foreign corporation maintain or defend any action or proceeding concerning its property in this state or any intrastate business or transaction in any court of this state.

There were therefore at least two grounds upon which the court might have abated the action, if the proofs warranted, and, the evidence not being before us, we must assume that the trial court refused to proceed further with the trial of said action upon proper and legal grounds.

For the reasons stated, we think the writ of mandate should be denied, and it is so ordered.

We concur: STURTEVANT, J.; NOURSE, J.

80 Cal. App. 411

PATTERSON et al. v. SOUTHERN TRUST CO. et al. (Civ. 5582.)*

(District Court of Appeal, First District, Division 2, California. Dec. 23, 1926.)

1. Mines and minerals 🔑55(8)—Plaintiffs had burden to prove their title and invalidity of mineral rights reservations in deed of grantor bank (Bank Act, §§ 61, 62).

Where plaintiffs sought to quiet title to entire estate and cancel reservations of mineral rights by grantor bank, they had burden to show both their title and invalidity of reservations, under Bank Act, §§ 61, 62 (St. 1919, pp. 631, 641).

2. Evidence 🔑60—In absence of evidence to contrary, it must be presumed that grantor bank, in reserving minerals, observed law (Bank Act, §§ 61, 62).

In absence of proof that reservation of minerals, in deed of grantor bank, was in violation of Bank Act, §§ 61, 62 (St. 1919, pp. 631, 641), it must be presumed that law has been observed and regular course of business followed.

3. Evidence 🔑60, 69—Grantor bank presumed to have possessed land legally and to have reserved mineral rights which it could take and hold (Bank Act, §§ 61, 62).

In view of plaintiffs' failure to prove that grantor bank reserved minerals illegally and of presumption that regular course of business was followed, it must be assumed that grantor possessed land, in first instance, legally, and reserved to itself mineral rights which, under Bank Act, §§ 61, 62 (St. 1919, pp. 631, 641), it was entitled to take and hold.

4. Banks and banking 🔑295—Where savings bank acquired land within terms of Bank Act, provision declaring forfeiture must be pointed out before forfeiture can be decreed.

When savings bank, having acquired real property within terms of Bank Act (St. 1919, p. 622), retains possession beyond time permitted, it is necessary to point to some provision of act declaring forfeiture of rights in property so held, before court will decree forfeiture.

5. Mines and minerals 🔑55(8)—Action to cancel savings bank's reservation of mineral rights held without equity.

Action by purchasers of land to quiet title and cancel reservation of mineral rights by grantors, because it would be of material property benefit to plaintiffs, *held* without equity.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by James M. Patterson and others against the Southern Trust Company and another. From judgment for defendants on the complaint, and for defendant Security Trust & Savings Bank on its cross-complaint, plaintiffs appeal. Affirmed.

Thomas K. Case, of Los Angeles, for appellants.

Newlin & Ashburn, of Los Angeles (Raymond L. Haight, of Los Angeles, of counsel), for respondent.

NOURSE, J. Plaintiffs sued to quiet title to several separate tracts of land situated in the Antelope valley, Los Angeles county. The amended complaint alleged that the plaintiffs had acquired title to their respective holdings through conveyances from the Southern Trust Company, the predecessor in interest of the Security Trust & Savings Bank. It was also alleged that in all the deeds of conveyance to these plaintiffs a reservation was inserted expressly excepting out of the conveyance all minerals and rights in relation thereto, including oil, petroleum, asphaltum, and like substances and the right to mine, dig, or bore for the same. The theory of the complaint was that the reservation deteriorated the value of the plaintiffs' holdings, and the prayer was that the reservation be declared void and that the defendant be restrained from entering upon the property for any purposes under the reservation. The defendant Security Trust & Savings Bank filed its answer and cross-complaint, setting up its title to the minerals and the right to remove them, as found in the reservation contained in the deeds of conveyance, and asking for a declaratory judgment in its favor based upon this reservation. The trial was had before

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Hearing denied by Supreme Court February 21, the court without a jury, and resulted in a judgment in favor of the defendants on plaintiffs' complaint and in favor of the defendant Security Trust & Savings Bank upon its cross-complaint. The court expressly found that the rights of the respective plaintiffs in the properties described were subject to the reservation contained in the deeds of conveyance. From this judgment, the plaintiffs have appealed upon a typewritten record.

[1, 2] The grounds of appeal are variously stated under separate headings, but, in fact, present but one question and that is, may a grantee question his grantor's title to his own benefit? The position of the appellants is that, under certain provisions of the Bank Act under which the respondent has been incorporated, the holding of real property for investment purposes is prohibited and the holding of mineral and oil rights is not expressly permitted; therefore, the appellants say that the respondent acted beyond its power when it acquired these lands, in the first instance, including the mineral rights, and that when it conveyed to the appellants it acted beyond its power in reserving to itself these mineral rights. The appellants have cited section 61 and section 62 of the Bank Act (Stats. 1919, pp. 631, 641). Section 61 authorizes savings banks to purchase, hold, and convey such real property as may have been mortgaged, pledged, or conveyed to it in trust, and such as may have been purchased at sales under pledge, mortgage, or deed of trust. Section 62 of the act prohibits a savings bank from directly or indirectly dealing or trading in real property in any other case than as authorized by the act. Because of these provisions, the appellants argue that, the respondent having failed to show that it had acquired the property in trust or at a sale under the terms provided in the act, it must have acquired the property illegally and its acts in retaining possession thereof and in reserving the mineral rights therein were ultra vires. The weakness of appellants' position is that, having sought to quiet title to the entire estate and having prayed for a decree canceling the reservations, the burden of proof was on them to show both their title and the invalidity of the reservations. They have failed to bring any evidence before this court to support their allegations in either respect. On the other hand, in the absence of evidence to the contrary, we must presume that the law has been observed and that the regular course of business has been followed.

[3] In view of these presumptions, it is necessary to assume that the respondent came into the possession of the property legally, in the first instance (that it acquired the property either in trust or in satisfaction of money loaned under pledge, mortgage, or deed of trust), and that, when it conveyed to the appellants, it passed a good title and reserved to itself a right which, under the provisions of the Bank Act, it was entitled to take and hold.

[4] It may be that, on proper showing, the rights awarded to the respondent under the reservations are such as must be disposed of under section 54 of the Bank Act (added by St. 1913, p. 136, amended by St. 1917, p. 622). But this is a question which is not raised on this appeal. Assuming that the appellants, as grantees from the respondent, could raise the question of "ultra vires" in the holding of the mineral rights by the respondent, the remedy under the Bank Act would be a sale of the mineral rights by the respondent, and not a forfeiture thereof to its next door neighbor. Plainly, the provisions of the Bank Act were written for the benefit and protection of the stockholders and creditors of the bank, and, when the bank, having acquired real property within the terms of the act, retains possession thereof beyond the time permitted by the act, it would be necessary to point to some express provision of the law declaring a forfeiture of the rights in the property so held before a court would be justified in decreeing a forfeiture.

[5] The case here is simply one of a failure of proof to show any measure of equity in appellants' plea. They asked to quiet title to an interest in property which they have never acquired and have asked that the property of the bank be taken from the bank and given to them, not because they are entitled to it upon any rule of law or equity, but because it would be of material property benefit to them if this could be done. Their case is without equity, and judgment properly went for the respondent.

Judgment affirmed.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 526

Ex parte GOEPPNER. (Cr. 1371.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1926.)

Adoption ⚿14—Adoption of minor child by Adelaine Howard does not give Adelaine Howat right to retain custody of child as against natural mother.

In habeas corpus proceedings by natural mother to recover possession of child in care and custody of one Adelaine Howat, latter has no right to retain custody by reason of adoption proceedings relating only to one Adelaine Howard, in absence of any explanation as to discrepancy in names.

Application for a writ of habeas corpus to recover custody and possession of Audrey Madeline Goeppner, also known as Audrey Madeline Howard, a minor child. Writ granted, with directions.

Lelia R. Leep and Robert L. Levy, both of San Francisco, for petitioner.

John D. Harloe, of San Francisco, for respondent.

NOURSE, J. The petitioner sues for a writ of habeas corpus to recover the custody and possession of her minor child, Audrey Madeline Goeppner. In her petition she alleges that the child is illegally and forcibly detained by one Adeline Howat; that the petitioner is the natural mother of said child, which was born out of wedlock; that she has at no time abandoned the child, but that, at all times, except when prevented by said Adeline Howat, said child has been in the actual care, custody, and control of the petitioner.

A return to the writ issued herein has been filed by the person who has the present custody of the child, and who will hereafter be referred to as the respondent. This return reads in part as follows:

> "Comes now Adelaine Howat, also known as Adelaine Howard, and makes this return."

None of the allegations of the petition is denied, but it is alleged that on March 25, 1924, Adelaine Howat, also known as Adelaine Howard, duly adopted the child by proceedings in the superior court for that purpose. A copy of these proceedings was not attached to the return, as required by section 1480 of the Penal Code, but the original proceedings were exhibited at the time of the oral argument.

From this record it appears that on March 20, 1924, Adeline Howard filed her petition for leave to adopt the minor child in which she alleged that written consents of her husband and of the natural mother of the child to the adoption of the child in accordance with the petition had been filed. As a part of the record we find a paper signed by Karl J. Howard, as husband of Adeline Howard, consenting to the adoption of the child by Adeline Howard, and another paper signed by Elva Goeppner consenting to the adoption of the child in accordance with the petition. The order of adoption recites the filing of the petition by Adeline Howard and the written consent of Karl Howard and Elvie Goeppner, and orders that Adeline Howard adopt the said child, and that the said Adeline Howard and said child shall thereafter bear toward each other the relation of parent and child. No explanation is made of the use of these various names—Adelaine and Adeline Howat, and Adelaine and Adeline Howard, or Karl Howat, and Karl Howard and Karl J. Howard, or Elva Goeppner and Elvie Goeppner. In the argument the petitioner claims that there are no such persons as Adeline Howard or Karl Howard, but that the true name of the person restraining the liberty of the minor is Adeline Howat, and that the true name of her husband is Karl Howat. The only answer of the respondent is that the English pronunciation of the name Howat is Howard, but of this fact there is neither allegation nor proof.

The respondent relies solely upon the adoption proceedings in justification of her retention of the child from its natural mother, but, as we have seen, those proceedings related to one Adeline Howard only. Whether Adeline Howat and Adeline Howard are one and the same person or whether Adeline Howard is a purely fictitious person, or whether the use of the name Adeline Howard was in furtherance of a plan conceived to practice a fraud upon the court and upon the adopted child are all questions which are not necessary to be decided at this time. It is sufficient to say that, upon the admitted facts before us, the respondent who now has the custody and control of the child has failed to show any right to retain that custody. The case is on a line with Ex parte Clarke, 87 Cal. 638, 25 P 967, except that in the Clarke Case the Supreme Court held that the order of adoption was void because of errors in the names of the parties involved, which to our minds were not as flagrant errors as appear here.

It is ordered that the petition be granted and that the respondent Adeline Howat forthwith restore to the petitioner herein the care, custody, and control of the minor child known as Audrey Madeline Goeppner, and also known as Audrey Madeline Howard.

We concur: LANGDON, P. J.; STURTEVANT, J.

80 Cal. App. 410

Ex parte POVLITZKI. (Cr. 1461.)

(District Court of Appeal, Second District, Division 2, California. Dec. 22, 1926.)

Husband and wife ⚷313—Prosecution of husband for failure to provide for wife must show wife had no independent means (Pen. Code, § 270[a]).

Prosecution of husband for failure to provide for wife must show that wife had no means of support, other than that derived from husband, whereby to provide herself with necessaries, contemplated by Pen. Code, § 270(a).

Original application by A. W. Povlitzki for writ of habeas corpus to be released from custody on commitment for failure to support his wife. Petitioner discharged.

John R. Stowe, of San Luis Obispo, for petitioner.

H. J. Dubin, of San Luis Obispo, for respondent.

WORKS, P. J. This is an application for the writ of habeas corpus. The petitioner is detained under a commitment issued pursuant to a preliminary examination upon a charge of failure to provide for his wife, under the provisions of section 270 (a) of the Penal Code. Several points are made by the petitioner, but we deem it necessary to refer to but one of them. The rule is that the prosecution in such a case must show that the wife has no means of support, other than that to be derived from her husband, whereby to provide herself with the necessaries contemplated by the section. People v. Smith, 31 Cal. App. 736, 161 P. 753. The testimony at the preliminary examination in the present instance shows a failure of evidence upon that point. There is, in truth, affirmative evidence in the record which tends to show that the wife did have independent means. Petitioner was therefore committed by the magistrate without probable cause.

There is a statement in the petition that a charge is pending against petitioner for a failure to provide for his children, but there is no showing, either in the petition or in the return, that he either is or is not held in custody pursuant to that charge. In dealing with the question before us, therefore, we contemplate only the commitment issued pursuant to the preliminary examination already mentioned, and not any commitment which may have been issued upon the charge as to the children.

The petitioner is discharged from custody.

We concur: CRAIG, J.; THOMPSON, J.

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80 Cal. App. 528

PEOPLE v. RAMOS. (Cr. 1421.)

(District Court of Appeal, Second District, Division 1. California. Dec. 30. 1926.)

1. Criminal law 🔑965—"New trial," under statute, held trial upon issues of fact (Pen. Code, §§ 1179, 1202).

"New trial," referred to in Pen. Code, § 1202, is a trial upon issues of fact, in view of section 1179.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Trial.]

2. Criminal law 🔑913(1)—Defendant, awaiting judgment under plea of guilty, is not entitled to new trial (Pen. Code, § 1202).

Right to new trial, as given by Pen. Code, § 1202, does not apply when defendant is awaiting judgment under plea of guilty.

3. Criminal law 🔑977(3)—Failure to impose sentence within time limit does not affect jurisdiction of court to impose sentence (Pen. Code, § 1191.)

Failure to impose sentence within time limited by Pen. Code, § 1191, does not affect jurisdiction of court to impose sentence.

4. Criminal law 🔑1176—Denial of new trial after plea of guilty held procedural error, not resulting in reversal unless miscarriage of justice was shown.

Even if court's denial of motion for new trial when plea of guilty had been entered was error, such procedural error was not grounds for reversal unless error resulted in miscarriage of justice.

5. Criminal law 🔑982—Where probation order was combined with void order directing defendant to remain in sheriff's custody, such order was severable, making probation order valid.

Where defendant pleaded guilty and attempt was made to combine with probation order an order retaining defendant in custody of sheriff, latter portion, being void, would be separated from valid probation order; defendant having violated conditions of probation after being placed thereon after pleading guilty to burglary.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Joseph Ramos was convicted of burglary, and he appeals. Affirmed.

S. S. Hahn and M. H. Silverberg, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

CONREY, P. J. On an information charging defendant with the crime of burglary, he pleaded guilty, and was permitted to file an application for probation. Plea of guilty was entered on the 22d day of August, 1924. Thereafter, in due course, the court on October 14, 1924, entered its order as follows:

> "That proceedings herein be suspended and the defendant granted probation for the term of three years, under the supervision of the probation officer and subject to the terms and conditions stated by the court. The first nine months of said probation period, defendant is to be in the custody of the sheriff of the county of Los Angeles, during which time he shall be permitted to work on the public highways of Los Angeles county."

On May 28, 1925, the court made the following order:

> "Order of October 14, 1924, is now modified as follows: Defendant is ordered released on probation under the terms and conditions stated by the court."

On August 6, 1926, defendant was brought before the court pursuant to suggestion made that, since his release on probation the defendant had violated the conditions of his probation. The defendant by his counsel then suggested that he was not legally on probation, and asked permission to file an application for a new trial. The application was filed, if we may so infer from the judge's statement: "So far as the written motion is concerned it may be deemed filed." The motion itself is not in the record. The court thereupon rendered judgment that the defendant be imprisoned in the state prison of the state of California, at San Quentin, for the term prescribed by law. The defendant appealed from the judgment, and from the order denying his motion for a new trial. In his "statement of grounds of appeal under Penal Code, §§ 1246 and 1247," defendant specified that the court had no jurisdiction to pronounce judgment, for the reason that defendant was not sentenced within the time provided under sections 1191 and 1202 of the Penal Code, and that the court erred in denying his motion and request for a new trial.

Section 1191 of the Penal Code states and limits the time for pronouncing judgment, and defines the rules governing extensions of time for pronouncing judgment. Section 1202, Penal Code, provides, among other things, that, if the judgment be not rendered or pronounced within the time fixed by the court, or to which it is continued under the provisions of section 1191, the defendant shall be entitled to a new trial.

[1, 2] The first question which suggests itself relates to the meaning and effect of the foregoing provision for a new trial, in a case where there has been no first trial. This, of course, always is the condition of the case when a defendant has pleaded guilty. The "new trial" referred to in section 1202 is a trial upon issues of fact. It seems to be axiomatic that on such plea there are no issues of fact, and that there is nothing for a jury to try or to decide. "A new trial is a reexamination of the issue in the same court, before another jury, after a verdict has been given." Pen. Code, § 1179. We conclude that the right to a new trial, as given by said section 1202, does not apply when the defendant is awaiting judgment under a plea of guilty.

[3, 4] Further, it is now settled by decision, that failure to impose sentence within the time limited by section 1191, Penal Code, does not affect the jurisdiction of the court to impose sentence. Rankin v. Superior Court, 157 Cal. 189, 106 P. 718. And, even if it were conceded that the defendant was entitled to a new trial, the court's denial thereof was an error in a matter of procedure. Such error is not a ground for reversal, unless the error has resulted in a miscarriage of justice. People v. Zuvela, 191 Cal. 223, 215 P. 907; People v. Haines, 64 Cal. App. 628, 222 P. 183.

[5] There is only one other suggested reason offered as a basis for the claim that on August 6, 1926, the court had lost jurisdiction to sentence the defendant. This relates to that part of the record which shows an attempt to combine with a probation order an order retaining the defendant in the custody of the sheriff during a part of the probationary period. On the authority of People v. Mendosa, 178 Cal. 509, 173 P. 998, this court in two of its decisions held that the superior court is without authority to suspend execution of sentence or imposition of sentence without admitting the defendant to probation. In re Clark, 70 Cal. App. 643, 234 P. 109; In re Howard, 72 Cal. App. 374, 237 P. 406. In those cases the orders which were in question therein were construed to be orders not made as probation orders. In the Clark Case, we said that for two sufficient reasons the order was not an order admitting to probation in this:

> "First, that the order itself states that the application for probation is denied; and, second, because it attempts to retain the defendant in actual custody."

We are satisfied, however, that the mere attempt by the court to retain the defendant in custody of the sheriff in the manner shown in the present case is not alone sufficient to affect the validity of the entire order, in the face of the plain and positive provisions of the order granting probation to the defendant for the period of three years. The void portion of the order, directing that defendant remain in the custody of the sheriff during the first nine months of the probation period, is severable from the order admitting to probation which was the principal element of the entire order as made by the court. As we have shown in the foregoing statement of facts, the order of May 28, 1925, was made within that period of nine months, and the defendant was thereupon released from custody. In harmony with the decisions above mentioned, this is exactly what the court could have been required to do. In the Matter of Fink (Cal. App.) 250 P. 714 (Div. 2, Second Dist.), the trial court had attempted to include in a probation order an order that the defendant be kept in the psychopathic ward of the county farm of Los Angeles county. On habeas corpus, it was ordered that the defendant be discharged from confinement in the county farm, "and remain in the charge and under the supervision of the probation officer subject to the lawful orders of the superior court."

So it appears that from and after the 28th day of May, 1925, the defendant was regularly on probation pursuant to an order suspending proceedings against him and granting him probation for the term of three years; that, while thus at large, and within the unexpired term of his probation, the defendant violated the conditions thereof. This being so, and the facts having been duly determined by the court below, the validity of the judgment seems to be clearly established.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

80 Cal. App. 494

LAMBORN v. LAMBORN. (Civ. 3186.)

(District Court of Appeal, Third District, California. Dec. 28, 1926.)

1. Evidence 🔑14—It is common knowledge that many people, suffering from some ailment and receiving treatment, continue usual employment.

It is common knowledge that many people, suffering from some ailment for which they are receiving treatment, continue their usual employment for considerable periods at a time.

2. Divorce 🔑245(3)—Evidence, on question of alimony modification, that former wife was incapacitated as professional nurse, did not require conclusion that she could not do other work.

Evidence, in proceeding for modification of alimony award, that former wife had phlebitis which prevented her following her profession as nurse, did not require conclusion on part of trial court that she was unable to earn money in other fields of labor.

3. Divorce 🔑240(2)—Where former husband is earning wages by daily labor, alimony should not be awarded in sum inducing idleness on part of former wife.

Trial court, in awarding alimony, should not do so in sum inducing idleness on part of former wife, where former husband is earning wages by daily labor.

4. Divorce 🔑245(2)—In modifying alimony award court could consider wish of husband to remarry.

In modifying alimony award, trial court was justified in considering husband's wish to remarry, and that he should not be so crippled in his finances that another home could not be established, unless it appeared that necessities of former wife compelled such course.

5. Divorce 🔑286—Appellate court could not interfere with trial court's discretion in modifying alimony award, in absence of abuse of discretion.

Whether divorced wife was able to become self-supporting was equitable matter for trial court to weigh, in considering modification of alimony award, and appellate court could not interfere, in absence of manifest abuse of discretion.

6. Divorce 🔑231 — Word "circumstances," used in statute relating to alimony, includes everything having legitimate bearing upon present and prospective matters affecting lives of both parties (Civ. Code, § 139).

Word "circumstances," as used in Civ. Code, § 139, providing for suitable allowance for wife in divorce action for such period as seems just, having regard to "circumstances" of parties, includes practically everything which has legitimate bearing on present and prospective matters relating to lives of both parties.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Circumstances.]

7. Divorce 🔑245(3)—Modification of alimony award from $45 to $30 per month held not abuse of discretion, in view of evidence.

Reducing amount of alimony from $45 to $30 per month *held* not abuse of discretion, in view of evidence that husband wished to remarry, and that wife had not been working.

Appeal from Superior Court, Alameda County; Dudley Kinsel, Judge.

Suit for divorce by Frances G. Lamborn against Ervin H. Lamborn. From an order reducing alimony after final decree, plaintiff appeals. Affirmed.

See, also, 190 Cal. 794, 214 P. 862.

Dixon L. Phillips, of Oakland (Esther B. Phillips, of San Francisco, of counsel), for appellant.

David D. Oliphant, Jr., and Hayes, Oliphant & Dukette, all of Oakland, for respondent.

PLUMMER, J. This is an appeal by the plaintiff from an order of the superior court of the county of Alameda, made and entered on the 6th day of June, 1921, reducing the amount of alimony from $45 to $30 per month, the former being the amount allowed in the interlocutory decree of divorce entered in said cause on the 19th day of May, 1919, and continued in effect in the final decree of divorce made and entered on the 21st day of May, 1920. The order appealed from bears date the 6th day of June, 1921. The bill of exceptions herein was settled and allowed by the judge of the superior court on the 27th day of September, 1921. The printed transcript on appeal was certified to by the county clerk of Alameda county and ex officio clerk of said court on the 9th day of August, 1924. Appellant's reply brief in this cause was filed on the 28th day of December, 1925. The appeal, having been taken to the Supreme Court, was by the Supreme Court, in 1926, transferred to this court for hearing and determination, and was placed upon the calendar for hearing on December 7, 1926. Whether the issues involved have now become moot after the lapse of 5½ years, we are unable to ascertain from the record, but, whatever the cause of the delay in reaching a final decision in this matter, the dates which we have set forth disclose the fact that whatever laches there may have been in reaching a final conclusion, they are not attributable to the District Court of Appeal.

The order reducing the alimony from $45 to $30 per month was made upon the application of the defendant and after hearing, wherein testimony orally and by way of affidavits was admitted. The transcript shows that the respondent herein was then of the age of 33 years, was an employee of the Atchison, Topeka & Santa Fé Railway, earning a sum slightly less than $160 per month; that the respondent desired to marry again; that the plaintiff in said action was able to earn money for her own support; that the decree was oppressive and deprived the petitioner herein of money for his own needs; and that the health of the plaintiff, the appellant in this proceeding, and her professional training enabled her to earn money for her own support.

The testimony taken upon the hearing shows that the defendant was earning the sum per month hereinbefore stated; that the plaintiff was a trained nurse, but, owing to the fact that she was suffering from an ailment known as phlebitis, she was unable to follow her profession or calling as a trained nurse; and that she was unable to remain upon her feet for any considerable length of time. In other particulars, the record would lead to the conclusion that the appellant herein was an ordinary healthful person. The record also discloses that during the examination, and while the appellant was upon the witness stand, the trial court inquired whether the appellant had at any time since the month of May, 1919, endeavored to find employment, to which the appellant answered, "No." The appellant was then asked by the court why she had not sought employment, to which the appellant replied: That she did not think it was necessary; that Judge Brown had so stated at the trial; and she did not feel like doing so; that since February, 1920, she had been incapacitated from following her profession as a trained nurse because of phlebitis, and, further, in reply to a question by the trial court as to why she had not sought other employment, the appellant stated that she had not done so for the reason that she did not feel like it. The affidavits of the physicians who testified in the matter were simply to the effect that the ailment mentioned incapacitated the plaintiff from her professional work as a trained nurse. There is also an affidavit by a sister of the appellant in this suit, introduced in evidence, to the effect that the appellant had been ill for some months.

The trial court had the parties before it, had the benefit not simply of the affidavits to which we have referred, but of the personal presence of the plaintiff and the defendant, and could judge from the appearance of the plaintiff as to whether she was or was not physically able to earn any part of the money necessary for her own support. The replies of the appellant to the questions of the trial court upon the cold record indicate, at least, a lack of any real disposition on the part of the appellant to earn any part of her own living.

[1, 2] Our attention is called to the fact that one of the physicians whose affidavit was read in evidence testified that he had treated the appellant for a number of months. This, however, does not require the conclusion that the plaintiff was wholly incapacitated for work. We think it is common knowledge that many people, suffering from some ailment for which they are receiving treatment, continue their usual employment for considerable periods at a time, nor is an ailment which incapacitates a person for a particular line of work a sufficient reason why a trial court should come to the conclusion that such person is not able to earn money in other fields of labor. To determine this question the trial court must necessarily have some knowledge of the intellectual capacity of the persons in question, their intelligence, their power of adaptability, none of which can properly be considered by this court upon appeal. The presence of the parties involved is the essential equation in order to approximate a conclusion as to whether any one is so endowed as to capacitate him to perform some labor, and, at least, make a reasonable effort toward self-support.

[3-5] We agree with the substance of appellant's argument that trial courts should not be niggardly in the matter of awarding alimony, and we also coincide with the effect of respondent's insistence that where the ex-husband is earning wages by daily labor, a trial court, in awarding alimony, should not do so in a sum inducing idleness on the part of the ex-wife. Where there are no children involved and the parties are both young in years, we think the trial court may take into consideration, in awarding alimony, the possibility, probability, and the desirability of allowing the respective parties to establish another and, perhaps, more congenial home. The prevalence of divorces may well call for judicial support of the institution of marriage, and we cannot say it is an abuse of discretion for a trial court to admit testimony and consider proof relative to future marriage. While the mere desire of a party to remarry may not, in and of itself, be a sufficient ground for reducing the award of alimony, it is a matter to be taken into consideration, when determining whether the other party has or has not evinced a willingness to earn something toward her own support. In other words, we think the trial court was justified in considering the laudable wish of the respondent to remarry, and that he should not be so crippled in his finances that another home may not be established, unless it appeared to the trial court that the necessities of the former wife compelled such a course. The change in the industrial world which has taken place in the last few years presents to the trial court many matters for consideration and calls for the exercise of its discretion in awarding alimony. Thousands of women and girls are now employed, where formerly men and boys were once found. The employment of women in all lines of work is now so general that it may almost be said to be a mark of distinction for a woman to be self-supporting. Whether the plaintiff is sufficiently able to enter this class and become independent, or,

at least, to make a reasonable effort to attain that end, and so relieve the opposite party from the monthly draft upon his wages, were all equitable matters for the trial court to weigh and consider, and, unless there appears a manifest abuse of discretion, this court has no authority to interfere.

[6] Section 139 of the Civil Code provides that where the divorce is granted for an offense of the husband, the court may compel him to make such suitable allowance for the wife during her lifetime, or for a shorter period as may seem just, having regard to the circumstances of the parties respectively, and the court may, from time to time, modify its orders in these respects.

We do not need to go into an extensive definition of the word "circumstances," but we think it includes practically everything which has a legitimate bearing upon the present and prospective matters relating to the lives of both parties. In 11 C. J. 768, the word is thus defined:

> "Proof, evidence, actually existing facts, as distinguished from opinions and motives, the surrounding facts, means, influence, etc., especially as related to one's support and way of living; circumstances appearing at the trial, circumstances of the parties, etc."

The mere fact that the appellant was granted a divorce in this action does not absolutely brand the defendant as one whose means and circumstances should not be taken into consideration. It is true that the decree was granted on the alleged ground of cruelty. A reference to the complaint, which is made a part of the record in this proceeding, shows that the alleged cruelty is based upon the following allegations:

> "That about three times a week the defendant would angrily, etc., say to the plaintiff that she was uncleanly in her person and about her home; that she was a bad housekeeper, and that defendant became angry about once a week because the plaintiff went to services at the church of which she was a member and would not speak to her for some days thereafter, and that the defendant did not desire to have any children." [No criminal acts intimated.]

We are not called upon to decide whether such matters amounted to cruelty, as defined by the Code, so as to entitle one to a decree of divorce, but they are certainly not sufficient to show an abandoned and malignant heart, justifying a trial court in awarding alimony that would be in any wise oppressive.

[7] From an examination of the transcript in this cause, we cannot say that there has been any legal abuse of discretion in modifying the order awarding alimony. Whether the court did or did not err in judgment is entirely beside the question. The same is true of whether we do or do not think that the court might properly have allowed the original order to remain unmodified. Necessarily, there is latitude of discretion to be exercised by the trial court, and we cannot say that this latitude has been exceeded or the discretion abused. Our inquiry can extend no further. 2 Cal. Jur. 896; 1 Cal. Jur. 964 et seq.; Dickerson v. Dickerson, 108 Cal. 351, 41 P. 475; Nave v. Nave, 35 Cal. App. 27, 169 P. 253; Gorman v. Gorman, 134 Cal. 378, 66 P. 313; White v. White, 73 Cal. 105, 14 P. 393; Stewart v. Stewart, 156 Cal. 651, 105 P. 955; Soule v. Soule, 4 Cal. App. 97, 87 P. 205. Other cases might be cited, but they all announce the same ruling; i. e., that it must be plainly made to appear that the trial court has abused its discretion before an appellate court is authorized to interfere.

The order appealed from is affirmed.

We concur: FINCH, P. J.; PRESTON, Justice pro tem.

80 Cal. App. 533

LILLYWHITE v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY et al. (Civ. 5454.) *

(District Court of Appeal, Second District, Division 2, California. Dec. 30, 1926.)

1. Statutes 🔑158—Court will not hold enactment repealed by inference, unless intention so to repeal is clear.

Court will hold that enactment was meant to repeal formerly existing enactment by inference only where inferential repeal was clearly intended, as such repeals are repugnant to rules of statutory construction.

2. Criminal law 🔑260(4)—Right to appeal orally from conviction of misdemeanor in justice's court to superior court held not defeated by subsequent statute (Pen. Code, § 1239, and section 1467, as amended by St. 1925, p. 950, § 2).

Pen. Code, § 1467, as amended by St. 1925, p. 950, § 2, providing appeal from justice's court might be taken under Pen. Code, §§ 1235–1265, within 15 days after judgment, by filing written notice of appeal, did not prevent taking of appeal from justice's court to superior court for misdemeanor by oral announcement in open court, as provided by section 1239, as section 1467 merely allows additional time in which written appeal, also provided for in section 1239, may be taken, without affecting oral appeal; Code Civ. Proc. § 1859, relating to statutory construction being inapplicable.

3. Statutes 🔑206—Every word in statute will be given effect if possible.

Every word of statute will be given effect, where it is possible to do so consistently with intent of Legislature as gathered from entire statute.

Proceeding by Dan Lillywhite for writ of mandate to be directed to the Superior Court of Los Angeles County, Arthur Keetch,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court February 28, 1927; Seawell, J., dissenting.

Judge, requiring respondent to set for hearing plaintiff's appeal from a judgment of the justice's court for conviction of a misdemeanor. Writ granted.

C. B. Hubbard, of Los Angeles, for plaintiff.

Everett W. Mattoon, Co. Counsel, and Pierce Works, Deputy Co. Counsel, both of Los Angeles, for defendants.

CRAIG, J. The question involved in this proceeding is as to whether or not, in view of the provisions of section 1467 of the Penal Code, a written notice of appeal is required on the taking of an appeal from the justice's court to the superior court in a misdemeanor case.

The defendant was found guilty of a misdemeanor, a motion for a new trial was made and overruled, and judgment was pronounced. Thereupon, in open court, his attorney announced that he appealed from the judgment and the order denying such motion. No written notice of appeal was either filed or given. Later a time was set for hearing the appeal, but, on motion of the district attorney, it was dismissed on the ground that no written notice of appeal had been filed, and by this proceeding in mandamus it is sought to require the superior court to place the appeal upon its calendar and hear the same.

The issue arises from an alleged conflict between the provisions of sections 1239 and 1467 of the Penal Code. Title 9, pt. 2, of the Penal Code contains the provisions for appeal to the Supreme Court. One of the sections therein is No. 1239, which reads:

> "An appeal from a judgment may be taken by the defendant by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from same or by filing a written notice of appeal within two days after the rendition of judgment with the clerk of the court wherein judgment was rendered; and from any order made after judgment, by announcing in open court at the time the same is made that he appeals from the same."

Title 11, c. 2, deals with appeals to the superior court, and within it is to be found section 1467, which reads:

> "The appeal may be taken, heard and determined as provided in title nine, part two of this code, except that such appeal must be taken within fifteen days after the judgment is rendered in a justice's or police court, or entered in a municipal court, or within ten days after the order is made from which the appeal is taken, by filing a written notice of appeal."

[1] Respondent argues that, as to appeals to the Supreme Court in criminal cases, the provisions of the section last quoted take the place of and repeal all of section 1239 upon the subject of time and manner of taking appeals; hence that no such appeal may now be taken except by the filing of written notice within the time limits designated. Of course, there is no express repeal of that part of section 1239 which gives a defendant the right to appeal "by announcing personally or through his attorney in open court at the time the judgment is rendered that he appeals from same." Such a repeal, if it has been made, must have been by inference. Repeals by inference are repugnant to established rules of statutory construction. Only when the intention to repeal by inference is clear will a court be justified in holding that an enactment was meant to repeal a formerly existing one. People v. Superior Court, 64 Cal. App. 770, 222 P. 864.

[2] The language of section 1467, as amended in 1925 (St. 1925, p. 950), and the circumstances surrounding the enactment thereof, do not meet these requirements. It cannot be said that an intent to repeal by inference is clear. The provision of section 1239 allowing appeals to be taken orally at the time of the rendition of judgment is not irreconcilably opposed to the language contained in section 1467 as it now reads. That this is so is made doubly clear from the fact that section 1239 authorizes both the oral method of appeal to the superior court, and that by written notice as well as by People v. Superior Court, supra.

Nor is there anything at all inconsistent with these conclusions found in the history of these sections and their amendments. It is true that until 1909 there was no provision in title 11, pt. 2, for the taking of an appeal orally, although section 1467 of the Penal Code had previously required appeals to the superior court to be taken, heard, and determined as provided in the title having to do with appeals to the Supreme Court. In 1909 section 1239 was amended so as to allow an appeal to be taken orally in open court. No amendment was at that time adopted as to section 1467. Hence the right to appeal orally as then provided in section 1239 was extended to appeals taken to the superior court. In 1917 section 1239 was again amended, and this time to read in its present form, in effect still authorizing oral appeals to the superior court, as well as to the Supreme Court. Thereafter, and in 1925, section 1467 was amended by adding the words, "by filing a written notice of appeal." Respondent argues that the order in which these changes in the section under discussion took place is evidence that the Legislature intended to differentiate the method as well as the time of taking appeals to the superior court from those appealed to the Supreme Court. We cannot agree with the reasoning in that behalf, nor do we interpret People v. Superior Court, supra, as authority for that contention. Although the case last cited is relied upon by both of the parties to this appeal to uphold their respective claims, we are constrained to regard its purport to be as argued by the petitioner. An appeal to the superior court had been taken by filing a written notice of appeal. It was contended that, since the amendment of section 1240 of that Code, providing that "such appeal must be taken within fifteen days after the judgment is rendered or within ten days after the order is made from which the appeal is taken," the latter was inferentially repealed, and the only way left to take an appeal to the superior court was by oral announcement in open court at the time of the rendition of judgment. The argument of respondents is based upon the history of the legislation in the matter. The opinion points out the fallacy of this argument, and rejects it.

Nor can we agree with respondents that the real basis of the decision under consideration is the rule, expressio unius est exclusio alterius. On the contrary, a careful analysis of the opinion shows that, after stating the facts before the court and the general principles concerning the hostility of the law toward repeals by inference, the opinion proceeds to apply these principles to the facts in the following language:

> "We have here two statutes relating to the same subject-matter; one of them by its exception applies strictly to appeals from the justice's court, and the other as originally enacted and without reference thereto by any other statute, applies solely to appeals from the superior court. They are not irreconcilably inconsistent one with the other. There is no express repeal of the statute first enacted, and it may stand without doing violence to the later statute. In such circumstances it must be held that the right of the people to appeal herein was not lost until after the expiration of fifteen days after the judgment was rendered."

No opportunity arose for the application of the maxim, expressio unius est exclusio alterius. Nor is there such in the instant case.

Neither can we find room here for the rule announced in section 1859 of the Code of Civil Procedure to be brought into play. That section, cited by respondents, reads: "When a general and a particular provision are inconsistent, the latter is paramount to the former." But obviously it is a condition precedent to the application of this rule that "a general and particular provision are inconsistent." We find no real conflict between the Code sections here in question, but only that, as to methods of taking appeals to the superior court, they are to be read together, and, when so read, provide alternatives. Other considerations lead us to the same conclusion.

But we think counsel have mistaken the issue. The problem to be determined is not so much whether or not there has been a repeal by inference as one of construction of the sections involved as they are now worded, and of course reading them together. As we have said, section 1239 provides for both oral appeals from judgments and those by written notice. As to the latter, until the amendment to section 1467 was enacted in 1925, the time within which the notice must have been filed was two days after the rendition of judgment. We think the only effect of the amendment was upon this provision, and in that regard the result is to extend the period from two to fifteen days. The words, "by filing a written notice of appeal," contained in section 1467, modify the subject of the phrase which precedes them. "By filing a written notice of appeal" limits the manner in which appeals may be taken; but not as to all such appeals—only those which are taken within 15 days after the order is made from which the appeal is taken. Viewing the question in this light, it appears that the amendment was not intended to affect the provision for the taking of an oral appeal at the time judgment is rendered, but only to alter that which formerly concerned the taking of an appeal by written notice.

[3] It is a well-recognized rule of statutory construction that no single phrase or word of a law will be held to be meaningless, but effect will be given to every word, where it is possible to do so consistently with the intent of the Legislature as gathered from the entire statute, and weighed by other established rules of statutory interpretation. Should we uphold the respondents' contention, the word "taken" in the first sentence would be given no meaning whatever, but would be eliminated from the law by judicial construction. All of the language following the word "except" is contained within and is applicable to the exception. To extract a few words from a proviso or exception clause and attach it to the body of the statute would be a novel procedure and one utterly irreconcilable with either the rules pertaining to the proper use of the English language or to those governing statutory interpretation.

Let the peremptory writ issue as prayed.

We concur: HOUSER, Presiding Justice pro tem.; THOMPSON, J.

MONTEZUMA MOUNTAIN RANCH SCHOOL et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5719.)*

(District Court of Appeal, First District, Division 2, California. Dec. 28, 1926. Hearing Granted by Supreme Court Feb. 24, 1927.)

1. Master and servant 🔑367 — Independent contractor's employee is not entitled to compensation as against principal.

As Constitution authorizes award of compensation only to employee, person injured is not entitled to compensation under Workmen's Compensation Act (St. 1917, p. 831), if independent contractor or employee of independent contractor.

2. Master and servant 🔑367—Son, injured while working on father's crew, cutting wood for school, held not entitled to compensation as "employee" of school (Workmen's Compensation Act, § 8b).

Where father of applicant agreed to saw logs for school at fixed price, and later agreed to cut up trash wood at agreed rate per hour, school reserving right to stop work, applicant, working on father's saw crew, *held* not entitled to compensation as "employee" of school under Workmen's Compensation Act (St. 1917, p. 835), § 8b, where father had sole supervision over workers, and sole right to hire and discharge crew and pay wages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

Proceedings under the Workmen's Compensation Act by Forrest Wilder, opposed by the Montezuma Mountain Ranch School, a corporation, employer, and the Employers' Liability Assurance Corporation, insurer. To review an order of the Industrial Accident Commission granting an award, employer and insurer bring certiorari. Award annulled.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

NOURSE, J. J. A. Wilder, father of the applicant for compensation, was a rancher living near Los Gatos in the vicinity of the Montezuma school. The father purchased a power saw, mounted it on a wagon, and entered into a contract with the agent of the school to cut up a quantity of cordwood into stovewood lengths at a fixed price per cord. As a part of the contract Wilder agreed to furnish the saw, the power to run it, and the crew to operate it. This work was done according to agreement, and, at about the time it was completed, the parties entered into another arrangement whereby Wilder, Sr., agreed to cut up a pile of trash wood lying on the premises. Because of the uncertainty as to the quantity and as to the time this work would require, the parties agreed that Wilder, Sr., would furnish the saw, the power, and the crew, and that the school should pay to him $2.50 an hour, with the express reservation that, if it should be found that the cost was too great for cutting the trash, the school might stop the work. The work progressed for a few days under this arrangement, when one of Wilder's crew quit, and the school "loaned" him a workman about the place. At about the same time two other employees of the school were directed to carry the trash down from a hillside, and to pile it near the saw in order to help speed up the work. Forrest Wilder, the applicant, while working as a member of the saw crew, received an injury to his foot, and the entire work was stopped. The school paid Wilder, Sr., the full amount for the services rendered, estimated by him on the cord basis for sawing the cordwood, and on the hour basis for sawing the trash. From this amount Wilder, Sr., paid the members of his crew at the rate of 50 cents an hour for the full time they were employed. The respondent commission found that the applicant was an employee of the school, and awarded him compensation as such.

[1] It is the settled rule that the Constitution authorizes an award of compensation to an employee only, and that, if the party injured is an independent contractor, or an employee of an independent contractor only, he is not entitled to compensation as against the principal. Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; Flickenger v. Industrial Acc. Comm., 181 Cal. 425, 184 P. 851, 19 A. L. R. 1150; Pacific Gas & Electric Co. v Industrial Acc. Comm., 180 Cal. 497, 181 P. 788.

[2] It has been held that, where a party is injured while performing service for another, "under any appointment or contract of hire," the burden is upon the latter to show that the party injured was an independent contractor and not an employee. Hillen v. Industrial Acc. Comm. (Cal. Sup.) 250 P. 570. In the same case the rule was reiterated that the finding of the commission upon this issue was binding, unless there is no substantial evidence in support of it.

The question whether a party in a given case was an employee or an independent contractor being a mixed question of law and fact, our courts have endeavored on numerous occasions to lay down definite rules of law so that the law side of the question might be determined according to fixed and uniform rules. Many tests have been declared to be controlling while other elements have been held to be important as tending to support the conclusion of the commission under review. We will not attempt to analyze the great number of cases which have been cited on this subject, as we are fully aware that one more opinion will not serve

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*Superseded by opinion of Supreme Court 258 P. 84.

to make the rule of interpretation any more stable.

The latest expression of the Supreme Court is found in Hillen v. Industrial Accident Commission, 250 P. 570, where it is said:

> "One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. * * * Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability."

Applying either of these tests to the case at hand, it becomes apparent that the applicant was not an employee of the school.

In the course of the oral argument the respondent commission conceded that the first contract for cutting the cordwood created the relation of an independent contractor, and that the applicant was not then an employee of the school. When the arrangement was made for cutting the trash, no change was made as to the management or control of the work. Wilder, Sr., provided the implements and the crew which he employed and directed without interference, or the right of interference, on the part of the school. He had sole charge of the time, place, and manner in which the work was to be carried on. He had the sole power to hire and discharge the members of his crew, and to fix and pay their wages. He had sole power to determine when the men were to commence work, how many hours in a day they were to work, and when they were to stop. The school did not exercise or retain the right to exercise any direction, supervision, or control over Wilder or his men. The service was plainly within the definition of an independent contractor "for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished." Workmen's Compensation Act (St. 1917, p. 835) § 8b.

The reservation by the principal of the right to stop the work if the cost proved too high would tend to emphasize the intention of the parties to contract for a definite result rather than for a mere employment. The agreement having been to cut up a certain pile of wood, the principal would have had no right to stop the work, because the cost appeared too high, unless that right had been reserved in the contract. There would, however, have been no necessity for this reservation in the case of a mere employment.

The case is parallel with Pryor v. Industrial Acc. Comm., 186 Cal. 169, 198 P. 1045, where, as here, two separate contracts had been made; one to bore a well at a fixed price per foot, the other to remove sand from the well at a fixed price per day. The court held that neither the change in the method of payment nor the right of the principal to continue the work changed the status from that of an independent contractor. Other cases in point are Donlon Bros. v. Industrial Acc. Comm., 173 Cal. 250, 159 P. 715; Fidelity & Deposit Co. v. Brush, 176 Cal. 448, 168 P. 890; Parsons v. Industrial Acc. Comm., 178 Cal. 394, 173 P. 585, and Worswick v. Industrial Acc. Comm., 181 Cal. 550, 185 P. 953.

Award annulled.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 321

PEOPLE v. SUGARMAN.

SAME v. PASSARELLO.

(Cr. 1360, 1361.)

(District Court of Appeal, Second District, Division 2, California. Dec. 16, 1926.)

1. Criminal law ⚿511(1)—Accomplice's testimony held sufficiently corroborated to sustain convictions of burglary and grand larceny (Pen. Code, § 1111).

Accomplice's testimony *held* sufficiently corroborated, under Pen. Code, § 1111, to sustain convictions of burglary and grand larceny.

2. Criminal law ⚿992—Sentencing for second degree burglary, instead of setting aside conviction of first degree burglary committed in daytime, held not error (Pen. Code, § 1161).

Pen. Code, § 1161, does not negative trial court's authority to pronounce sentence on lesser offense necessarily included in that of which defendant is convicted, so that court did not err in sentencing defendant for second degree burglary, instead of setting aside conviction of first degree burglary on evidence of commission of crime in daytime.

3. Criminal law ⚿829(10)—Refusal of instruction that corroboration of accomplice as to immaterial matters, commission of crime, and his connection therewith, is insufficient, held not error, in view of instructions given.

Refusal of instruction that corroboration of accomplice as to immaterial matters, fact that crime was committed, and his connection therewith, would not, alone or combined, be sufficient to support conviction, *held* not error, in view of instructions that accomplice's testimony is insufficient to connect defendant with crime unless corroborated.

4. Criminal law ⚿510—Accomplice's testimony is subject to same rules as any other, except that it must be corroborated as to defendant's connection with crime.

Accomplice's testimony is to be viewed, and is subject to same general rules, as that of any other witness, both as to its weight and sufficiency, except that it must be corroborated on element of connecting defendant with commission of crime.

5. Criminal law ⚷780(4)—That accomplice's corroboration on his connection with offense is not proof of defendant's connection is too obvious to require instruction.

That corroboration of accomplice on his own connection with offense is not proof of defendant's connection therewith is too obvious to require an instruction.

6. Criminal law ⚷777—Court need not instruct that facts entirely disconnected with point in issue have no bearing thereon.

Court is not burdened with duty of enumerating all facts which ingenuity of counsel may conceive, and instructing that they, no matter how disconnected with point in issue, have no bearing thereon.

7. Criminal law ⚷829(1)—Refused instructions substantially covered need not be considered.

Refused instructions, substantially covered by instructions given, need not be further considered.

Appeals from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Utey J. Sugarman and Paskie Passarello were convicted of burglary and grand larceny, and they appeal. Affirmed.

Joseph M. Wapner and Harold Ide Cruzan, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant Sugarman and one Harry Herman were charged by two counts of an information filed by the district attorney of Los Angeles county with burglariously entering a store and building in the city of Los Angeles and with having on the same date committed grand larceny therein. Appellant Passarello was likewise charged with burglary and grand larceny upon the same premises, on the same date. The cases were consolidated and tried together in the superior court, and the appellants were convicted upon each charge. This is an appeal by Sugarman and Passarello from the respective judgments and orders denying their motions for a new trial.

A witness for the people, by the name of Sam Geller, testified upon the trial that on March 31, 1925, his tailor shop at 4415 Central avenue, in Los Angeles, was entered, and that trousers and bolts of cloth of a value of about $1,200 were stolen; that portions of the rear door were broken off, and that the lock with which he had previously fastened the door had been removed; that he thereafter identified all of his stolen property at the preliminary examination of the defendants. This witness further testified that the defendant Berman lived near said store, and that he had known Berman for about six years. The proprietor of an automobile livery testified that on March 31, 1925, he rented to Berman a Ford touring car bearing license No. 996644, which the witness thereafter found at the Lincoln Heights police station, in custody of certain officers. A railroad towerman swore that on the last-named date a Ford touring car approached the railroad tracks near his tower and stopped; that three men alighted therefrom; that one of the men was tall, and one was much shorter than the others, that "there was a distinct difference in all three of their sizes"; that the men left the machine, whereupon the witness and a companion, named Charles Bill, inspected it and found therein the trousers and cloth which were produced at the trial and identified by Geller. Bill corroborated the testimony of the towerman, and identified Passarello as one of the men formerly seen in the Ford. He further averred that Berman and Sugarman resembled the other two. It also appears that the auto livery obtained the rented Ford from the police station; that Berman visited the livery to pay the rental bill and was arrested. Thus it was shown the automobile which was rented to Berman was the same machine which the defendants deserted, in which Geller's goods were found, and which subsequently was held by the police, registered by them at the station, and returned to its owners.

When Berman was apprehended he made a confession, which he repudiated at the preliminary examination, saying that he had been threatened with violence unless he so testified; upon redirect examination at the trial Berman testified that Passarello had told him that he would be beaten up in the jail if he did not deny such confession.

Previously to the trial Berman pleaded guilty and requested probation. When called by the prosecution as a witness he testified that he had known Passarello and Sugarman for some years; that on March 31st he first met Sugarman; that he rented the Ford car, and the two men thereafter took Passarello in the car and all three drove to Geller's place of business, where the witness remained in the car, and his two companions robbed the store, placed the goods in the machine, and that the three then drove in a circuitous route, finally arriving at the railroad tracks where the towerman and the witness Charles Bill testified to having first seen them; that some one called to them that a train was approaching, whereupon they backed up, jumped from the machine. and ran toward north Broadway; that Berman and Sugarman rode with some person to Second street, while Passarello took a street car, and that all three men again met at Temple street. Berman further swore that Passarello advised him to leave town; that Sugarman told him to telephone the livery that the Ford had been stolen; that he called the livery, and, being informed that they had recovered the car, he went there to pay the rental bill, but was arrested.

A police officer testified: That when Sugarman was arrested he was asked if he was with Berman at the time of the robbery, to which Sugarman replied, "Yes; I will tell you everything when we are alone." That Berman was asked in the presence of Sugarman as to whether or not he had burglarized the Geller store, and that Berman admitted that he had, and that Sugarman was with him, to which the latter made no reply. Police officers also testified to a conversation between Sugarman and Berman, wherein Berman asked the former if he had told them anything, and that Sugarman said: "Don't say anything about it; don't let them know that I was in on the job; I am on seven years' probation now." Sugarman admitted on the stand that he was with Berman on the 31st of March, but denied having had any connection with the robbery. It appears that Passarello was present at the preliminary examination of Berman and Sugarman, and that he was there positively identified by the witness Charles Bill as one of the men who alighted from the Ford car as heretofore recited. Bill also identified Passarello at the trial as one of the former occupants of the machine who ran away, and swore that he and one Williams immediately searched the car and police officers were summoned.

[1] It is urgently insisted that the testimony of Berman, an admitted accomplice, was not corroborated, and that therefore the verdict and judgment appealed from are contrary to both the law and the evidence. The principle stated in a brief excerpt from People v. Ames, 39 Cal. 403, quoted by the appellants, is opposed to this contention. It was there said, with reference to section 1111 of the Penal Code:

> "As we construe this provision, the corroborating evidence must, of itself, and without the aid of the testimony of the accomplice, tend, in some degree, to connect the defendant with the commission of the offense. It need not, of course, be sufficient to establish his guilt; for, in that event, the testimony of the accomplice would not be needed."

It was there further said that aside from the testimony of the accomplice, "there was no evidence whatever in this case 'tending to connect the defendant with the commission of the offense.'" In the instant case the circumstances and the evidence of many witnesses strikingly substantiated in detail the story told by Berman from the witness stand. The loss of the property, descriptions of the men at the railroad yards, recovery and identification of the goods and of the automobile, positive identification of Passarello, remarks of Sugarman overheard at the police station, and other details which we deem it unnecessary to relate, all contributed to establish the fact that the offense had been committed by these three men. We think that the accomplice was abundantly corroborated.

[2] The jury found appellants guilty of burglary in the first degree, but the trial court decided that the offense was burglary of the second degree, and sentenced them accordingly. It is insisted that the court below had but two alternatives—to sentence the appellants for burglary in the first degree, as fixed by the jury, or to set the verdict aside and grant the motion for a new trial.

After careful research we have been unable to find any case in which the exact point here presented has been decided in this state. However, this same question has been determined in a number of other jurisdictions with uniformity. The general rule is stated in 16 C. J. at page 1303, § 3076, to be that where the court is of the opinion that the evidence does not warrant the verdict rendered by the jury, but that it is sufficient to support a conviction of a lesser offense necessarily included therein, it has power to impose sentence for the latter. This conclusion is sustained by the citation of authorities from a number of states whose statutes provide for such procedure, and also from others having no statute upon the subject when the question was presented. In United States v. Linnier (C. C.) 125 F. 83, the decisions are reviewed at length. It was there said that, although the jury rendered a verdict of guilty of murder in the first degree, if the evidence showed the defendant to be guilty of manslaughter only, it was the duty of the court to pronounce judgment for the lesser offense. The theory upon which this right is founded is that, by the verdict of guilty of the greater offense, the jury decided that the defendant is necessarily guilty of each lesser offense included within the greater. The following authorities are to the same effect: State v. Schele, 52 Iowa, 602, 3 N. W. 632; State v. Fields, 70 Iowa, 196, 30 N. W. 480; State v. Keasling, 74 Iowa, 528, 38 N. W. 397; Comm. v. Squire, 1 Metc. (Mass.) 258; Comm. v. Mahar, 8 Gray (Mass.) 469; Sullivan v. State, 44 Wis. 595; Anderson v. State, 56 Ark. 8, 19 S. W. 99; State v. McCormick, 27 Iowa, 402, 414; Hogan v. State, 30 Wis. 438, 11 Am. Rep. 575; Johnson v. Comm., 24 Pa. 386; State v. Bloedow, 45 Wis. 279; McEntee v. State, 24 Wis. 43.

In section 1161 of our Penal Code it is provided that:

> "When there is a verdict of conviction, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider their verdict, and if, after the reconsideration, they return the same verdict, it must be entered. * * *"

Obviously, the trial court could not follow the first alternative suggested by appellants, to wit, that of sentencing the defendants for burglary in the first degree, since there was an utter absence of evidence to sustain such a verdict, as the crime was committed in the daytime.

People v. Peete, 54 Cal. App. 333, 202 P. 251, and People v. Machuca, 158 Cal. 64, 109 P. 886, are cited by appellants. These cases, however, go farther than to hold that where the jury has rendered a verdict of guilty of the offense charged, and the evidence was of a contradictory character, it was not within the province of the trial court to substitute its judgment for that of the jury by pronouncing judgment upon a lesser offense, but that the action of the jury is conclusive, and that the trial court proceeds properly by pronouncing judgment upon the verdict rendered. There is nothing in these decisions which even remotely bears upon the question here presented, nor does the provision quoted from section 1161 of the Penal Code in any way negative the authority of the trial court to pronounce sentence upon a lesser offense necessarily included within that of which a defendant has convicted a defendant.

[3] The trial court was requested by the defendants to instruct the jury that corroboration as to immaterial matters to which the accomplice testified, as to the fact that the crime was committed, and as to the connection of the accomplice with the crime, would not alone or combined be sufficient to support a conviction. Such instruction was refused, but the court did instruct that:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

And further:

> "That while it is true that a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence tending to connect the defendant with the commission of the offense, yet I charge you that such corroborative evidence need not tend to establish the precise facts testified to by the accomplice. It is sufficient if such corroborative evidence standing alone tends to connect the defendant with the commission of the crime charged."

[4-6] The only limitation placed upon the sufficiency of the testimony of an accomplice, as distinguished from that of any other witness, is that the testimony of the former must be corroborated upon the element of connecting the defendant with the commission of the crime. With respect to other matters, the testimony of an accomplice is to be viewed and is subject to the same general rules as that of any other witness; this is true both as to its weight and sufficiency. Consequently, when the court instructed the jury as it did in two separate instructions that the testimony of an accomplice is not sufficient to connect the defendant with the crime alleged in the information, unless corroborated, it gave them all the information that could be required. It is true that the corroboration of an accomplice upon his own connection with the offense is not proof of the defendant's connection with it. That is a fact too obvious to require an instruction. The court is not burdened with the duty of enumerating all of the facts which the ingenuity of counsel may conceive and of instructing that such things, no matter how disconnected they may be with the point in issue, have no bearing upon that point. As the instructions given stated the law upon the one element of proof as to which there is a distinction, and as to the necessity for other evidence than that of an accomplice, it did all that the law requires.

[7] The refusal of the trial court to give other requested instructions is also assigned as error, but they were substantially covered, and we do not deem it an advantage to consider them further.

No error appearing, the judgments and orders appealed from are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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80 Cal. App. 444

LOWER v. HUGHES. (Civ. 5544.) *

(District Court of Appeal, First District, Division 2, California. Dec. 27, 1926.)

1. Automobiles 🔑245(72)—Pedestrian waiting near center of street for automobiles to pass held not contributorily negligent as matter of law.

Pedestrian advancing nearly to center of street and waiting for automobiles to pass *held* under evidence not contributorily negligent as matter of law when run down by defendant's automobile.

2. Evidence 🔑222(2)—Evidence of defendant's admission that skid marks of automobile were undoubtedly his held properly admitted (Code Civ. Proc. § 1870, subd. 2, and section 2061, subd. 4).

Where witnesses examined scene of automobile accident and stated to defendant there were skid marks, evidence of defendant's reply that skid marks were undoubtedly his *held* admissible as admission, in view of Code Civ. Proc. § 1870, subd. 2, and section 2061, subd. 4.

3. Appeal and error 🔑1066—Instructions based on statutes inapplicable to facts held not prejudicial.

In action for injury to pedestrian from being run down by defendant's automobile at street intersection, instruction based on Motor Vehicle Act 1923, § 125, subd. (c), and section 130 (St. 1923, p. 517), inapplicable to facts, *held* not prejudicial to defendant.

★Hearing denied by Supreme Court February 24, 1927.

4. Automobiles 🔑246(31)—Instruction that pedestrian was entitled to assurance automobile would not approach crossing at excessive speed held not error under facts (Motor Vehicle Act 1923, § 125, subd. [c]).

In pedestrian's action for injury from being run down by automobile at street intersection, instruction based on Motor Vehicle Act 1923, § 125, subd. (c) (St. 1923, p. 517), that plaintiff was entitled to assurance that defendant would not approach at excessive speed and that plaintiff had right to take place of safety at street intersection *held* under facts not error.

5. Trial 🔑191(7)—Instructions as to assurance against excessive speed of automobile and pedestrian taking place of safety held not erroneous as assuming facts.

In pedestrian's action for personal injury from being run down by automobile at street intersection, instructions that plaintiff was entitled to assurance that defendant would not approach crossing at excessive speed, and plaintiff had right to take place of safety at street intersection, *held* not erroneous as assuming facts.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Edna Lower against Lloyd S. Hughes. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.

Glickman & Glickman, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages for injuries alleged to have been suffered by her when struck by the automobile of the defendant. The defendant answered and a trial was had in the trial court before the court sitting with a jury. At the end of the plaintiff's case the defendant made a motion for a nonsuit. The motion was denied. Thereupon the defendant rested without introducing any evidence. Thereafter the defendant moved for a directed verdict repeating the grounds of the motion for nonsuit. That motion was also denied. The jury returned a verdict in favor of the plaintiff. A judgment was entered in favor of the plaintiff in accordance with the verdict so returned, and from that judgment the defendant has appealed under section 953a of the Code of Civil Procedure.

[1] At about 6 o'clock on the evening of the 9th day of December, 1923, the plaintiff and her escort, Mr. George Moon, left Mr. Moon's house in Oakland to go to Fruitvale. It was their intention to take a San Pablo avenue car at Thirty-Fourth Street. San Pablo avenue runs north and south and Thirty-Fourth street crosses it, running east and west. On San Pablo avenue there is a double street car track. On the easterly track the cars run to the north; on the westerly track the cars run to the south. A large street lamp is suspended over the center of the street crossing. The plaintiff and her escort walked along the sidewalk on the north side of Thirty-Fourth street until they reached the curb at the street crossing. There they paused for the traffic to pass which was traveling in a northerly direction. They then attempted to cross the street car tracks to take a position on the northwest corner of the crossing for the purpose of boarding the street car. When they were out in the middle of the street they paused to allow the traffic to pass which was going in a southerly direction. The plaintiff testified that they paused on the west rail of the north car track. She stood on Mr. Moon's right. From that time until the accident happened she stood perfectly still, not moving in any direction, and during all that time she was looking at the approaching traffic coming from the north down the west side of San Pablo avenue. The blocks are short, but the plaintiff testified that the first cars to pass were followed by other cars which were at the time she first observed them about a block away. These other cars consisted of three, and we will hereafter refer to them as "the group." They were coming from the north in line in the space between the east curb of San Pablo avenue and the west rail of the street car tracks. The space between the left-hand side of the moving traffic and the rail on which the plaintiff stood was wide enough for three cars to travel abreast. The group of cars came from the north, one behind the other, separated by spaces of about 20 feet. The defendant was driving the rear car. The plaintiff testified that she was looking at the cars continuously. As Mr. Moon stood on the south side of the plaintiff he was in a position to testify as to how her head was turned but clearly he could not testify as to what her sight was resting on. As Mr. Moon stood slightly at the back of her head it is equally clear that the plaintiff could not testify on what the sight of Mr. Moon was resting. We shall not pause, therefore, to consider the statements of either of the witnesses made in response to questions propounded to them as to where the other one was looking. The plaintiff repeatedly said that she was looking at the group of cars and repeatedly stated that she did not have her eyes focused on the defendant's car. When the group of cars had proceeded to a point about 100 feet from the plaintiff, the plaintiff testified that they were in line. She also testified that when the first one of the group was opposite to her that the other two were quite a good ways behind, but they were coming in line. She estimated that the defendant's car at that time was 40 feet away. When the second car was right opposite her she testified that Hughes' car was on top of her. The plaintiff

and Mr. Moon were the only eyewitnesses examined. The plaintiff testified that she did not see the defendant's car leave the line, swerve to the left, and attempt to pass the cars ahead of it. Her testimony was that the defendant's car was at all times in the line until immediately before it struck her, when she obtained a mere flash of it. Mr. Moon testified that he saw the car swerve to the left, and that he stepped backwards about 10 inches and attempted to draw the plaintiff backward by pulling on her arm. He also testified that at the same time he was pointing at the Hughes car. The plaintiff testified that she did not see Mr. Moon point and that she did not feel him pull on her arm. Mr. Moon testined that at the time the defendant attempted to pass the other cars that the defendant was then driving 35 or 40 miles an hour. If defendant's car was traveling 40 miles per hour as it swerved to the left and when it was 40 feet from the plaintiff, it is apparent that the time elapsing between the instant it turned out of the line and the instant of the impact was less than three-fourths of a second. The plaintiff testified that she was not afraid and did not see any danger before the collision. The appellant contends that as a matter of law the plaintiff under the foregoing facts was guility of contributory negligence, and he cites Finkle v. Tait, 55 Cal. App. 425, 432, 203 P. 1031; Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174; Moss v. H. R. Boynton Co., 44 Cal. App. 474, 186 P. 631; Ogden v. Lee, 61 Cal. App. 493, 215 P. 122. No one of those cases is addressed to a state of facts such as we have before us in this case. In so far as the motion for a nonsuit and the motion for a directed verdict were based on the contributory negligence of the plaintiff, the motions were properly denied.

[2] The next day after the accident Mr. Moon and his brother Ralph went to the scene of the accident and examined the street at the point where the accident had occurred. They found some skid marks. They measured the length of them, and thereafter they went to the office of the defendant and held a conversation with him. Testifying regarding what occurred in that conversation, each one of the Moon boys said that George Moon stated to the defendant that they had been out there and saw where the accident happened and measured the place up, and George then said, "There was 28 feet of skid marks"; and Mr. Hughes replied, "They were undoubtedly mine." The testimony was objected to, and the objection was overruled, and at this time the appellant strenuously urges that it was error to overrule the objections. We think there is no merit in the contention. The evidence of the admissions of a party to an action is admissible. Code Civ. Proc. § 1870, subd. 2. After the evidence was received the defendant might have asked for an instruction regarding what caution the jury should exercise in weighing the oral admissions. Code Civ. Proc. § 2061, subd. 4. But the trial court was correct in ruling that the objection to the admissibility of the evidence should not be sustained.

The appellant complains regarding certain instructions given on the subject of the defendant's negligence. Before taking up these matters it is proper to state that the plaintiff's complaint was framed on the complaint that was before the court in Stein v. United Railroads, 159 Cal. 368, 113 P. 663. There was no evidence introduced showing that the territory immediately adjacent to the place where the accident occurred had been "sign-posted." Motor Vehicle Act 1923, § 114, subd. (c) (St. 1923, p. 517). The record does not disclose, therefore, whether the territory was a business district, a residence district, or outside of a business or residence district. The defendant was not called as a witness, his absence was not accounted for, and his deposition was not produced.

[3] The trial court gave two instructions purporting to be based on section 130 of the statute. The facts to which that portion of the statute is applicable were not introduced in evidence, and the record contains nothing showing that the jury based its verdict on anything contained in said section. The trial court gave two instructions purporting to be based on section 125, subdivision (c), of the statute. An examination of those provisions of the statute discloses that the care therein provided for is in behalf of the vehicles at the rear, or of the vehicle that is being passed or overtaken. As neither of such vehicles was injured, the provisions of the statute which we have cited were inapplicable. As plaintiff stood looking at the group of cars she was not injured by the defendant's failure to give the statutory signal, as he turned out of the line to pass the cars ahead of him. Dewhirst v. Leopold, 194 Cal. 424, 229 P. 30. Therefore there is nothing in the record from which we can say, as a matter of law, that the giving of the instructions, hereinabove referred to and which we have shown were inapplicable to the facts, in any way prejudiced the rights of the defendant.

[4] The appellant complains of two other instructions which the trial court gave. The first one is as follows:

"The plaintiff in this action had the right to assume while crossing the intersection of Thirty-Fourth street and San Pablo avenue that the defendant, Lloyd S. Hughes, approaching from her right, would travel along the opposite side of the street in a southerly direction so as not to endanger her in any event until she had passed its center, and the plaintiff herein is further *entitled to the assurance* that the defendant, Lloyd S. Hughes, would use such care and circumspection as the circumstances required, and that he (the defendant) would not approach at an excessive speed and would not endanger her without warning." (Appellant's italics.)

In his argument the appellant does not show to the court wherein there was any error in said instruction.

The trial court also gave an instruction worded as follows:

> "You are further instructed that plaintiff had the right to take *a place of safety at the intersection of Thirty-Fourth street and San Pablo avenue in crossing said* San Pablo avenue, and plaintiff had the right to assume that any vehicle coming from the direction of the approaching traffic from the north would observe the statutory regulation as to the rate of speed and that any vehicle would not attempt to overtake another vehicle at the intersection of Thirty-Fourth and San Pablo avenue unless directed so to do by a traffic or police officer." (Appellant's italics.)

The instruction purports to be based on subdivision (c) of section 125 of the statute. The accident occurred at the intersection of Thirty-Fourth street and San Pablo avenue. The impact took place within the boundaries of the four corners made by the intersecting streets. At the time of the impact the defendant's car was in the very act of passing the other car which had been immediately in front of it. From the evidence adduced the jury could rightly determine whether the defendant was directed by an officer to overtake the car ahead of him.

[5] As to both of the instructions last referred to, the appellant contends that they assume certain matters of fact. We submit that a most cursory reading of the instructions discloses that no question of fact is assumed. If any fact was assumed, such fact was not a controverted fact in the case. The only evidence before the court was the evidence of the plaintiff and Mr. Moon. As to the alleged assumed facts, those two witnesses did not disagree.

The judgment is affirmed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

81 Cal. App. 126

PEOPLE v. SMITH. (Cr. 1375.)

(District Court of Appeal, Second District, Division 2, California. Jan. 28, 1927.)

1. Criminal law ⚷814(12)—Instruction on character of alleged robber for peace, quiet, and law-abidingness was properly refused where not supported by evidence.

In prosecution for robbery, there being no testimony concerning accused's character as to peace, quiet, and as law-abiding citizen, court properly refused to instruct as to such traits.

2. Criminal law ⚷1038(3)—One charged with robbery cannot complain on appeal of failure to instruct concerning honesty, in absence of request.

In prosecution for robbery, there being testimony, but no instruction requested, upon trait of honesty, accused cannot complain on appeal of failure to instruct concerning same.

3. Criminal law ⚷830—Whole instruction may be rejected if any part is improper.

If any part of a single instruction should not have been given, action of court in rejecting the whole will be affirmed.

4. Criminal law ⚷830—Where instruction concerning reputation for law-abidingness was not supported by evidence, court need not substitute trait of honesty, which was in evidence.

In prosecution for robbery, testimony having been introduced as to character of accused for honesty but not for peace, quiet, and law-abidingness, court was not bound to amend instructions by striking out traits of peace, quiet, and law-abidingness, which were included in request for instructions, and substituting therefor trait of honesty, concerning which there was no request.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Jesse Smith was convicted of robbery, and he appeals. Affirmed.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

THOMPSON, J. The defendant was convicted of the crime of robbery. Judgment was pronounced upon the verdict, and a motion for a new trial of the action was denied. From the judgment and the order defendant prosecutes this appeal.

During the trial of the action the defendant called three witnesses who testified that his general reputation for truth, honesty, and integrity was good. The defendant requested the following instruction, which the court refused to give:

> "You are instructed that in all criminal cases the law permits the defendant to introduce evidence concerning his good reputation upon the points of character involved in the special case under consideration; and in this case the law permits the defendant to introduce evidence of his good character as to peace, quiet and as a law-abiding citizen; and you are instructed that if such good character has been satisfactorily shown, it is a fact which must be taken into consideration in determining the guilt or innocence of the defendant, and you are instructed that the reputation of the defendant, in the respects above indicated, may of itself be sufficient to create such reasonable doubt as to his guilt, that you should give him the benefit of the doubt and acquit him."

[1-3] It has been held in People v. Chrisman, 135 Cal. 282, 67 P. 136, that character or reputation for honesty is the trait involved in a charge of larceny, and we think it is one of the traits involved in the charge of robbery. It will be noted, however, that the instruction here proposed by the defendant assumed that some testimony had been introduced relative to the reputation of the defendant "as to peace, quiet, and as a law-abiding citizen," and that the instruction touched only upon these traits and not upon the trait of honesty. There being no testimony concerning the defendant's character as to peace, quiet, and as a law-abiding citizen, the court properly refused to give the instruction. There being no instruction requested upon the trait of honesty, the appellant cannot now complain that the court did not give such an instruction. People v. Haun, 44 Cal. 96; People v. Ah Wee, 48 Cal. 236; People v. Gray, 66 Cal. 277, 5 P. 240; People v. Olsen, 80 Cal. 128, 22 P. 125; People v. Balkwell, 143 Cal. 260, 76 P. 1017; People v. Lips, 59 Cal. App. 381, 211 P. 22; and People v. Golsh, 63 Cal. App. 609, 219 P. 456. In the last-mentioned case this court, speaking through Mr. Presiding Justice Finlayson, says:

> "The rule is that if any part of a single instruction should not have been given the action of the court in rejecting the whole will be affirmed"—citing People v. Davis, 64 Cal. 440, 1 P. 889.

The same was announced in People v. Lips, supra.

[4] If, therefore, we view the refusal to give the present instruction not as a failure to instruct upon a proposition concerning which no instruction was asked, but as a failure to give an instruction requested, the last two cases are authorities for the rule that the court was under no obligation to amend by striking out the traits concerning which no testimony was offered and substituting in place thereof a trait concerning which testimony was offered.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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80 Cal. App. 352

W. H. MARSTON CO. v. KOCHRITZ et al.*

(Civ. 5471.)

(District Court of Appeal, First District, Division 1, California. Dec. 20, 1926.)

1. **Judgment 🔑131—Clerk's failure to enter judgment on regularly entered default cannot prejudice plaintiff's rights, or confer any right on defendant.**

Clerk's failure to enter judgment on regularly entered default cannot prejudice rights of plaintiff or confer any right on defendant who subsequently moved to quash summons and dismiss action as to him.

2. **Parties 🔑51(4)—Plaintiff, in suit to enforce stockholder's liability, may amend to make administrator of deceased stockholder party defendant (Code Civ. Proc. § 473).**

In suit to enforce stockholder's liability, where administrator of deceased stockholder was not made party in original complaint, plaintiff had right to amend and make him defendant in view of Code Civ. Proc. § 473, since he was proper party.

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*Hearing denied by Supreme Court February 17, 1927.

3. Parties 🔑53—General order, giving leave to amend in action to enforce stockholder's liability, is sufficient to permit bringing in administrator of deceased stockholder.

In action to enforce stockholder's liability, general order giving leave to amend *held* sufficient to permit amended complaint to bring in administrator of deceased stockholder as new defendant.

4. Appeal and error 🔑187(4)—Decree cannot be attacked on appeal because making new parties without leave of trial court, where question was not raised in trial court.

Decree cannot be attacked on appeal because of filing of amended petition making new parties without leave of court and notice to adverse parties, where amendment was proper, and no question of defect of parties was made in trial court.

5. Appeal and error 🔑241—On appeal from order dismissing action, contention not stated in notice of motion to dismiss cannot be raised (Code Civ. Proc. § 1010).

On appeal from order dismissing action to enforce stockholder's liability, administrator of deceased stockholder cannot raise question that action against him was prematurely brought, where such ground was not stated in notice of motion to dismiss action, in view of Code Civ. Proc. § 1010.

6. Appeal and error 🔑173(4)—Nonpresentation of claim to administrator cannot be raised for first time on appeal.

Nonpresentation of claim to administrator is matter of abatement, which must be raised by proper means in trial court, and, if not so raised, it cannot be urged on appeal.

7. Process 🔑6—Clerk must issue alias summons on second amended complaint, where summons on original complaint had been filed (Code Civ. Proc. § 408).

Where summons on original complaint had been returned and filed, clerk must, under Code Civ. Proc. § 408, issue alias summons on second amended complaint.

8. Pleading 🔑252(2)—Amended complaint supersedes all previous complaints.

When amended complaint is filed, the original ceases to be complaint in action, and is entirely superseded, and second amended complaint supersedes all previous complaints.

9. Pleading 🔑332—Process 🔑6—Amended complaint must be served on defendants that have appeared and summons issued thereon served on defendants that have not appeared.

Amended complaint must be served on all defendants who have appeared, and, if any have not appeared, summons must be issued on amended complaint, and served on such defendants.

10. Process 🔑45—Summons issued on second amended complaint held "alias summons," though another party had been added (Code Civ. Proc. §§ 407, 408).

Summons issued on second amended complaint *held* "alias summons" within Code Civ. Proc. § 408, though another party had been added, since such addition does not prevent summons from being "in the same form as the original," in view of section 407.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Alias Writ.]

11. Appeal and error 🔑870(2)—Order quashing service of summons may be reviewed, where it was part of order dismissing action; "final judgment" (Code Civ. Proc. §§ 956, 963).

Order of trial court quashing service of summons may be reviewed, where such order was part of order dismissing action, in view of Code Civ. Proc. § 956, since latter order was "final judgment" within section 963.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the W. H. Marston Company against F. J. Kochritz and others. From an order quashing summons and dismissing the action as to Mathew Hamilton as administrator of the estate of J. Carmichael, deceased, plaintiff appeals. Reversed and remanded.

Keyes & Erskine, of San Francisco, for appellant.

B. D. Marx Greene, of San Francisco, and Hugh K. Landram, of Merced, for respondents.

CAMPBELL, Justice pro tem. This in an action against the stockholders of Central Alaska Fisheries, Inc., to enforce their stockholders' liability. On June 26, 1924, the trial court made an order quashing the summons issued upon the second amended complaint and dismissing the action as to Mathew Hamilton, as the administrator of the estate of J. Carmichael, deceased, and this appeal is from that order.

The grounds of the action, as alleged in the second amended complaint, are that W. H. Marston guaranteed the notes of the Central Alaska Fisheries, Inc., aggregating $138,000; that as such guarantor he paid $126,644.60 on account of the principal and interest of such notes; and that the corporation has repaid to him the sum of $18,681.89 and no more. The action is brought by the W. H. Marston Company, as the assignee of W. H. Marston, against the stockholders of Central Alaska Fisheries, Inc., to recover the amount expended by W. H. Marston over and above the amount repaid to him by the corporation.

The first complaint was filed on September 17, 1923. It named J. Carmichael as the owner of 400 shares of the total of 9,794 shares of the subscribed capital stock of Central Alaska Fisheries, Inc. On July 2, 1923, prior to the commencement of the action, J. Carmichael had died.

On December 20, 1923, a stipulation was signed by the attorneys representing the defendants who had appeared in the action, stipulating that the plaintiff could file an amendment to his complaint. This amendment named the administrator of the estate of J. Carmichael, deceased, as a party defendant, and added a paragraph to the complaint which alleged that on July 2, 1923, J. Carmichael had died; that on July 20, 1923, the administrator had been appointed and had qualified; that on November 7, 1923, the plaintiff had filed a claim against his estate for $5,272.20, with interest, "being the proportion of the debts of the said corporation due by the said J. Carmichael to the W. H. Marston Company, as assignee of W. H. Marston on account of the stockholders' liability incurred by the said J. Carmichael to the said W. H. Marston," and that the plaintiff had elected to treat the refusal of the administrator to act on this claim as a rejection of it.

This amendment was filed on December 27, 1923, but no minute order was made by the court granting plaintiff leave to file it. The summons in the action, together with a copy of the amendment to the complaint, was served by the sheriff of San Joaquin county on the administrator on January 11, 1924, and the summons was returned and filed February 14, 1924.

The plaintiff moved to amend his complaint The motion was based on a notice of motion, to which was attached a copy of the proposed amended complaint. The proposed amended complaint named the administrator as a party defendant, and contained the same allegations respecting the death of J. Carmichael, the appointment and qualifications of the administrator, and the filing and rejection of the claim, as those set out in the amendment to the complaint filed on December 27, 1923.

On February 8, 1924, the court made its order granting plaintiff leave to file the amended complaint. Certain defendants filed a demurrer to this amended complaint, and on March 21, 1924, the court made an order sustaining the demurrer and granting plaintiff leave to amend.

The plaintiff, in pursuance of this order, on April 7, 1924, filed a second amended complaint, which also named the administrator as a party defendant, and contained the same allegations respecting the death of J. Carmichael, the appointment and qualification of the administrator, and the filing and rejection of the claim, as those contained in the amendment to the complaint, and the amended complaint. The original summons in the action was returned and filed on February 14, 1924, and on April 7, 1924, when the second amended complaint was filed, the clerk issued a summons thereon which was served on the administrator on April 9, 1924, and was returned and filed on April 11, 1924. On May 22, 1924, the default of the administrator for failing to answer the second amended complaint was entered by the clerk.

On June 7, 1924, the administrator served a notice of motion on plaintiff, reciting that the administrator appeared in the action "specially only," and that he was going to move the court for an order quashing the summons issued upon the second amended complaint "upon the grounds that there has been no order of this court authorizing or directing the issuing of an amended summons in this action," and also for an order dismissing the action as to the administrator "on the ground that there has been no order of this court bringing in said Mathew Hamilton, as administrator of the estate of J. Carmichael, deceased, as a necessary party defendant in this action." When this motion came on for hearing, the court made its order quashing the summons issued upon the second amended complaint and dismissing the action as to the administrator of the estate of J. Carmichael, deceased.

Heretofore, respondent made a motion in the Supreme Court to dismiss the appeal upon the ground that the orders appealed from were nonappealable. This motion, as stated by respondent, was denied, the court holding that the order dismissing the action was appealable, and that the order quashing the summons was a part of the other order, inasmuch as it was a part of the same document. It will be noted that according to the record the motions to quash and dismiss were contained in one document, as were likewise the order to quash and to dismiss.

The first point discussed by appellant in his brief is the effect of the default of the administrator, and cites us to Christerson v. French, 180 Cal. 525, 182 P. 27, as holding that a default having been entered against the administrator, he was out of court, and not entitled to make the motion, nor take any other step in the cause. In the case cited, the court stated the effect of the default as follows:

> "In the matter of entering judgment the clerk had no discretion, but having entered the default he was bound under the said subdivision [subdv. 1, sec. 585] to enter judgment 'immediately thereafter.' The fact that he did not enter judgment 'immediately thereafter' in no way prejudiced the rights of plaintiff and conferred no right on the defendant whose default had been regularly entered. * * * A defendant against whom a default is entered is out of court and is not entitled to take any further steps in the cause affecting plaintiff's right of action."

The case goes on to say that the filing of a demurrer and motion to strike out did not suspend the duty of the clerk to enter judgment, and the filing of such papers could have no legal effect.

[1] In the instant case the respondent con-

cedes that, after the default was entered, he could not demur nor plead to the complaint, but urges that he has not attempted to appear in the action, but appeared specially, and attacked directly the jurisdiction of the court; that is, that the entry of the default was without jurisdiction and void. This he would have the right to do even after entry of judgment. While judgment was not actually entered by the clerk, the default having been entered, the fact that judgment was not immediately entered must be considered as entered so far as the proceedings in this action are concerned, as the clerk's failure to enter judgment upon the default can in no way prejudice the rights of plaintiff and can confer no right on defendant whose default has been regularly entered. Edwards v. Hellings, 103 Cal. 204, 37 P. 218; Beck v. Pasadena Water Co., 130 Cal. 50, 62 P. 219; Christerson v. French, supra. The respondent, however, contends that the default was not regularly entered, but was without jurisdiction, because there was no order of court joining the administrator as a necessary party defendant; and, second, because there was no order of court directing the issuance of summons upon the amended complaint. As to this second point urged, appellant concedes that no order was made by the court directing the issuance of summons.

[2] The administrator of the estate of J. Carmichael, deceased, was appointed and qualified as such on July 20, 1923. The suit was commenced on September 18, 1923. The administrator was not made a party defendant in the original complaint, and, while he was not a necessary party to determine the rights as between the parties plaintiff and defendants, he was a proper party defendant, for, by bringing him in, the entire matters growing out of the transaction could be adjudicated. Under the circumstances the plaintiff had the right to amend his complaint, making him a party defendant in the action. Section 473 of the Code of Civil Procedure provides:

> "The court may in the furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party."

There can be no doubt but that, under section 473 of the Code, plaintiff had the right to amend his complaint by making the administrator a party. The claim, however, is made that the amendment joining the defendant was made without leave of court.

[3] On December 27, 1923, plaintiff moved to amend its complaint. The motion was based on notice of motion to which was attached a copy of the proposed amended complaint. The proposed amended complaint named the administrator as a party defendant, and was before the court when it made its order giving plaintiff leave to file an amended complaint. What amended complaint? Why assuredly the amended complaint, a copy of which was before the court, and which named the administrator a party defendant. A demurrer was sustained to this amended complaint, and the court made an order giving plaintiff leave to again amend. It would be supertechnical to hold that, when a motion is made to amend, and the motion has attached to it the amendment itself which it is proposed to file, in granting the motion, because it does not expressly so state, it does not include the right to file the proposed amendment which is submitted to the court as the basis for the order. However, there can be no doubt but that the administrator was a proper party, and that plaintiff was given leave generally to amend, and that, therefore, whether it be held that the order to amend, based on a motion which had attached to it the proposed amendment, carried with it the right to file the proposed amendment, in the absence of the order expressly directing such filing, is of no moment, as, under the authority of Louvall v. Gridley, 70 Cal. 507, 11 P. 777, the general order giving leave to amend is held sufficient, under circumstances similar to those in the instant case, to permit the amended complaint to bring in a new defendant who was a proper party. In Louvall v. Gridley, the court says:

> "We think the rulings were right. The administratrix was a proper party to the action, and the plaintiff, having obtained leave to amend generally, had a right to make her a party without any special permission to do so."

[4] The question as to whether the filing of an amended complaint without leave of court renders a judgment void where such order is a prerequisite to filing an amended complaint has not been passed upon in this state so far as we have been able to discover; at least none has been cited. In other jurisdictions, however, the rule is that the filing of an amended complaint without leave of court does not render a judgment void, but is a mere irregularity which cannot be taken advantage of for the first time on appeal. It is the rule that an amended complaint, filed after answer and without leave of court first obtained, where plaintiff was not entitled as a matter of right to file such amendment, is subject to be stricken from the files on motion of the defendant. But, if it is not stricken, and the court thereafter recognizes it, the irregularity will be deemed cured. Danielson v. Danielson, 62 Mont. 83, 203 P. 506. A decree cannot be attacked on appeal because of the filing of an amended petition making new parties without leave of court and notice to adverse parties, where the amendment was proper, and no question of defect of parties was made in the trial court. West Side Lumber Co. v. Hathaway, 115 Iowa, 654, 89 N. W. 35. See, also, Ross v. Berry, 17 N. M. 48,

124 P. 342; Carlisle v. Sells-Floto, 180 Iowa, 549, 163 N. W. 380.

[5, 6] Respondent urges that, because the claim was not presented to the administrator and rejected, which was a necessary prerequisite before filing suit—before the original complaint was filed—that the action, as far as the administrator is concerned, was prematurely brought. This point cannot be raised at this time. Section 1010 of the Code of Civil Procedure provides that a notice of motion must state the grounds upon which it will be made, and it has been held under this section that the court may consider only such grounds as are specified in the motion. Mojave & Bakersfield Ry. Co. v. Cuddeback, 28 Cal. App. 439, 152 P. 943; Garrett v. Garrett, 31 Cal. App. 173, 159 P. 1050. The respondent's notice of motion to dismiss the action was based only upon one ground, and this did not include his present claim that the action was prematurely brought. If, however, respondent could now raise this point, it would be of no avail to him, as it is established in this state that the nonpresentation of a claim to an administrator is a matter of abatement, and that it must be raised by proper means in the trial court, and that, if it is not so raised, it cannot be urged on appeal. Hentsch v. Porter, 10 Cal. 555; Coleman v. Woodworth, 28 Cal. 567; Peterson v. Hornblower, 33 Cal. 266; Preston v. Knapp, 85 Cal. 560, 24 P. 811; Burmester v. McNear, 42 Cal. App. 527, 183 P. 832. Here it is not contended that a plea in abatement was filed, nor that the objection was in any manner raised in the trial court. In the case of Bemmerly v. Woodward, 124 Cal. 568, 57 P. 561, in which case the facts closely parallel the instant case, the court says:

> "The supplemental complaint avers that the claim for the amount due plaintiffs was duly presented to the defendant as executrix of the estate of Woodward within the time allowed by law for the presentation of claims, and that it was rejected. These allegations are admitted in the answer. Still the complaint itself shows that the suit was commenced before the claim had been presented and rejected. There was no plea in abatement, nor was any objection made on this account at the trial or before judgment. * * * Section 1498 enacts that, if rejected, suit must be brought within three months; and section 1500, that no holder of a claim shall maintain an action thereon, unless the claim is first presented, except upon mortgage liens. It is contended that plaintiffs had no cause of action at the time that the suit was commenced, and such objection may be made at any time in the trial court, although it cannot be made for the first time in this court. It has been held, however, that this is a mere matter of abatement, which is waived unless pleaded. Formerly, such pleas could only be interposed before a plea to the merit. Under our Code all defenses may be included in one answer, but if a defense which is mere matter of abatement is not made by that time, it should be deemed waived."

In Hentsch v. Porter, supra, holding that this question must be raised in the answer by way of plea in abatement, the court gives the reason for the rule:

> "It is simply a matter of abatement—a defense which is not favored, and must be made by plea, and in proper time, or it is waived. * * * In this case if the defense had been promptly made, plaintiffs could have dismissed their suit and brought another. But if, after three months had elapsed after the claim was rejected, the point could be successfully urged, plaintiffs would have lost their right of action."

[7] A motion was also made to quash the service of summons upon the ground that the court made no order permitting the plaintiff to amend the summons, and an order was made granting this motion.

The summons issued upon the original complaint, which was returned and filed on February 14, 1924, did not name the administrator as a defendant. When the second amended complaint was filed on April 7, 1924, the clerk issued a summons upon this complaint, which named the administrator as a defendant, and which was served upon him on April 9, 1924, and filed on April 11, 1924. No order of court was made at the time the second amended complaint was filed, directing the issuance of summons thereon. It is contended that, in the absence of such an order, the clerk had no right to issue summons upon the second amended complaint, and that his act in so doing was void.

[8, 9] It is elementary that, when an amended complaint is filed, the original complaint ceases to be the complaint in the action. It is entirely superseded by the amended complaint, and in this action the second amended complaint superseded all previous complaints filed. An amended complaint must be served upon all defendants who have appeared in the action. If any defendants have not appeared, a summons must be issued upon the amended complaint, and served upon such defendants. Thompson v. Johnson, 60 Cal. 294; Witter v. Bachman, 117 Cal. 318, 49 P. 202; Linott v. Rowland, 119 Cal. 452, 51 P. 687. As the summons on the original complaint had been returned and filed, the clerk had power, and it was his duty, under section 408 of the Code of Civil Procedure, to issue an alias summons upon the second amended complaint—the only complaint in the action—and, as the administrator was named as a party defendant, the summons issued necessarily included him. Section 408 of the Code of Civil Procedure provides:

> "If the summons is returned without being served on any or all of the defendants, or if it has been lost, the clerk, upon the demand of the plaintiff, may issue an alias summons in the same form as the original, and within such time as the original might have been served if it had not been lost or returned,"

—and, as the administrator was named as a defendant in the second amended complaint the summons issued thereon necessarily included him.

[10] The summons issued on the second amended complaint, while entitled an "amended summons," is an "alias summons," and is in the same form and language of the original summons, excepting for the addition of the administrator as a party, and respondent contends that such addition changes the form of the summons, and, not being in the same form as the original, it was not an alias summons, and therefore its issuance was without authority. Section 408 of the Code of Civil Procedure provides that an alias summons shall be "in the same form as the original." Section 407 of the same Code provides what shall be the form and contents of the summons, viz. that it must be directed to the defendant, signed by the clerk, and issued under the seal of the court, and must contain: (1) The names of the parties, the court in which the action is brought, and the county in which the complaint is filed; (2) a direction that defendant appear and answer the complaint within a specified time; and (3) notice that, unless he does appear and answer, the plaintiff will take judgment for the money or damages demanded, etc. "The provision of section 408 of the Code of Civil Procedure as to the form of the alias summons means no more than that it shall conform to the requirements of section 407 of the Code of Civil Procedure, and did not preclude the insertion therein of the name of a defendant, which, through clerical error, had been omitted from the original summons." Doyle v. Hampton, 159 Cal. 729, 732, 116 P. 39, 41. In the light of this case there can be no doubt but that the alias summons issued in the instant case is in the "same form" as the original.

[11] Respondent insists that the appellant has not the right to have the order of the trial court quashing the service of the summons reviewed upon this appeal. As hereinbefore stated, the Supreme Court denied a motion to dismiss this appeal, holding that the order quashing the summons was a part of the other order dismissing the action. This order of the trial court dismissing the action was a final judgment within the meaning of section 963 of the Code of Civil Procedure, and appellant has the right to a review of the order quashing the service of summons under section 956, Code of Civil Procedure.

Respondent has cited a number of authorities which he urges uphold the order of the trial court. After a careful reading of the cases and Code sections cited, we conclude that they are not in conflict with the views herein stated.

From what we have said it follows that the court below erred in quashing the service of the summons and dismissing the action as to Mathew Hamilton, as the administrator of the estate of J Carmichael, deceased, and that, as the default was properly entered, it is the duty of the clerk to enter judgment in favor of appellant upon such default.

The order appealed from is reversed, and the cause remanded for proceedings in accordance with the views herein expressed.

We concur: TYLER, P. J.; KNIGHT, J.

FINN v. GOLDSTEIN. (Civ. 5043.)*

(District Court of Appeal, First District, Division 2, California. Dec. 30, 1926. Hearing Granted by Supreme Court Feb. 24, 1927.)

1. Pleading 🔑312—Instrument containing agreement for sale of land, sought to be specifically enforced, determines terms thereof, and not pleadings construing instrument.

Terms of agreement for sale of land, sought to be specifically enforced, are to be determined from agreement itself, and not from construction put on agreement by pleadings.

2. Frauds, statute of 🔑108(4)—Instrument for sale of land must state price of property sold to be sufficient as memorandum, under statute.

Instrument containing agreement for sale of land, to be sufficient as memorandum, within statute of frauds, must state price for which property is sold.

3. Frauds, statute of 🔑108(4)—Recital, "Cost of property—$11,500," is not sufficient statement of sales price for memorandum, within statute of frauds.

Agreement for sale of land reciting, "Cost of property—$11,500," does not contain sufficient statement of price for which property is sold, required of memorandum within statute of frauds.

4. Frauds, statute of 🔑108(4)—Memorandum relied on for specific performance of contract to sell land should have contained purchaser's offer to assume incumbrances.

Offers by purchaser of property to assume incumbrances and pay defendant balance in cash, if made pursuant to agreement to sell property, were material elements of contract, and should have been contained in memorandum relied on for specific performance of contract.

5. Vendor and purchaser 🔑50—No other writing than instrument for sale of land is part of contract, where it contains no cross-reference to other writings.

Where writing relied on by purchaser for specific performance of contract to sell land contained no cross-references to any other writing, no other writing could be said to be part of contract.

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*Superseded by opinion of Supreme Court 258 P. 85.

6. Frauds, statute of 🔑108(4)—Written instrument reciting receipt of deposit on certain property held insufficient as memorandum, under statute of frauds, to be specifically enforced.

Instrument reciting receipt of deposit on real property located on certain street known by certain numbers, cost of property, and that deposit is to stand good until certain date, *held* insufficient as memorandum of sale, within statute of frauds, and could not be specifically enforced by purchaser.

7. Specific performance 🔑114(3)—Complaint, not pleading extrinsic facts identifying property not described by metes and bounds in contract sought to be specifically enforced, is insufficient.

Complaint for specific enforcement of contract to sell land, failing to plead extrinsic facts to identify property not described in contract by metes and bounds, *held* insufficient.

8. Specific performance 🔑114(2)—Allegation that sale price in contract sought to be specifically enforced was not disproportionate to value held insufficient, under statute (Civ. Code, § 3391).

Amendment to complaint for specific performance of contract to sell property, reciting that sale price is not disproportionate to value of property, *held* not to meet requirements of Civ. Code, § 3391, prohibiting decree of specific performance, unless contract is just and reasonable and supported by adequate consideration.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Joseph T. Finn against Rose Goldstein. Judgment for plaintiff, and defendant appeals. Reversed.

Milton T. U'Ren and Albert Jacoby, both of San Francisco, for appellant.

R. M. J. Armstrong, of San Francisco, for respondent.

J. J. Dunne, of San Francisco, amicus curiæ.

STURTEVANT, J. Action in specific performance. The judgment of the trial court was in favor of the plaintiff, and the defendant has appealed, bringing up the judgment roll only.

The plaintiff's complaint was as follows:

"Plaintiff complains of defendant and for cause of action alleges:

"I. That the defendant on the 19th day of March, 1923, was the owner in fee of the premises hereinafter described, and that she then and there entered in an agreement with the plaintiff, executed under their names and seals, whereby plaintiff agreed to buy, and defendant agreed to sell, the property hereinafter described; that said agreement was in the words and figures following, to wit:

" 'San Francisco, March 19, 1923.

" 'Received from Mr. Joseph Finn fifty dollars. Deposit on three flats and four stores located on Twenty-Fourth street known as Nos. 3257 to 3269 Twenty-Fourth street.

" 'Cost of property—$11,500.

" 'Deposit to stand good until April 2, 1923.

" '[Signed] Rose Goldstein.

" 'I accept above agreement.

" '[Signed] Joseph T. Finn.'

"II. That the plaintiff has duly performed all the conditions of said agreement on his part to be performed.

"III. That on the 27th day of March, 1923, at the city and county of San Francisco, Cal., the plaintiff tendered to defendant the sum of fifty-nine hundred and fifty ($5,950.00) dollars and requested a conveyance of said premises according to the terms of said agreement, but defendant then and there, and ever since, has refused to execute and deliver such conveyance.

"IV. That there are two liens upon said property as follows: A deed of trust in the sum of fifty-five hundred ($5,500.00) dollars, executed to the Title Insurance & Guarantee Company, trustee for Jerome S. J. Bettman, dated April 20, 1922, and recorded on April 25, 1922; and another deed of trust in the sum of one thousand ($1,000.00) dollars, executed to the Title Insurance & Guarantee Company, trustee for Henry Redlick, dated November 14, 1922, and recorded in the office of the county recorder of the city and county of San Francisco; that the total amount due on said deeds of trust is the sum of sixty-five hundred ($6,500.00) dollars; that the equity of defendant in and to said property is the sum of five thousand ($5,000.00) dollars.

"V. That the plaintiff ever since the 27th day of March, 1923, the time of said tendering of the said sum of fifty-nine hundred and fifty ($5,950.00) dollars, has kept said money so tendered on deposit in the Title Insurance & Guarantee Company, located at 250 Montgomery street, San Francisco, Cal., and that said money is unproductive, and is ready to be paid over to said defendant on said agreement, and in this court.

"Wherefore," etc.

The defendant interposed a general demurrer, the demurrer was overruled, and the case went to trial before the trial court sitting without a jury. Thereafter, and before the findings were signed, the plaintiff filed an amendment by which he added to his complaint:

"That the sum of eleven thousand five hundred ($11,500) dollars is not disproportionate to the value of said property."

The defendant filed another demurrer, it was overruled, and the defendant answered, denying many of the allegations contained in the complaint, and denying the allegations contained in the amendment. The trial court made findings in favor of the plaintiff and a judgment was entered in his favor.

The first point made by the appellant is that the demurrer should have been sustained. For several reasons we think that on this point the appellant is clearly correct. In his complaint the respondent sets forth the writing and alleges that it is the contract on which he relies.

[1] Let us test the pleading first by the law governing specific performance. The general rule governing the case was quoted by Mr. Justice Richards in Patterson v. Reddish, 56 Cal. App. 197, 202, 204 P. 565, 567, as follows:

> "It is not necessary to cite authorities to support the proposition that the court, when called upon specifically to enforce an agreement, must ascertain the terms of the instrument sought to be enforced from the instrument itself and not from the construction put upon it in the pleading demanding its enforcement. A complaint in specific performance cannot supply the deficiencies which may render the contract nonenforceable in equity."

Speaking of a similar paper, in Allan v. Bemis, 120 Iowa, 172, 180, 94 N. W. 560, 562, the court said:

> "Thereby Bemis does not agree to sell, nor does Allan agree to purchase. That parties may by writing make admission of a prior oral contract or agreement to sell lands is not to be doubted. And an oral contract thus established may be enforced as of the time made as fully as the subsequent writing makes disclosure thereof. It is well settled, however, that in all such cases the court cannot look beyond the writing to ascertain the terms, conditions, or provisions of the contract. [Citing cases.]"

In the case of Heller v. Cochran, 280 Pa. 579, 124 A. 737, the Supreme Court of Pennsylvania had before it a writing which was more definite than the writing in the instant case, but that court quoted with approval as follows:

> "The agreement in this case is too vague and indefinite to permit equity to enforce it. * * * In addition to the vagueness in the description of the property, there is nothing contained in the agreement relative to the terms or time of payment or delivery of the deed; all of these matters will have to be established by parol evidence, and, indeed, as to some of them the bill alleges verbal agreements were entered into."

Speaking of a writing that was more formal than the one before us, in the case of Buckmaster v. Bertram, 186 Cal. 673, at page 676, 200 P. 610, 611, the court said:

> "On its face the agreement is too uncertain to be enforceable by way of specific performance."

[2, 3] Let us now test the pleading under the statute of frauds. To be sufficient as a memorandum coming within the provisions of the statute of frauds the writing should state the price for which the property is sold. Breckinridge v. Crocker, 78 Cal. 529, 535, 21 P. 179. The recital, "Cost of property—$11,500," is by no means a clear statement that it was an attempt to state the sales price. If it was an attempt to state the sales price, it does not appear whether the plaintiff was to pay $11,500 over and above existing incumbrances or otherwise. Speaking of such a writing, the Supreme Court of Connecticut, in Wetkopsky v. New Haven Gas Light Co., 88 Conn. 1, 8, 90 A. 30, 33, Ann. Cas. 1916D, 968, at page 970, said:

> "The two receipts which were in evidence were not sufficient memoranda of any contract to satisfy the statute. They did not show any sale, present or prospective, of the house, and would apply as well as money received on a lease as on a sale of the house."

In Patterson et al. v. Underwood, 29 Ind. 607, at page 610, the court said:

> "The receipt is not a sufficient memorandum in writing to take the case out of the statute. It contains no promise to convey. There was no note or memorandum, therefore, in writing, of the contract."

[4-6] From the allegations contained in the complaint it appears that the property was incumbered; that the plaintiff has offered to assume the incumbrances; and that he has offered to pay the defendant the balance in cash. If these offers were made pursuant to the agreement, such terms of the agreement were material elements of the contract, and as such should have been contained in the memorandum relied on. Fritz v. Mills, 170 Cal. 449, 458, 150 P. 375. However, the writing is wholly silent on these matters. The writing contains no cross-reference to any other writing, therefore no other writing can be said to be a part of the contract. Craig v. Zelian, 137 Cal. 105, 106, 69 P. 853; Eaton v. Wilkins, 163 Cal. 742, 746, 127 P. 71. It follows that the written instrument set forth in the complaint was insufficient as a memorandum within the statute of frauds.

[7] As the writing did not purport to describe the real estate by metes and bounds, the pleader proceeded to do so. In so doing he added to the writing; but he had no right to do more than lay a foundation for introducing evidence of the extrinsic facts. To do that he should have pleaded the extrinsic facts. Having failed to do so, the complaint was insufficient. Marriner v. Dennison, 78 Cal. 202, 20 P. 386; Eaton v. Wilkins, 163 Cal. 742, 745, 127 P. 71; Joyce v. Tomasini, 168 Cal. 234, 239, 142 P. 67.

[8] In this state it is provided by statute that a court of equity may not grant a decree in specific performance, unless it appears that, as to the defendant, the contract is just and reasonable and is supported by an adequate consideration. Civil Code, § 3391. To meet the requirements of the statute the pleader amended his complaint by adding the amendment which we have quoted above. The amendment fell short of the requirements. Joyce v. Tomasini, 168 Cal. 235, 237, 142 P. 67.

The judgment is reversed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

80 Cal. App. 478

SMITH et al. v. SCHRADER et al. (Civ. 3128.)

(District Court of Appeal, Third District, California. Dec. 28, 1926.)

1. Vendor and purchaser 🔑170—Variations from contract in purchaser's instructions to escrow holder held insufficient to justify vendor's refusal to perform.

In action by purchaser for specific performance of land contract deposited in escrow, vendor's refusal to perform *held* not justified because purchaser's instructions to escrow holder varied from contract in that one lot might be released from mortgage on payment at any time before specified date instead of on that date, and in that one note was given for aggregate sum due instead of a number of notes for fractions of it payable in successive years, in view of purchaser's willingness and readiness to comply with terms of contract.

2. Specific performance 🔑121(8)—In purchaser's action for specific performance, evidence held to sustain necessary finding that price was just.

Evidence *held* to sustain finding that price in land contract was fair, just, and reasonable as required to authorize specific performance.

3. Specific performance 🔑128(3)—Rent paid by purchaser seeking specific performance for other premises after vendor should have conveyed held erroneous measure of damages (Civ. Code, §§ 3306, 3334).

In purchaser's action for specific performance, amount of rent paid by purchaser for other premises after vendor should have conveyed *held* erroneous measure of damages, in view of Civ. Code, §§ 3306, 3334, since not relating to value of rents, issues, and profits of property to be conveyed.

4. Appeal and error 🔑221—Rule making unavailable error as to measure of damages where case was tried on theory that measure was proper held inapplicable to party who objected.

Rule that error cannot be based on measure of damages where case was tried on theory that measure was applicable *held* not to apply to party who objected to adoption of such measure.

5. Specific performance 🔑128(3)—Interest on purchaser's deposit in escrow held element of his damages in action for specific performance.

Purchaser, who according to land contract deposited $5,000 in escrow, *held* entitled to interest on this sum as an element of damages in action by him for specific performance.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Lisle L. Smith and another against George Schrader and others. From a judgment for plaintiffs, defendants appeal. Affirmed in part, and in part reversed.

Haas & Dunnigan, of Los Angeles, for appellants.

Joseph Musgrove and Fred O. McGirr, both of Los Angeles, for respondents.

PLUMMER, J. Action to compel specific performance of a contract to convey real estate. Plaintiffs had judgment, and the defendants appeal.

The transcript shows that on the 19th day of January, 1923, the plaintiffs and defendants, other than the Paul Kent Truck Company, entered into the following agreement for the sale and purchase of certain lots situated in the city of Los Angeles:

"This agreement, made this 19th day of January, 1923, at the city of Los Angeles, by and between George Schrader, hereinafter called the vendor, and Lisle L. Smith and Stoughton Smith, hereinafter called the vendees, witnesseth:

"That the said vendor agrees to sell and the vendee agrees to buy the following described real estate situate in the city of Los Angeles, county of Los Angeles, state of California, and known as lots 164, 166, 188, 187, 186, and 185 of the Wingerter tracts, for the sum of thirty-two thousand dollars ($32,000), to be paid in the manner following:

"$5,000 to be deposited with the Title Insurance & Trust Company upon the placing of the deal in escrow.

"$3,000 two years thereafter (should, however, the said vendees pay $5,000 in lieu of said $3,000 at said time, the said vendor will release said above lot No. 188);

"And the sum of $3,000 each year thereafter, together with interest at the rate of 6 per cent. on all deferred payments, said obligations to be evidenced by promissory notes bearing 6 per cent. interest and secured by mortgage upon the premises to be conveyed; interest to be paid quarterly.

"And the said George Schrader agrees upon this transaction being placed in escrow to serve written notice upon the tenant now in possession of said premises, to vacate the same within ninety days, according to provisions of certain lease under which said tenant now holds the said premises.

"This agreement to be binding upon the heirs and executors of the parties hereto.

"Dated the day and year first above written.

"Geo. Schrader.
"Lisle L. Smith.
"Stoughton Smith."

On the same day, the defendant George Schrader executed and delivered to the Title Insurance & Trust Company, the escrowee named in the foregoing agreement, a memorandum of instructions, the part material to be considered herein being as follows:

"As a part of the consideration for said deed, you will also procure note executed by above vestees and Abbie M. Smith and Eleanor A. Smith, their wives, in favor of George Schrader, for $27,000.00 due in annual install. of $3,000.00 each, due in 2, 3, 4, 5, 6, 7, 8, 9, 10 yrs. after 1/25/23 with int. at 6 per cent. per annum from 1/25/23, payable at Los Angeles, Calif., payable quarterly (*See special privilege below*) secured by a mortgage your form on said premises which by your guarantee shall 'Privilege reserved in mortgage of paying $5,000.00 to apply on principal at any time prior to 1/25/25 by paying accrued interest to date of such payment.' In the event this option is exercised lot 188 is to be released from the mortgage at time of such payment."

At the same time the plaintiffs executed and delivered to the Title Insurance & Trust Company a like memorandum of instructions, the material part of which necessary to be considered herein is as follows:

"Los Angeles, Cal., Jan. 19, 1923.

"Title Insurance & Trust Company: I hand you herewith check for $5,000.00 and will hand you funds sufficient to cover my portion of your charges together with note and mortgage for $27,000.00 as set out below; all of which you are authorized to use in connection with your order No. 643902 when you can issue, in your usual form, your cont. guarantee of T. G. & Tr. Co. or L. A. T. I. Co.'s (with your liability thereunder not to exceed $32,000.00) on lots 164, 166, 185, 186, 187, 188 of Wingerter tract, city and county of Los Angeles, California, at 15/52 M. R. which will show record title to said property vested in Lisle L. Smith and Stoughton F. Smith, both married men, free from incumbrances except * * * and a mortgage your form, executed by vestees and wives in favor of George Schrader for $27,000.00, due in annual installments of $3,000.00 each in 2, 3, 4, 5, 6, 7, 8, 9, 10 yrs. after 1/25/1923, with int. at 6 per cent. per annum from 1/25/23 payable quarterly at Los Angeles, Cal. Privilege reserved of paying $5,000.00 of the principal at any time prior to 1/25/25 by paying accrued interest to date of such payment without bonus. In the event this option is exercised lot 188 of the above tract is to be released from the mortgage."

These memoranda of instructions contained much detailed matter not involved in this action and therefore need not be set forth herein. After the execution of the agreement of sale and purchase and memoranda of instructions, as set forth herein, it appears that the defendant George Schrader noticed that there had been some slight variations between the memoranda of instructions and the agreement of purchase and sale, and thereupon, on the 24th day of January, 1923, the following letter was sent by the defendant George Schrader to the Title Insurance & Trust Company, and, also, to the plaintiffs in this action:

"Los Angeles, Cal., January 24, 1923.

"To the Title Insurance & Trust Company, Messrs. Lisle L. Smith and Stoughton F. Smith and Bernard Meidenberg:

"Gentlemen: I hereby notify you that the escrow instructions in escrow No. 195057 (order No. 643,902), the terms for the sale of lots 164, 166, 185, 187, and 188 of the Wingerter tract were deviated from in the following two particulars:

"The time at which the option for a release of lot 188 from mortgage was to be exercised should be at the maturity of the first note, which would be two years after the 19th day of January, 1923.

"And furthermore said agreement of sale provided for separate notes of $3,000 each, due in 2, 3, 4, 5, 6, 7, 8, 9, and 10 years.

"And further in accordance with the agreement between the parties the note maturing in two years from date of said agreement shall contain a clause in pursuance with said agreement specifying that should the mortgagors at the time of maturity of said note desire the release of lot No. 188 from the operation of the mortgage the said mortgagors shall pay the sum of $5,000 in lieu of said sum of $3,000; and that

"Further the provisions and conditions of the mortgage shall be made in conformity with said provisions of said note maturing two years from date of the agreement.

"Kindly notify me that you have complied with this request to make the aforesaid corrections on or before January 31st, 1923, and oblige,

"Yours respectfully, George Schrader."

Thereafter, and on the 2d day of February, 1923, the defendant wrote an additional letter to the plaintiffs in this action, notifying the plaintiffs that he refused to and would refuse to comply with the agreement of sale entered into, as herein stated. This letter is as follows:

"Gentlemen: On January 24, 1923, I mailed you and each of you a notice in writing containing a request that escrow instructions in escrow No. 195,057 (order No. 643,902) be modified to correspond to the original contract entered into for the sale of lots 164, 166, 185, 186, 187, and 188 of the Wingerter tract, and requested you to notify me on or before the 31st day of January, 1923, that you had complied with said request.

"Not having received any such notice from you, you are hereby notified that I refuse to go on with said sale, and that the same is hereby terminated.

"Yours respectfully, George Schrader."

Immediately upon receipt of this letter, the attorneys for the plaintiffs notified the defendant Schrader to the effect that the plaintiffs had until the 19th day of February, 1923, within which to close the proposed deal, and were ready and willing to comply with all the conditions of the agreement of sale. This letter is as follows:

"February 5, 1923.

"Mr. George Schrader, 18 Mar Vista Street, Pasadena, Cal.—Dear Sir: I am the attorney for L. L. Smith and S. F. Smith, who are purchasing certain real property from you in the Wingerter tract, consisting of lots 164–66, 185–6–7 and 8.

"They have heretofore entered into a written agreement concerning this property, and also escrow instructions. They received a notice from you dated the 2d of February, 1923, in which you notify them of your refusal to go on with this sale, and notify them of your intention to terminate the sale.

"Both Mr. Smiths insist on carrying out the terms of this sale, and performing the obligations on their part to be performed, and according to their contract with you, and are ready, able, and willing to perform each and every thing upon their part to be done or performed to carry out this contract.

"The escrow instructions, so I am informed, provide for 30 days from the 19th of January, 1923, within which to close this deal, therefore this deal must be closed before the 19th of this month, and I therefore desire to ascertain from you if it is your intention to refuse to abide by this contract, which you have with Mr. Smith, and if you refuse to deliver the property according to the agreement. If so, I have no other alternative but to immediately institute suit to compel the performance. I trust you will notify me by return mail so there will (be) no unnecessary delay.

"I have discussed the matter several times with Mr. Weyse and made several propositions to arrive at an amicable adjustment of the matter, but he informs me same cannot be done as you insist on terminating this contract. Both Mr. Smiths went to the office of Mr. Weyse today hoping to meet you there and discuss the settlement of your differences, and to ascertain if some amicable adjustment could not be arrived at, but you refused to be present. It is my understanding from what my clients inform me Mr. Weyse informed them you refuse to go on with the deal.

"I therefore wish to ascertain if this is the position you take and if there is no possibility of closing the transaction, as I will have no other alternative but to institute an action at law.

"Trusting to hear from you by return mail, I am,

"Yours truly."

On February 9, 1923, the defendant Schrader sold the premises in controversy to the defendant Paul Kent Truck Company for a consideration of $31,000. The plaintiffs, as stated, had judgment for specific performance of the contract and judgment in damages for the sum of $210 per month from the 19th day of February, 1923, on account of the alleged increase in the rent upon the premises then occupied by the plaintiffs, being premises other than those involved in this action.

The record shows that the plaintiffs and the defendant Paul Kent Truck Company, a corporation, were engaged in the motor transportation business; that prior to the time of the execution of the agreement of sale herein mentioned the plaintiffs occupied certain premises under a lease which expired on December 31, 1922; that the plaintiffs desired to purchase suitable property for the location of their business and the erection of a warehouse thereon; that the Schrader property was especially adapted or suitable for such purposes; that on January 19, 1923, the plaintiffs and the defendant Schrader met in the office of a Mr. Weyse, an attorney representing Mr. Schrader, for the purpose of entering into an agreement for the purchase and sale of the property. Mr. Schrader's agent, Mr. Meidenberg, was also present. It further appears that the agreement of purchase and sale was then prepared, read, and signed; that the parties, including the attorney for Mr Schrader, and his agent, Mr. Meidenberg, went to the office of the Title Insurance & Trust Company for the purpose of placing the transaction in escrow and having escrow instructions prepared and signed by them; that the escrow memoranda herein referred to were then and there drawn, read over to the parties, and, also, to the defendant Schrader and his attorney, and were signed by the parties to the contract. It does not appear that the plaintiffs were represented by an attorney during these transactions. Immediately upon the signing of the escrow instructions, plaintiffs signed and delivered to the Title Insurance & Trust Company their check for $5,000, made payable to the company, as provided in the contract.

Immediately thereafter the defendant Schrader served a written notice upon the defendant Paul Kent Truck Company, the tenant, which was then in possession of the premises in controversy, to vacate the same within 90 days thereafter, which notice informed the defendant Paul Kent Truck Company of the agreement of sale made with the plaintiffs, and that the property had been sold to plaintiffs for $32,000, of which the defendant Schrader was to receive the net sum of $30,000. At that time the defendant Schrader also notified Mr. Paul Kent of the Paul Kent Truck Company that there were six lots included in the deal. Mr. Kent replied that if he had known that there were six lots instead of five, he would have purchased the property himself. In a few days thereafter, the defendant Paul Kent Truck Company offered the defendant Schrader $31,000 for the property. On the next day, February 2, 1923, the defendant Schrader withdrew the notice to vacate. On the 23d day of January, 1923, the defendant Schrader obtained from the Title Insurance & Trust Company copies of the escrow instructions, with a copy of the contract of sale herein set forth, and took the same to the office of Mr. Shipman, the attorney for the Paul Kent Truck Company, and on January 24, 1923, the defendant Schrader, together with Mr. Shipman, went to the office of Mr. Weyse, attorney for defendant Schrader, and then and there a letter was prepared and signed by Mr. Schrader and mailed to the Title Insurance & Trust Company, stating, in substance, that the escrow instructions deviated from the terms of the sale in two particulars, to wit, that the time for which the option for the release of lot No. 188 from the mortgage was to be exercised should be at the maturity of the first note and that the agreement provided for separate notes of $3,000 each; that the note maturing in two years from date should contain a clause specifying that should the mortgagors at the time of maturity of the note desire the release of lot No. 188 from the operation of the mortgage, the said mortgagors should pay the sum of $5,000 in lieu of $3,000. Some further negotiations took place, from which it appears that the plaintiffs were ready and willing to comply with the terms of the contract just as written, irrespective of the alleged variations in the memoranda of instructions given by the respective parties to the Title Insurance Company.

[1] One contention made by the appellant that the court erred in allowing judgment for specific performance is that the variation in the terms of the escrow instructions relative to the $5,000 being paid at any time prior to January 25, 1925, or, as it is written in the memorandum "1/25/25," instead of being paid at the maturity of the first note, which would be, as stated in the Schrader memorandum, on the 25th day of January, 1925, and the further variation in the plaintiffs' memorandum to the extent that there was only to be one note, whereas there were to be a number of notes in the sum of $3,000 each, equal to the sum remaining due, payable 2, 3, 4, 5, 6, 7, 8, 9, and 10 years after date, bearing interest at 6 per cent. per annum. There was no difference in the amount nor in the annual installments, nor in the interest to be paid, the only variation being in this particular, that the agreement called for notes and the memoranda of instructions called for the execution of a note, and the amount remaining due was to be secured by mortgage. This variation, it is argued by appellants, imposed onerous conditions upon the defendant Schrader, contrary to their agreement of sale and of such a nature as to entitle the defendant Schrader to refuse to comply with the terms of the agreement. However, the record shows that shortly after this variation had been discovered, the plaintiffs, in writing, stated that they were ready and willing to comply with the terms of the written agreement, irrespective of the variation therefrom contained in the memoranda of instructions. Irrespective of this, we do not very well see how the alleged variation imposed any onerous or burdensome conditions upon the defendant Schrader. The amount of money agreed to be paid was exactly the same in all the installments, the amount of the deferred payments were the same, the amount of the installments were the same, and the rate of interest was not changed. As to the installments, it appears from the agreement that they were to be evidenced by a number of notes. In the memoranda of instructions, the installments were to be evidenced by one note, or a note for the aggregate sum remaining due, payable in installments. The record is absolutely silent as to how the alleged variation between the agreement of sale and the memoranda of instructions delivered to the Title Insurance & Trust Company occurred. There is not a scintilla of evidence that either party intended to deceive or mislead the other, or showing in any way whatever that either party either desired or was attempting to vary the terms of sale. The only burden imposed upon the seller, under the memoranda of instructions, would be the duty of accepting payment of $5,000 earlier than called for in the agreement. It does not appear that either of the parties intended by the memoranda of instructions delivered to the escrowee to vary the terms of the agreement of sale, and in view of the fact of the plaintiffs' readiness and willingness to comply with the terms of sale as mentioned in the agreement, we think the trial court was justified in concluding that the defendant Schrader had no grounds upon which to attempt cancellation of the agreement of sale and to refuse to comply with the conditions therein upon the defendants' part imposed.

[2] It further appears that after refusing to comply with the terms of his agreement of sale entered into with the plaintiffs, the property was sold to the defendant Paul Kent Truck Company, a corporation, for the sum of $31,000, or $1,000 less than the sum agreed to be paid by the plaintiffs, which answers the requirement of the law, we think, that the evidence must show, before specific performance will be awarded, that the amount agreed to be paid is fair, just, and equitable.

[3] The second ground for reversal which is necessary to be considered herein and which we find meritorious is that in relation to the damages awarded by the trial court. It appears in the transcript, and from the facts which we have gleaned therefrom and stated herein, that the plaintiffs were occupying premises not involved in this action, their lease to which had expired on the 31st day of December, 1922, and that after the failure of the defendant Schrader, in this action, to comply with the agreement of sale, the rent on the premises then and there occupied by the plaintiffs was increased in the sum of $210 per month. It is this increase in the rental value of the premises occupied by the plaintiffs that, as set forth in plaintiffs' complaint, is the foundation for its claim to damages in said sum, and it is upon this basis that the trial court made its findings and judgment awarding the plaintiff damages in the sum of $210 per month, in addition to interest on the $5,000 deposit by the plaintiffs with the Title Insurance & Trust Company as the first payment of the purchase price of the premises agreed to be sold by the defendant Schrader to the plaintiffs. The facts recited above show that the plaintiffs had permitted their lease to expire on the premises occupied by them some little time before the execution of the agreement of purchase and sale set forth herein, and therefore any

allegation that plaintiffs were left without a lease on the premises occupied by them, by reason of the defendants' failure to comply with the agreement of sale, is controverted by their own testimony that the lease had been allowed to expire prior to the execution of the agreement. The complaint is silent as to the rental value of the premises involved in this action. The only reference thereto is found in the testimony of Paul H. Kent to the effect that his company was paying the sum of $85 per month therefor. The findings of the court make no mention of the rental value of the premises involved in this action. The appellants base their appeal upon the provisions of section 3306 and 3334 of the Civil Code, and argue that said sections fix and limit the damages recoverable, if at all, by the plaintiffs in this action. This contention, however, does not appear to be borne out by the authorities. On the other hand, the respondents, apparently, take the position that all damages, whether remote or proximate, suffered by the plaintiffs, whether within the reasonable contemplation of the parties or connected with the property involved, may be recoverable, as well as a decree for specific performance in this form of action. This contention appears to be based upon the following excerpt found in the opinion, in the case of Abbott v. The 76 Land & Water Co., 161 Cal. 42, 118 P. 425, to wit:

> "It is true that the vendee had an election of remedies. He might have brought an action to recover such damages as were caused him by the breach, or he might, as he did, bring his action for specific enforcement of the contract, and in such action obtain not only the specific enforcement of his contract, but also such damages as he was lawfully entitled to, for it is thoroughly settled that a court of equity taking jurisdiction for the purpose of specifically enforcing a contract takes full jurisdiction of all the rights of the parties, whether legal or equitable, and may award such legal damages as the vendee may have suffered by reason of the delay in performance. See 2 Warvelle on Vendors, § 958; 36 Cyc. 753."

A careful reading of this statement of the law relied upon by respondents discloses that the award can be only of such legal damages as the vendee may have suffered by reason of the delay of the vendor. The text found in Cyclopedia, upon which this language of the Supreme Court rests, defines the legal damages as follows:

> "A vendor retaining, or wrongfully regaining, possession, after the time appointed for delivery of possession, is chargeable with the rents and profits, or with the fair rental value of the premises." 36 Cyc. 755. "Where there is delay in completion of the contract, compensation may be made to one or the other of the parties by means of the rents and profits, and interest on the price. The general rule is to adjust the rights of the parties so as to give to each as nearly as possible what he would have received if the contract had been performed according to its terms. * * * The vendee is discharged from the duty of paying interest by a tender of the purchase-money when it became due and a continued readiness to pay it since, or by depositing it in a bank, with notice to the vendor, subject to his order, to be delivered to him on the execution and delivery of a deed."

A number of authorities are cited on pages 754 and 755 of 36 Cyclopedia, setting forth the measure of damages. In Harper v. Battle, 180 N. C. 375, 104 S. E. 658, 20 A. L. R. 357–360, a case involving the damages to be allowed under certain circumstances, in addition to specific performance, the court said:

> "On the facts presented, we are of opinion that the judgment should be reformed so as to allow plaintiff for the rents from June 1, 1918, the day when the deed should have been made, and plaintiff charged with interest from that date on the contract price."

In McMahan v. McMahan, 122 S. C. 336, 115 S. E. 293, 26 A. L. R. 1295, in a case for specific performance and damages, where specific performance was not awarded, the court stated the rule as to damages, as follows: "Where a vendor having title refuses to convey, and no part of the consideration has been paid, the measure of damages which the vendee is entitled to recover is the value of the land at the time the contract should have been performed, less the contract price," which conforms very closely to the provisions found in section 3306 of our Civil Code. In Baker v. Puffer, 299 Ill. 486, 132 N. E. 429, the direct question which we are here considering was passed upon by the Supreme Court of the state of Illinois, and it was there held that the plaintiff was not entitled in a court of equity to damages for rent paid for other premises that he might occupy or had occupied by reason of the refusal of the defendants to perform their contract. In 27 R. C. L. 631 (section 388), the rule as to the measure of damages is thus stated:

> "Under any of the different rules of damages the purchaser is entitled at least to recover nominal damages for a breach by the vendor. The rule is laid down in many cases that the purchaser is entitled, as general damages for the refusal or inability of the vendor to convey, to recover the difference between the actual value of the land and the agreed price, together with any payments he may have made, or the value of the land deducting the amount of the purchase money unpaid. These statements are substantially the same in effect and result in giving the purchaser as damages the benefit of his bargain in case the land is worth more than the price agreed upon."

And on page 636 of the same volume, section 394, relative to special damages, the law, supported by authorities there cited is thus stated as follows:

"In addition to general damages the purchaser may be entitled to recover special damages where they are the natural and proximate cause of the vendor's breach of the contract; and where the breach consists in the failure of the vendor to convey at the time agreed upon and his continued wrongful detention of the possession from the purchaser, a conveyance having been afterward made and accepted, rents received by the vendor during the time the control of the property was so detained have been held to be recoverable. To be recoverable, however, the special damages must be a proximate cause of the vendor's breach of his contract. Thus expenses incurred by a purchaser in preparing to build on other lands owned by him with the use of a building on the land sold, the benefit of which is lost to the purchaser by reason of the failure of the vendor to convey, are too remote to be recoverable."

The general rules which we have stated relative to the measure of damages are supported by practically all the authorities, and must be held to be the legal damages referred to by the Supreme Court of this state in Abbott v. The 76 Land & Water Company, recoverable in connection with a decree for specific performance.

[4] The respondents, in reply to the appellants' claim that the court adopted the wrong measure of damages, call our attention to the case of Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 P. 389, and Kincaid v. Dunn, 26 Cal. App. 686, 148 P. 235, where it is held that error cannot be predicated upon the failure of the court to adopt the correct measure of damages, where the case has been tried upon the theory that a particular rule of damages was applicable to the issues being tendered to the trial court. This position, however, is untenable. A reference to the transcript shows that the right of the plaintiff to recover damages under the pleadings in this case was all the while controverted by the defendants, as the following colloquy taking place between counsel during the trial abundantly shows: Mr. Musgrove, attorney for the plaintiffs, in seeking to introduce certain testimony stated:

"The purpose is to show that Mr. Schrader knew that this property was the only property available, etc. * * *

"Mr. Haas: That might be material, if your Honor please, in an action for damages where the question of good faith and bad faith were concerned, but it is immaterial in an action for specific performance.

"Mr. Musgrove: The theory is that in an action for specific performance—well, we are not asking for damages. We want the property because it is the only property for this particular purpose.

"Mr. Haas: Well; it is absolutely immaterial what you want it for. The question of good faith or bad faith does not enter into it. Well; I will stipulate that such is a fact, but I will not stipulate that it is material in any way.

"The Court: Well; it would be material as bearing upon the question as to damages for withholding, wouldn't it?

"Mr. Haas: Well; those damages for withholding—we will show that they are not entitled to recover those in an action for specific performance. They may be grounds for a separate action, but I am satisfied they are not entitled to recover any damages in an action for specific performance.

"The Court: If that is the case, what is the danger of going into it for what it is worth? * * * Subject to the objection and ruling, which will be reserved, the facts last stated by Mr. Musgrove are admitted."

And further on the question of damages:

"Mr. Musgrove: We might have an action for damages. Now, I do not want to be placed in the position, inasmuch as I have already included an action for damages; I do not want to be foreclosed by this action, and if necessary, I will offer proof * * * for the particular needs for which we wanted it.

"Mr. Haas: You are not entitled to make that proof.

"The Court: Do you think you would be entitled to make that proof? Mr. Musgrove: Under the pleadings as they now stand; not under the pleadings of the third amended complaint, no.

"The Court: Was this preliminary to a suggested amendment?

"Mr. Haas: Well; we will resist that. Having gone into the trial and having asked us to make stipulations which are now in the case, they are not entitled to amend. That is an entirely different line of attack, which would mean a different line of preparation. We have a right to rely upon the pleadings as they are at this time."

Upon the question of the increased rent which the plaintiffs allege they paid on property other than that involved in this action, the record shows that the plaintiffs offered to prove by a certain witness that the rent had been increased as alleged, and counsel for the defendants stipulated that the witness would so testify. The stipulation is as follows:

"Mr. Haas: We will stipulate that they will so testify. We do object to it on the ground it is incompetent, irrelevant and immaterial, if offered. Your Honor may withhold your ruling on that until the final argument."

It was also stipulated that Paul Kent was the sole owner of the stock of Paul Kent Truck Company, with the exception of qualifying shares.

It is clear from the foregoing that the measure of damages alleged in the complaint and sought to be established by the testimony, and which was finally adopted by the court, was opposed by the defendants all during the course of the trial, and, having been so opposed and questioned, the cases dealing with the measure of damages, accepted by counsel as the true measure of damages applicable to the case being tried, have no relevancy, nor when the measure adopted by the court as the true measure of damages is not acceded to but controverted during the trial by the defendants.

[5] Interest on the $5,000 deposited by the plaintiffs with the escrowee was properly allowed. We do not find any merit in the contention of appellants that the decree awarding specific performance varies from the agreement of purchase and sale entered into by the parties. The wording is slightly different, but the effect is precisely the same. Under such circumstances, it would only unduly lengthen this opinion to set forth our views in relation thereto.

It follows from what we have said that the judgment of the trial court, so far as it relates to damages awarded for increased rents paid by the plaintiffs, must be set aside on the ground that the damages have been based upon remote and collateral matters, and not upon anything relative to usable values—that is, the rents, issues, and profits of the premises to be sold by the defendant Schrader to the plaintiffs. No question has been made upon this appeal that if specific performance should be awarded under the agreement of sale, it should be awarded as well against the defendant Paul Kent Truck Company as against the defendant Schrader. A number of minor objections have been urged upon this appeal, but, not being deemed of sufficient merit to affect the decision in this cause, are not specifically referred to in this opinion.

The judgment of the trial court awarding damages to the plaintiffs, in so far as it is based upon the alleged increase of rents paid by them for other premises than those involved in this case, is hereby reversed; as to all other parts, the judgment is affirmed, appellants to recover their costs on appeal.

We concur: FINCH, P. J.; PRESTON, Justice pro tem.

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80 Cal. App. 501

WAGG v. TOLER et al. (Civ. 3179.)

(District Court of Appeal, Third District, California. Dec. 28, 1926.)

1. Appeal and error 🔑1010(1) — Finding of trial court will be sustained on appeal if supported by any substantial evidence.

Finding of trial court, if supported by any substantial evidence, will be sustained on appeal.

2. Bills and notes 🔑525—Corporation transferring note sued on in payment for plaintiff's stock held under evidence not to have sold stock under agreement to repurchase as affecting claim that plaintiff was holder in good faith of note.

In action on note transferred by corporation to plaintiff to pay for stock repurchased by corporation, evidence *held* to show that plaintiff did not purchase stock under agreement by corporation to repurchase same as affecting claim that he was holder in good faith of note.

3. Appeal and error 🔑1052(5)—Error in admitting evidence of fraudulent acquisition by corporation of note sued on and transferred to plaintiff in payment for stock held not prejudicial, in view of finding.

In action on note transferred by corporation to plaintiff in payment for his stock repurchased by corporation, error in admitting proceedings in action by maker of note to show that corporation fraudulently acquired note *held* not prejudicial, in view of finding that repurchase of plaintiff's stock was void ab initio.

4. Corporations 🔑324—Directors of corporation cannot use assets of corporation to purchase capital stock in behalf of corporation (Civ. Code, § 309).

Under Civ. Code, § 309, directors of corporation are prohibited from using its assets to purchase in behalf of corporation its capital stock except under certain conditions, such act being made misdemeanor by Pen. Code, § 560.

5. Corporations 🔑370(1)—Term "ultra vires" refers to powers not conferred on corporation by act of its creation.

Term "ultra vires" refers to powers not conferred on corporation by act of its creation and are violations of trust reposed in managing board.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ultra Vires.]

6. Bills and notes 🔑352—Stockholder exchanging stock for note held by corporation is not purchaser in good faith of note (Civ. Code, § 309).

Under Civ. Code, § 309, incorporator and stockholder of corporation cannot become purchaser in good faith of note given corporation in payment of its stock by exchanging for note his stock in corporation.

7. Corporations 🔑376—Objection that transfer of note by corporation to stockholder in payment of stock was void may be made at any time.

In suit on note transferred by corporation to stockholder in payment of stock repurchased by corporation, objection that transfer is void may be made at any time.

8. Corporations 🔑376—Transfer of corporate note to stockholder in payment of stock repurchased by corporation held void ab initio (Civ. Code, § 309).

Purchase by corporation of its stock and transfer of note held by corporation as asset of company in payment of stock *held* void ab initio, under Civ. Code, § 309, applying as well to stockholder as to corporation.

Appeal from Superior Court, Los Angeles County; J. B. Landis, Judge.

Action by W. I. Wagg against J. L. Toler, known also as Jessie Lee Toler, and another, Judgment for defendants, and plaintiff appeals. Affirmed.

Gerald Willis Myers and Bigby & Myers, all of Los Angeles, for appellant.

Bailie, Turner & Lake, of Los Angeles, for respondents.

PLUMMER, J. Action by plaintiff to recover from the defendants the sum of $2,500 on a certain promissory note executed and delivered by the defendant Toler to the defendant Leach-Biltwell Motorcar Company, a corporation, and by the corporation assigned and transferred to the plaintiff. Defendants had judgment, and the plaintiff appeals.

The grounds urged by appellant for reversal upon this appeal necessary to be considered herein are: First, that the court erred in holding that the transfer of the note sued upon to the plaintiff by the defendant corporation was void ab initio; second, that the evidence was insufficient to support the findings; third, errors in the admission of testimony. Other grounds are set forth, but are not such as affect the merits of this action and need not be set forth in detail in this opinion.

It appears from the transcript that some time prior to the incorporation of the defendant Leach-Biltwell Motorcar Company there was in existence a certain other corporation known as and called the Leach-Biltwell Motor Company; that the plaintiff, W. I. Wagg, became a stockholder in that corporation and also a director; that the par value of the stock purchased by the plaintiff in said corporation was the sum of $10,000; that at the time of the purchase of said stock by plaintiff from the Leach-Biltwell Motor Company the plaintiff was promised employment and was immediately given employment at a salary of $150 per month; that a number of months later all the property and good will of the Leach-Biltwell Motor Company was transferred to the Leach-Biltwell Motorcar Company, a corporation, which appears to have been formed for the purpose of taking over all the affairs and properties of the Leach-Biltwell Motor Company.

The testimony tends to show that the plaintiff was one of the incorporators and a director of the Leach-Biltwell Motorcar Company. After this latter company was organized all the property of the Leach-Biltwell Motor Company was transferred to the Leach-Biltwell Motorcar Company, and the various stockholders in the older corporation surrendered all their stock and received from the new corporation certificates of stock evidencing their ownership therein. The plaintiff remained in the employ of the Leach-Biltwell Motorcar Company until some time in October, 1921. The agreement for the issuance of stock in the new corporation was made some time prior to March 31 of that year. At that time the plaintiff was a director of the new corporation. Some time in September, 1921, the defendant Toler purchased a number of shares of stock in the defendant Leach-Biltwell Motorcar Company and executed a promissory note in part payment therefor, in the sum of $2,500. In October, 1921, the defendant corporation purchased from the plaintiff all of its common stock theretofore issued to and then owned and held by the plaintiff, and, as part payment therefor, assigned without recourse and delivered to the plaintiff the promissory note executed to defendant corporation by the defendant Toler, which is the note involved in this action. In December, 1921, the defendant Toler commenced an action against the defendant corporation whereby she sued to have the sale of stock theretofore purchased from the corporation rescinded and set aside on the grounds of fraud; that said action was compromised and in settlement the defendant corporation agreed with the defendant Toler that the transaction relative to the purchase of stock should be rescinded and that the corporation would hold defendant Toler harmless by reason of said note, and agreed before said note matured it would buy the same and return the note to the defendant Toler. This the corporation did not do. The pleadings in this suit instituted by the defendant Toler against the defendant corporation, as well as the cancellation of the purchase of stock, were admitted in testimony by the trial court. Upon the facts presented relative to the transaction, which we have here sketched, the court found as follows:

> "II. That on or about the 5th day of October, 1921, Leach Biltwell Motorcar Company attempted to transfer the promissory note herein sued upon to plaintiff, and, for that purpose, wrote upon the back of said note what purported to be an indorsement thereof to plaintiff without recourse, and then and there delivered said note to plaintiff with said purported indorsement thereon, and that plaintiff ever since has been in possession thereof, but the court further finds that said attempted transfer of said note to plaintiff by said Leach Biltwell Motorcar Company was made pursuant to an agreement made and entered into by and between said plaintiff and said Leach Biltwell Motorcar Company, in and by the terms of which agreement said plaintiff attempted to sell to said Leach Biltwell Motorcar Company and the said Leach Biltwell Motorcar Company attempted to purchase from plaintiff certain shares of the capital stock of Leach Biltwell Motorcar Company theretofore sold and delivered by Leach Biltwell Motorcar Company to plaintiff herein, and in and by the terms of which said agreement said Leach Biltwell Motorcar Company, in consideration thereof, and for no other consideration, attempted to transfer to said plaintiff said promissory note and delivered the same to him as aforesaid; that said promissory note constituted, at the time of the attempted transfer thereof by said Leach Biltwell Motorcar Company to said plaintiff, a part of the actual

capital and assets of Leach Biltwell Motorcar Company with which it carried on its corporate business, and did not constitute surplus profits, and that said attempt on the part of said Leach Biltwell Motorcar Company to purchase said stock from said plaintiff was not made pursuant to any agreement made or entered into by or between said Leach Biltwell Motorcar Company and said plaintiff prior to or at the time plaintiff purchased said stock from said corporation by which said corporation was bound or obligated to repurchase said stock, or any part thereof, from plaintiff."

The court also further found that the transfer of the note by the corporation to the plaintiff was without any consideration to support it; that the transfer was against public policy; and that the plaintiff never acquired any ownership in said note. The court also found in finding No. 4 that the defendant Toler had instituted an action for the cancellation of her purchase of stock in the defendant corporation on the grounds of fraud, and that the purchase was canceled and rescinded and that the defendant Toler had restored to the defendant corporation everything of value which she had received on account of her agreement to purchase stock in the defendant corporation.

The chief contention of the appellant is that the stock purchased and held by him was purchased and held under an agreement with the corporation to repurchase the same. This contention is found adversely to the plaintiff and constitutes the principal attack made upon the judgment of the trial court.

Though not in the order presented, we will here consider the question of the sufficiency of the evidence to support the findings of the trial court. The plaintiff's assignment in this particular reads as follows:

"In finding as a conclusion of fact that the plaintiff did not prove by a preponderance of the evidence that the defendant corporation was under contractual obligations to repurchase his stock."

[1] The finding of the court here attacked is not set forth in appellant's brief, nor in any supplement thereto, and it would be sufficient, under the rule laid down in the Estate of Berry, 195 Cal. 354, 358, 359, 233 P. 330, under such circumstances, to pass this question by as not being presented so as to require consideration, and so far as this question is concerned in the determination of this cause to hold adversely to the appellant's contention. However, as presented to us on appeal, we will state it is not a matter of preponderance of evidence, because if there is any substantial evidence supporting the finding of the trial court it is sufficient.

[2] An examination of the testimony shows that the preponderance of the testimony would appear to be against the appellant and not in his favor. The plaintiff testified that at the time he obtained his position in Leach-Biltwell Motor Company and also his stock therein he had a conversation with Mr. Leach, the president of the corporation, in which the following conversation took place. The witness said: "If I don't make good, what is going to happen?" Mr. Leach replied: "Why, we will give you your money back. * * *" "I couldn't give you the dates, but before I left the employ of the Leach-Biltwell Motorcar Company, I had conversations about leaving the company. I was only supposed to be in the store-room about a month and then I was to have a better position; I didn't get a better position, waited a couple of months more; and probably three months after I went to work I spoke to Mr. Leach about getting a better position. He said he could not do anything more, nothing at present. I waited a little while longer and went to him again about three months afterwards. I wanted a better position or have him give my money back."

The only other evidence in behalf of the plaintiff is that of the witness King, called by him. This witness testified, in substance, as follows:

"About February 18, 1920, I had a conversation with Mr. Leach at the office of the company; Mr. Wagg, Mr. Hertzler, Mr. Leach, and myself were present, possibly the stenographer; the first time I remember that I was there, I took Mr. Wagg in and introduced him to Mr. Leach and Mr. Hertzler, and then afterwards we were in again and went over the matter more thoroughly; we went over the matter of the investment of Mr. Wagg in the company and getting a position with the company; he was to have the position of buyer, or purchasing agent; buyer was the word used—was the only position talked of; there had been a question as to Mr. Wagg's experience and Mr. Leach stated that they were willing to try Mr. Wagg out in that position and if he did not fill that position acceptably to the company, that they would find some other suitable position for him with the company.

"Q. Was there anything said at that time with regard to whether or not he was not satisfactory, that they would find a purchaser for his stock? A. Yes.

"Q. What was said in that connection? A. Mr. Leach stated definitely to myself that if Mr. Wagg wouldn't fill the position acceptable and didn't wish to remain with the company, that they would buy the stock back or give him his money back, at any rate see that he got it back."

The witness Leach testified substantially as follows:

"I am president and manager of the Leach Biltwell Motorcar company; I had the same position in Leach Biltwell Motor Company; Mr. Wagg purchased $10,000 worth of stock in Leach Biltwell Motor Company; when he purchased the same Mr. Hertzler, the salesman that sold him the stock, and myself were present, as well as Mr. Wagg; Mr. Hertzler is now dead; Mr. Wagg stated he was desirous of obtaining a position where his money went, that he had to work for a living and if he made an investment it would be necessary that he go with it, and we gave him a position; I told him his salary would be $150 a month, that he could go to work any time; nothing whatever was said about giving him a position as purchasing agent; we did not have any purchasing agent at that time. When we moved down to the Santa Fé avenue plant and our operations had been enlarged, and Leach Biltwell Motorcar Company had been incorporated, Mr. Wagg made application at that time for the position as purchasing agent; at the time Mr. Wagg purchased the stock in Leach Biltwell Motor Company, there was nothing mentioned at all about Leach Biltwell Motor Company buying the stock, nor was anything said about Leach Biltwell Motor Company repurchasing Mr. Wagg's stock during the time said company was operating the business; I do not remember any conversation in which Mr. Wagg said, 'What will happen if I don't make good?' I did not state to Mr. Wagg in effect that, 'If you don't make good, why, we will give you your money back', nor did I make to him any other statement to that effect; a new company was organized and called Leach Biltwell Motorcar Company; the stockholders of the old company exchanged their stock for stock in the new company; Mr. Wagg was a director in the Leach Biltwell Motorcar Company; he continued as an employee of the Leach Biltwell Motorcar Company from the time of its organization until some time in October of the same year; he was a director of the company at the time the agreement was made for the exchange of stock; the first time Mr. Wagg mentioned the repurchase of the stock was 60 to 90 days prior to the time he left the company; Wagg came in and said his wife was ill and wanted to return to Canada; that his salary of $150 would not permit his sending her there and he living in California, and asked if I could help him out. I said, 'Mr. Wagg I would be glad to do anything I can for you, you have been a good, faithful employee here; if it is possible for me to turn over to you the assets of the corporation that you can use, and take back your stock, I will endeavor to do so.' This matter came up on several different occasions until the time we actually did deliver to him something like $10,000 or $11,000 worth of notes that were in possession of the Leach Biltwell Motorcar Company, among which was the Toler note; these conversations commenced about three months prior to the time that he actually left our employ; the repurchase of his stock had not been mentioned prior to that time; there were several applications among other employees for the position of purchasing agent, of which Mr. Wagg was one; I told him I thought he was not qualified to fill the position; he told me that he thought he was. The Leach Biltwell Motorcar Company never operated at a profit."

Testimony was then introduced relative to the rescission and cancellation of the purchase of stock by the defendant Toler from the Leach-Biltwell Motorcar Company, as we have herein stated. The testimony further shows that the sole consideration for the transfer of the stock from the plaintiff to the defendant corporation was the transfer to the plaintiff of notes held by it, including the note sued upon in this action.

The foregoing shows without the necessity of argument that the finding of the court that the purchase of plaintiff's stock in the Leach-Biltwell Motorcar Company was not made upon any agreement by the company to repurchase the same is amply supported and does not fall within the line of cases holding that, under such circumstances, such agreements will be enforced.

[3] The admission of the pleadings and proceedings in the action instituted by the defendant Toler for the cancellation of her purchase of stock in the defendant corporation we think erroneous, but from the fact that finding No. 4 that such stock had been issued upon fraudulent representations and had been surrendered up and canceled and the defendant corporation agreed to hold the defendant Toler harmless on account of the note sued on in this action that had theretofore been transferred to the plaintiff as part payment for the purchase of his stock is wholly unnecessary to support the judgment in this action, and from the further fact that the testimony shows that the finding of the court that the purchase of the plaintiff's stock was attempted to be made by taking the assets of the company and transferring them to the plaintiff, we cannot well see that the plaintiff was at all prejudiced by the action of the court in admitting such testimony. If the purchase of the plaintiff's stock by the use of the assets of the corporation was unlawful and therefore void ab initio and transferred no property rights to the plaintiff, then and in that case, it would make no difference whether the defendant Leach-Biltwell Motorcar Company had acquired the Toler note by either fair or fraudulent means.

[4] By section 309, Civ. Code, directors of corporations are prohibited from using the assets of a corporation to purchase in behalf of the corporation its capital stock, except under well-defined conditions, such as are set forth in the case of Stewart v. Stewart Hotel Co., 33 Cal. App. 168, 164 P. 620. Nothing has been called to our attention that would take this case out of the general rule prohibiting directors from the purchase of the capital stock of a corporation and using the assets thereof for such purposes. Section 560, Penal Code, makes any such act a misdemeanor.

This case presents not merely the question of an ultra vires transaction on the part of the corporation, such as was at issue in the cases of Ingle v. Scales, 36 Cal. App. 412, 172 P. 169; Savings Bank v. Barrett, 126 Cal. 413, 58 P. 914; Savings Bank v. Burns, 104 Cal. 480, 38 P. 102; Bay City v. Broad, 136 Cal. 525, 69 P. 225; and Blochman v. F. G. Inv. Co., 177 Cal. 762, 171 P. 943. In all of these cases it is held, in substance, that a debtor of a corporation, who had received loans from or property from a corporation, cannot set up in defense of an action to recover the money loaned or the property involved that the act of the corporation in transferring the property or making the loan was ultra vires. As pointed out in the cases cited, such holding would be, in effect, to permit a party to a transaction to take advantage of his own wrong. Thus, banks are prohibited from making loans to any one individual above a certain percentage of their capital stock, and if a loan were made above such amount, it would be ultra vires on the part of the corporation, but it would not operate as a gift to the borrower by estopping the corporation from maintaining an action to recover the money loaned. It is evident that such cases have no bearing upon the questions here presented.

[5] The following cases are more nearly in point: In Poultry Producers, etc., v. Barlow, 189 Cal. 278, 208 P. 93, it was held that a clause in a subscription agreement purporting to give to a corporation the right, at its option, to purchase its shares of stock from its stockholders, was illegal and void. Likewise, in Chilberg v. Cross Land Co., 55 Cal. App. 678, 204 P. 28, it was held that a clause in a certificate of a corporation agreeing to return to stockholders the amount paid for shares out of the money received from the sale of real property of the corporation was void. The term "ultra vires" simply refers to the power of a corporation. It simply refers to those powers which are not conferred upon a corporation by the act of its creation and are violations of the trust reposed in the managing board. This difference is made plain in the Matter of the Assignment of the Mutual Ins. Co., 107 Iowa, 143, 77 N. W. 868, 70 Am. St. Rep. at page 158.

[6] The transaction under consideration is not merely one which is outside of and beyond the powers conferred upon the corporation by the provisions of the Codes, to which it owes its corporate existence, but is a distinct unlawful act so denominated by the Civil Code and made a crime by the Penal Code. The plaintiff in this case was one of the incorporators of the defendant as well as a stockholder therein, and could not, under such circumstances, become a purchaser in good faith of the Toler note by exchanging therefor his stock in the defendant corporation. As said in Schulte v. Boulevard Gardens Land Co., 164 Cal. 464, 129 P. 582, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914B, 1013, the plaintiff, as well as the corporation, was acting within the inhibitions of the Codes. In speaking of section 309 of the Civil Code, prohibiting directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, or from reducing or increasing the capital stock, except as therein provided, thus defines the phrase "capital stock":

> "The phrase 'capital stock,' as used in this section, and in the section of the Practice Act from which the Code provision was drawn, has been construed in various decisions of this court. Its meaning has been definitely settled to be, not the shares of which the nominal capital is composed, but the actual capital, i. e., assets, with which the corporation carries on its corporate business. Martin v. Zellerbach, 38 Cal. 309, 99 Am. Dec. 365; San Francisco & N. P. R. Co. v. Bee, 48 Cal. 398; Kohl v. Lilienthal, 81 Cal. 385, 20 P. 401, 22 P. 689, 6 L. R. A. 520; Tapscott v. Mex. Col., etc., Co., 153 Cal. 667, 96 P. 271; Burne v. Lee, 156 Cal. 222, 104 P. 438."

[7] It is finally urged that the respondents were not entitled to raise this question. This objection, however, is not well taken, as the objection that the contract is absolutely void may be made at any time. In Morey v. Paladini, 187 Cal. 727, 203 P. 760, where the question of a transaction being void is first raised on appeal and its consideration objected to on that ground, the court in holding the transaction illegal and void, states the rule as follows:

> "The respondent objects to a consideration of the point upon the ground that objection comes too late. But a void contract, a contract against public policy or against the mandate of the statute, may not be the foundation of any action either in law or in equity. Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387—390, 18 P. 391, 9 Am. St. Rep. 211; Chateau v. Singla, 114 Cal. 91, 94, 45 P. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63. As the appellant comes now into court pleading that he has violated the law and is seeking relief based upon his own unlawful acts, respondent contends that the court should leave him where it finds him. But neither the silence nor the consent of the parties justifies the court in retaining jurisdiction of such an action. Ball v. Putnam, 123 Cal. 134, 140, 55 P. 773. Any one sued upon a contract may set up a defense that it is a violation of an act of Congress, and if it is found to be so, that fact will constitute a good defense to the action. Bement v. National Harrow Co., 186 U. S. 70, 88, 22 S. Ct. 747, 46 L. Ed. 1058. See, also, Rose's U. S. Notes. The burden ordinarily rests upon the party asserting the invalidity of the contract to show how and why it is unlawful (Harbison-Walker Co. v. Stanton, 227 Pa. 55, 63, 75 A. 988), and, as a general rule, cases will not be reversed upon points which the respondent has not had an opportunity to discuss, but in cases of this kind it matters not that no objection is made by either party. When the court discovers a fact which indicates that the contract is illegal and ought not to be enforced, it will, of its own motion, instigate an inquiry in relation thereto."

[8] As we have said, the pleadings and finding in this case are not set out in appellant's brief nor in any supplement thereto, nor is the testimony, other than that of the plaintiff and of plaintiff's witness King,

copied herein set forth in appellant's brief, nor does the appellant print anything indicating the grounds upon which objection was made to the introduction in this case of the pleadings and proceedings in the case of Toler against the defendant corporation, and, so far as we have been able to ascertain, the typewritten transcript shows only that the plaintiff objected to the introduction of such testimony as being immaterial. The sufficiency of this objection is questioned by the respondent, but whether sufficient or insufficient is unnecessary for us to decide, because in holding that the attempted sale of the note and transfer thereof as the assets of the company to the plaintiff, in return for his stock, was void ab initio and that the Code provisions apply as well to a stockholder as to a corporation, is determinative of the case at bar and shows that the plaintiff has no right of property or ownership in the note in question, nothing further needs to be decided.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; PRESTON, Justice pro tem.

MEMORANDUM DECISIONS

199 Cal. 749

Edward Velardi MANRIQUEZ, Petitioner, v. SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of LOS ANGELES, and Hon. Hugh J. Crawford, Judge of Said Court, Respondents. (L. A. 9591.) (Supreme Court of California. Dec. 9, 1926.) In Bank. Application for writ of mandate prayed to be directed to the Superior Court of Los Angeles County, Hugh J. Crawford, Judge, to compel restoration to calendar and disposition of motion for new trial. Writ granted. Alan Nichols, of Los Angeles, for petitioner. Everett W. Mattoon, County Counsel, and McIntyre Faries, Deputy County Counsel, both of Los Angeles, for respondents.

PER CURIAM. At the close of the oral argument the Chief Justice announced the decision of the court as follows: This is an application for a writ of mandate to compel the respondent superior court, and the judge thereof, to restore to its calendar, and to dispose of, a motion for a new trial, in an action entitled Eileen M. M. Manriquez v. Edward Velardi Manriquez, No. D37507, pending in said court. The record discloses that the trial judge, when the motion was called for hearing, being of the opinion that the defendant in the case and the moving party for a new trial was in contempt of court for noncompliance with an order of the court previously made allowing alimony, made and entered an order in which it is recited that the motion for a new trial came on for hearing, A. Moresby White representing the plaintiff, and Alan Nichols representing the defendant, and ordering that said motion for a new trial be dismissed on account of the defendant being in contempt of court for noncompliance with a court order. The attorney for the defendant duly excepted thereto. The court is of the opinion that, under the circumstances disclosed by the record which is now before it on the petition and the return of the respondent, the trial court acted in abuse of its discretion in making the order complained of, and that it is that court's duty to restore said motion for a new trial to its calendar, and to proceed to dispose of the same on its merits as required by law. Let the writ issue as prayed for.

CALIFORNIA REPORTER

252 PACIFIC REPORTER

200 Cal. 201

MOUSSEAU v. GAREY, County Auditor.
(L. A. 9075.)

(Supreme Court of California. Dec. 30, 1926.)

1. Counties ⚷72—County officer is not prohibited from performing services for county other than official duties and receiving compensation therefor (Pol. Code, § 4290).

Pol. Code, § 4290, making salaries provided for full compensation for services rendered by county officers, does not prohibit county officer from performing services for county other than his official duties and receiving compensation for such services.

2. Counties ⚷74(2)—County clerk may be lawfully compensated for services as purchasing agent while occupying latter office (Pol. Code, § 4041, subd. 21, and §§ 4246, 4290).

Under Pol. Code, § 4041, subd. 21, and 4246, 4290, county clerk may legally accept employment from board of supervisors as county purchasing agent while occupying office of county clerk and may be compensated for services as purchasing agent.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Mandamus by Calvin G. Mousseau to compel W. D. Garey, Auditor of Imperial County, to issue warrants in payment of plaintiff's services as purchasing agent of county. Judgment for plaintiff, and defendant appeals. Affirmed.

E. R. Utley, Dist. Atty., of El Centro, for appellant.

Calvin G. Mousseau, MacDonald & Thompson, of Los Angeles, and Harry W. Horton, of El Centro, for respondent.

CURTIS, J. Respondent is the duly elected and qualified county clerk of the county of Imperial, having been elected to that position at the general election held in November, 1922. He qualified as such officer and entered upon the discharge of his duties on the first Monday in January, 1923, and has ever since continued to fill said office and to discharge the duties thereof. On the 15th day of January, 1923, the board of supervisors of said county appointed or employed him to act as county purchasing agent and fixed his compensation for the services to be performed under said appointment at the sum of $50 per month. He accepted such employment and discharged the duties required by him thereunder up to the 1st day of June, 1923. His salary was paid for the first three months of his employment, but the appellant, the duly elected, qualified, and acting auditor of said county, refused to allow respondent's demands for salary for the months of April and May, 1923. Thereupon respondent instituted this proceeding in mandamus to compel appellant to issue warrants in payment of respondent's services as purchasing agent for the months of April and May, 1923. There is no dispute as to any of the facts in the case and the only question presented for decision is one of law, and that is whether the respondent while occupying the office of, and drawing the salary as, county clerk of said county, can legally accept other employment from said county and be paid therefor from the public funds of said county.

The county of Imperial belongs to the seventeenth class and the salary of the county clerk of said county at the date of respondent's election to said office as fixed by section 4246 of the Political Code was the sum of $2,400 per annum. By section 4290 of the same Code it is provided that:

> "The salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided. * * *"

[1, 2] By subdivision 21 of section 4041 of the Political Code, the board of supervisors is given authority to appoint a purchasing agent. This section was in force at the time of plaintiff's election. Therefore, the duties of the purchasing agent were at no time any part of the duties to be performed by the plaintiff as county clerk of said county. The board of supervisors had no authority to require plaintiff in his official capacity to perform these duties. Whoever the board appointed purchasing agent would perform the duties of this office as purchasing agent and not in any other capacity. When, therefore, plaintiff was appointed to this position and entered upon the discharge of the duties of purchasing agent, he performed said duties not as county clerk of said county or as ex officio county clerk. The salary paid him as purchasing agent was not paid him for services rendered either as county clerk or ex officio county clerk of said county. Had plaintiff resigned his office as county clerk the next day after his appointment as purchasing agent said resignation would have had no effect upon his position as purchasing agent and he would have continued to discharge the duties of said last-named position so long as the board of supervisors continued him in such employment.

Therefore section 4290 of the Political Code, providing that the salaries therein provided shall be in full compensation of all services rendered by county officers either as officers or ex officio officers, has no application to the compensation paid plaintiff for services which had no connection with, and which were entirely independent of, his duties as county clerk. This section does not attempt to deal with the question as to whether county officers can or cannot perform services for their respective counties outside of their official duties and be compensated for such services. It certainly contained no provision prohibiting a county officer from performing services on behalf of his county other than his official duties and to receive compensation for such services, and our attention has not been called, nor have we been able to discover, any other statute of the state which makes such prohibition. It is true that there is language to be found in the case of County of Humboldt v. Stern, 136 Cal. 63, 68 P. 324, which might support such a contention, but a careful reading of this case, we think, will convince any one that such language was not necessary for its decision and that it is mere dictum. Accordingly, we find nothing either in the statutes or in the decisions of the courts of this state that made the plaintiff ineligible to the position of purchasing agent. Having been appointed to such position by the board of supervisors, who are specially authorized to make said appointment, we see no real reason why he is not entitled to receive the compensation agreed to be paid him for his services in said position.

The judgment is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; SULLIVAN, J.; PRESTON, J.; SHENK, J.

200 Cal. 152

In re SMITH'S ESTATE.

SMITH v. SPAULDING.

(L. A. 9122.)

(Supreme Court of California. Dec. 29, 1926.)

1. Wills 🔑53(2)—Evidence concerning unsoundness of mind before or after executing will is important only as showing condition at time of executing it.

Where testator's competency is attacked, question is his mental condition at time of execution of will, and evidence of unsoundness of mind before or after execution of will, is important only in so far as showing mental condition at time of execution of will.

2. Wills 🔑52(1)—To overcome presumption, testator's unsoundness of mind must be shown by preponderance of evidence.

To overcome presumption of sanity, contestant must show that testator was of unsound mind by preponderance of evidence.

3. Wills 🔑34—Only insanity, resulting in general incompetency, or hallucination, or delusion, of which will is product, invalidates will.

Mental derangement to invalidate will must be insanity, resulting in mental incompetency generally, or hallucination, or delusion, of which the will is the product.

4. Wills 🔑50—Testator need only be able to understand nature of act, nature and situation of property, and relations to persons having claims on bounty and affected by will; "competent."

Testator is "competent," if he has mental capacity to understand nature of act, to understand and recollect nature and situation of his property and his relations to persons having claims on his bounty and whose interests are affected by his will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Competent.]

5. Wills 🔑324(2)—Aged testator, suffering from auto-intoxication, held not incompetent, as matter of law.

Evidence that 79 year old testator executed will when suffering from attack of acute auto-intoxication *held* insufficient to establish testator's mental incompetency, as matter of law.

6. Wills 🔑324(3)—That testator executed will during attack of auto-intoxication, in presence of sole beneficiary, held not to establish undue influence, as matter of law.

Evidence that 79 year old testator was suffering fatal attack of acute auto-intoxication and executed will, in presence of sole beneficiary, to exclusion of wife, from whom he was separated. *held* insufficient to establish undue influence, as matter of law.

7. Wills 🔑155(1)—"Undue influence" is exercise of acts toward another person, by which latter's mind is controlled.

"Undue influence" is exercise of acts or conduct by one person towards another person, by which latter's mind is subjugated to that of former.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

8. Wills 🔑166(7)—Substantial proof of pressure overcoming volition is required to set aside will for undue influence, proof of interest and opportunity alone being insufficient.

To establish that will was executed under undue influence requires substantial proof of pressure which overpowered testator's volition when will was made, and proof of interest and opportunity alone is insufficient.

9. Wills 🔑52(2)—No presumption of incompetency arises from nor is burden of proof shifted by will being unnatural, unfair, or unjust.

That will is unnatural, unfair, or unjust does not raise presumption of incompetency or shift burden of proof to proponent.

10. Wills 🔑163(6)—No presumption of undue influence arises from nor is burden of proof shifted by will being unnatural, unfair, or unjust.

That will is unnatural, unfair, or unjust does not raise presumption of undue influence, nor shift burden of proof to proponent.

11. Wills 🔑384—Court's declaration that contestant, claiming undue influence and incompetency, would waste time by introducing further similar expert medical testimony held not prejudicial error.

Court's declaration that expert medical testimony did not assist him, and that contestant who claimed incompetency and undue influence would waste time in introducing further similar testimony, *held* not prejudicial error, where court did not preclude contestant from introducing further testimony, and hypothetical question contained matters not established by evidence.

12. Wills 🔑386—Discrepancies and falsities in proponent's evidence are for trial court.

It is for trial court to weigh discrepancies and falsities in proponent's evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Application by John E. Spaulding for the probate of the will of D. K. Smith, deceased, opposed by Barbara M. Smith, contestant. From a judgment in favor of proponent admitting the will to probate, contestant appeals. Affirmed.

G. P. Adams and W. W. Orme, both of Los Angeles, for appellant.

Frank G. Tyrrell and R. A. Jarrott, both of Los Angeles, for respondent.

PER CURIAM. This is an appeal from an order and judgment of the superior court of the county of Los Angeles admitting to probate the will of D. K. Smith, deceased.

The decedent at the time of his death, which occurred on February 28, 1925, was 79 years of age. His widow, contestant and appellant, survived him, but he left no issue. By a will bearing date February 23, 1925, the decedent devised and bequeathed his entire estate to the proponent and respondent, who was a friend of some years' standing. On March 5, 1925, the proponent filed a petition for probate of said will and prayed that letters of administration with the will annexed be issued to him. The appellant thereupon filed her contest, alleging, among other things, that she was the surviving widow of said decedent; that at the time of the execution of the will the decedent was not of sound and disposing mind; and that the execution thereof was procured through undue influence. A trial of said contest was had before the court without a jury, and the order and judgment admitting the will to probate, and from which this appeal is prosecuted, were duly entered.

Inasmuch as the contestant reiterates herein that the decedent was without testamentary capacity at the time the will was executed, and that said will was the creature and product of undue influence exerted upon the testator by the proponent thereof, we will set forth, in substance, the evidence relating to or bearing upon those issues.

Barbara M. Smith, the contestant, testified that she was the widow of the decedent, and that he was 79 years of age at the time of his death; that he was taken sick on February 23, 1925; that he was seriously ill, his heart failing and his body in a state of utter collapse; that he refused to leave the cabin where he had been living in back of her house and declined to go to a hospital; that she saw the proponent about the decedent's cabin on the day the will was executed; that proponent came to her house at 9 p. m. on said day, and during the course of the conversation inquired if the witness thought that decedent would die during the night; that she went to decedent's cabin at 10 p. m. that night, and the proponent and his wife were there; that decedent was in bed "in a semiconscious condition, with his eyes half open, and his mouth open, panting for breath"; that he was "apparently unconscious—in a stupor or daze"; that decedent did not recognize her; that "his mind worked very slowly"; that she saw decedent at 5:30 a. m. the following morning, and "he was very much worse than the night before"; that "his mind was dazed"; that he was taken to a hospital on February 24, 1925; that in the afternoon of said day he "appeared to be better"; that "he appeared rational then."

Thomas Lavell testified that he knew the decedent and his wife intimately; that he saw decedent at the hospital on February 25, 1925, and found him to be "an extremely sick man"; that he was "really too sick to be conversed with" and "was half out of his head, you might say"; that he answered some questions "irrelevantly," and others "relevantly"; that when he first saw decedent at the hospital he thought he was semidelirious because he failed to reply to some questions.

Marcel L. Maxey testified that he saw decedent at the hospital the day preceding his death and "he seemed rather in a daze."

John E. Spaulding, proponent, called on behalf of the contestant, under section 2055 of the Code of Civil Procedure, testified: That he stayed with the decedent on February 23, 1925, continually from 9:30 a. m. until 6 a. m. the following day with the exception of but a few short periods. That the contestant came to the cabin a few times during this period to see and inquire of the decedent. That she asked the witness if the decedent had made "out any papers," and suggested that he prevail upon the decedent to go to a hospital as she did not "want him to stay down here and disgrace me any longer." That, in response to the decedent's interrogatories, he conveyed to him the substance of the witness' conversation with the contestant; that the decedent stated: "Well, she is awful confounded interested about me now. I will make a will. Look over in the drawer and you will find some paper." That he dictated the will to the witness' wife. That decedent signed it, and witness and his wife also signed at the end thereof. That decedent said, "You will need a witness to this. Go and get Mr. Britt." That the other witness was secured. That decedent asked the proponent to keep the will. That decedent discussed some of the property with him. That he and his wife were alone with the decedent during the night on which the will was executed.

Dr. John L. Kirkpatrick testified, in response to a lengthy hypothetical question, that, in his opinion, the decedent at the time of executing the will was "irrational and incompetent"—this answer was apparently based on his next statement that:

> "A man of his age, if he was suffering from this acute auto-intoxication and absorption of poisons, and he was irrational Monday morning and he was also irrational Tuesday, he certainly could not have recovered any normal state Monday night. If he died of acute auto-intoxication, he would not be clear at any time. There might be apparently intervals in which he would seem to be talking all right, but he would never be perfectly clear to a person who was skilled and was watching him."

On cross-examination, the witness testified that, if the decedent at the time of executing the will had intelligently discussed his property and exercised good business judgment, he would "think it was all right." In response to a question propounded by the court, the witness stated that if the decedent was not irrational on Monday and Tuesday, there was nothing else to indicate that decedent was incompetent when he executed the will "only his age and his general sickness."

Miss L. J. Sherrod testified that she had been the decedent's day nurse; that he recognized all of his friends that came to see him and spoke with them; that "he appeared to be rational, all the time, and conscious"; that he answered questions "rationally and reasonably"; that "his mentality seemed quite clear all the time."

Mrs. Geneva Spaulding, wife of the proponent, testified that decedent dictated the will to her, and that she wrote it on paper; that decedent signed it, and requested the witness and her husband to sign their names, and suggested that a witness be procured; that her husband secured Mr. Robert L. Britt, and he signed as a witness at decedent's request and after the latter had declared the instrument to be his will and acknowledged his signature; that the will was executed after 10 p. m., on February 23, 1925.

Robert L. Britt testified that proponent came for him after midnight on February 23, 1925; that they went to the decedent's cabin; that he conversed with the decedent; that decedent stated he had made and signed a will, which decedent read to the witness and asked the latter to sign his name as a witness thereto; that "a man that would talk as intelligently as he did, especially in a business matter of that kind, I would consider of very sound mind."

As indicated at the commencement of this synoptical statement, we have attempted to set forth, in substance, only that evidence which might have some bearing on the issues of testamentary capacity and undue influence.

[1, 2] The actual mental condition of the decedent at the time of the execution of the will is the question to be determined upon a contest based on his alleged incompetency, and evidence tending to show unsoundness of mind either before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will. Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795. To overcome the presumption of sanity, the contestant must show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed his will. Estate of Casarotti, supra; Estate of Dow, 181 Cal. 106, 183 P. 794.

[3] It is declared in Estate of Perkins, supra, that "Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally; or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion," and, even in this latter class of cases, the evidence "must establish that the will itself was the creature or product of such hallucination or delusion."

[4] A testator is of sound and disposing mind and memory, if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument. Estate of Sexton (Cal. Sup.) 251 P. 778; Estate of De Laveaga, 165 Cal. 607, 133 P. 307; Estate of Huston, 163 Cal. 166, 124 P. 852.

[5] In our opinion, the evidence outlined above is not sufficient to establish that the testator was incompetent at the time he executed his will. Disregarding any conflicting evidence and resolving whatever conflicts there may be in the evidence in favor of and granting to the contestant every possible inference to be drawn from the evidence, there still remains a hiatus in the chain of proof that, at the time of the execution of the will, the testator was mentally incompetent, or that he was at the time subject to delusions which, in any manner, affected his testamentary act.

[6-8] Nor do we think the evidence above narrated is sufficient to warrant and support an inference that the testator was induced to make the will in question as the result of the undue influence of the sole beneficiary named therein. Undue influence has been repeatedly defined to be "the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjugated to the will of the person seeking to control it." Estate of Newhall, 190 Cal. 709, 717, 214 P. 231, 234 (28 A. L. R. 778). It is declared in Estate of Bryson, 191 Cal. 521, 541, 217 P. 525, 533, that:

> "In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires. * * * The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made."

The evidence of the contestant relating to the issue of undue influence does no more than show that the proponent had the opportunity to make the alleged false statements attributed to him touching asserted conversations with the contestant. But there is no showing, in addition, that the mind of the testator, at the time of the making of the will, was subjugated to and dominated by the desires and designs of the proponent to the point of undue influence. Moreover, there is a conflict in the evidence as to the correctness or falsity of these statements made by the proponent to the decedent, and this was within the province of the trial court to consider.

[9, 10] The fact that the will of a testator may be unnatural, unfair, or unjust creates of itself no presumption that the decedent was incompetent or that the instrument was procured by undue influence, nor does it shift the burden of proof to the proponent. In Estate of Martin, 170 Cal. 657, 663, 151 P. 138, 141, it is declared that:

> "A testator has the right to make an unjust, or an unreasonable, or even a cruel will, and that no will may be legally set aside upon the mere establishment that it is such a will."

We do not wish to be understood as characterizing the will in question as an "unfair, unjust, or unnatural" will. In our view, the evidence tends to stamp it as a fair and just will, for it was shown that the decedent and proponent had been intimate friends for many years; that decedent was solicitous of the proponent's well-being and had often loaned him money for various purposes; that he had often expressed the desire and willingness to assist proponent in acquiring his own home; and that the proponent had cared for the decedent in his last illness. On the other hand, the evidence tends to show that the decedent and contestant had experienced certain marital difficulties, which terminated in the filing of a divorce action by the contestant in 1916 or 1917; that said divorce action proved abortive; that decedent and contestant had never resumed marital relations thereafter; and that the decedent had stated that the contestant had sufficient property in her own name. When these matters and circumstances are borne in mind, they tend, in some degree, to account for and explain the dispositive provisions of the decedent's will.

[11] We are not prepared to hold that the contestant was injured as a result of the trial court's declaration that he was not assisted in the determination of the cause by the testimony of Dr. J. L. Kirkpatrick, and that the introduction of similar expert testimony would therefore tend to "waste time." The court did not preclude the contestant from introducing further expert testimony, for he further declared:

> "I don't want to be arbitrary; if you feel that you want to put him on, I will give you the opportunity to do so."

Moreover, as contestant's plan was to ask "the same line of questions propounded to Dr. Kirkpatrick," and as the principal hypothetical question put to said witness contained matters which had not been established by the evidence adduced, it follows that contestant suffered no prejudicial injury as a result of the court's expression of its attitude in the premises.

The rulings of the court below, excluding certain testimony of Dr. W. P. Burke and Dr. J. F. Scherfee as being privileged, within the provisions of subdivision 4 of section 1881, Code of Civil Procedure, were correct. In re Redfield, 116 Cal. 637, 644, 48 P. 794; Estate of Nelson, 132 Cal. 182, 187, 64 P. 294; Estate of Budan, 156 Cal. 230, 232, 104 P. 442.

An examination of the several asserted "errors in law" fails to disclose anything prejudicial to the contestant.

[12] It was for the trial court to weigh and pass upon the asserted discrepancies and falsities in the evidence adduced by the proponent.

For the foregoing reasons, the order and judgment appealed from are hereby affirmed.

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200 Cal. 143

CITY OF SACRAMENTO v. GODDARD, Mayor. (Sac. 4002.)

(Supreme Court of California. Dec. 24, 1926.)

1. Municipal corporations 🔑918(2)—Submission of more than one bond proposition at election is not prohibited (Const. art. 11, § 18; St. 1901, p. 27).

Const. art. 11, § 18, does not prohibit submission of more than one bond proposition or purpose at same election, and St. 1901, p. 27, authorizes such submission, but provides that it shall require votes of two-thirds of voters voting.

2. Municipal corporations 🔑918(4)—Words "so voting" held to relate to electors voting at bond election, and, if two-thirds vote "Yes," proposition carries (Sacramento Charter, § 92).

Under Sacramento Charter, § 92, providing that, if two-thirds of electors "so voting" at election vote in favor of bonds, council may proceed to issue them, words "so voting" relate back to electors voting, and, if two-thirds of electors vote in favor thereof, proposition is carried.

In Bank.

Original proceeding for mandamus by the City of Sacramento against A. E. Goddard, as Mayor of the City of Sacramento. Writ granted.

R. L. Shinn, of Sacramento, for petitioner.

Hinsdale & Otis and Devlin & Devlin, all of Sacramento, for respondent.

WASTE, C. J. The city of Sacramento prays for a peremptory writ of mandate directing the respondent, as mayor of the city, to attest and sign certain bonds, issuance of which, it is alleged, was duly authorized by action of the voters. The respondent has demurred to the petition, and raises the question whether or not the bonds were authorized by the requisite number of electors voting therefor.

At a special election regularly called and held for that purpose on the 29th day of June, 1926, twelve different propositions for the issuance of municipal public improvement bonds, separately designated and stated on the ballots, were submitted to the electors of the city of Sacramento. Among them was one designated as proposition No. 4, for the issuance of bonds in the sum of $350,000, to provide for the installation of additional filter beds in the filtration plant of the city, and the purchase and installation of additional equipment for the plant which is a part of the city's water supply system. A total of 9,890 votes were cast at the election; 9,412 votes were cast on proposition No. 4, 6,298 of which were for the bonds, and 3,114 in opposition thereto. It thus appears that 23 more than two-thirds of those voting on proposition No. 4, but 296 less than two-thirds of all those voting at the election, cast their votes in favor of the bonds for the filtration plant. All the proceedings leading up to and including the election were regular, but respondent refused to attest the bonds upon the ground, and for the reason, that they had not been authorized by two-thirds of all the votes cast at the election.

[1, 2] Section 18 of article 11 of the Constitution prohibits a city from incurring a bonded indebtedness, such as that here sought, "without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." So far as this provision governs, it is not directly provided that more than one purpose may be submitted at the same election, but such submission is not prohibited. The Legislature, however, by a subsequent enactment (Stats. 1901, p. 27), authorized the submission of more than one proposition or purpose at the same election, but provided that it shall "require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds." It is conceded here that, if the sufficiency of the vote on the filtration bond issue is to be determined in accordance with the provisions of the statute, proposition No. 4 did not carry. Petitioner, however, relies upon a provision of the Sacramento city charter to support its contention that the bonds received the favorable vote of a sufficient number of the electors. This provision appears to be peculiar to the Sacramento charter, for which reason the question presented in this case is one de novo, and is not determined by any of the former rulings of this court. The language of the charter is as follows:

> "Section 92: The city council may contract bonded indebtedness as follows: It shall, by order duly passed by Ayes and Noes, recorded in its journal of proceedings, specify the particular purpose for which the indebtedness is to be created, and the amount of bonds which it is proposed to issue. * * * The ballot shall be printed 'For the Issue of Bonds. Yes.' 'For the Issue of Bonds. No.' If two-thirds of the electors of the city *so voting* at such election shall vote in favor of issuing bonds, and not otherwise, the city council may proceed to issue the amount of bonds specified."

It is the contention of the petitioner that the use of the words "*so voting*" (italicized by us) is significant. It claims that the framers of the charter had in mind the statute of 1901 requiring all the votes cast at such an election to be determinative of the requisite number for each particular purpose, and sought to obviate the statutory restriction by using the words "*so voting*," thereby making the vote on each proposition the basis of determining whether or not such proposition "so voted" upon was legally assented to by the electors of the city. If that were the purpose, and it seems only reasonable to believe that it was, it was but the forerunner of the action of the voters generally throughout the state at the last general election. The section of the Constitution, supra, was amended to provide that, whenever two or more propositions for incurring any indebtedness or liability are submitted at the same election to the electors of any city, or other specified political subdivision, the votes cast for and against each proposition shall be counted separately, and, when two-thirds of the qualified electors, voting on any one of such propositions, vote in favor thereof, such proposition shall be deemed adopted.

We are of the view that the words "*so voting*," as used in the Sacramento charter, were intended to, and do, relate back to those electors who vote "Yes" or "No" on any particular bond proposition, and that, if two-thirds of the electors of the city voting on any separate proposition vote in favor thereof, as was done in the instant case, the proposition is carried. No cases have been called to our attention in which the precise question has had judicial consideration, but an interesting discussion of the subject will be found in Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S. W. 773, 20 Ky. Law Rep. 827, 42 L. R. A. 738.

Let a writ of mandate issue as prayed for.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; SULLIVAN, J.; CURTIS, J.

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200 Cal. [illegible]

MILLER v. LYONS. (L. A. 8536.)

(Supreme Court of California. Jan. 10, 1927.)

1. Automobiles 🔑244(18)—Evidence held to show negligence in placing truck carrying girder across road after dark.

Evidence *held* to show defendant was negligent in placing truck carrying steel girder completely across road after dark when there was "considerable traffic."

2. Automobiles 🔑244(36)—Evidence held to show negligence in placing truck across road was proximate cause of automobile driver's injury by protruding girder.

Evidence *held* to show negligence in placing truck carrying steel girder completely across road after dark was proximate cause of death of driver of approaching automobile, who ran into girder protruding beyond end of truck.

3. Automobiles 🔑245(23)—Negligence as to automobile driver injured by girder on truck held question of fact.

Determination of whether defendant was negligent in placing truck across road, and whether negligence was proximate cause of death of automobile driver who ran into girder which was on truck, *held* for trial court.

4. Appeal and error ⚷1010(1)—Findings and judgment of trial court supported by evidence will not be disturbed.

Where there is evidence ample to justify findings and judgment of trial court, Supreme Court will not disturb them.

In Bank.

Appeal from Superior Court, Los Angeles County; C. P. Vicini, Judge.

Action by Vada Lou Miller against Jerome F. Lyons. Judgment for plaintiff, and defendant appeals. Affirmed.

Joe Crider, Jr., of Los Angeles, for appellant.

George L. Greer, of Los Angeles, for respondent.

PER CURIAM. This is an appeal from a judgment of the superior court of the county of Los Angeles awarding to the plaintiff damages in the sum of $10,000 for the death of her husband, George Miller, caused by the alleged negligence of the appellant's employees. The case was tried by the court without a jury.

[1, 2] In appellant's brief the sole ground of the appeal is thus stated:

> "We insist that there is no evidence whatsoever justifying the judgment, and that it is against the weight of all of the evidence. This is our sole basis for appeal."

The casualty occurred after dark and at about 7:30 o'clock on the evening of November 7, 1922. At the time of the accident the deceased, an oil well worker, was driving a Dodge automobile along Norwalk road, a highway having a paved surface 22 feet wide, in a southerly direction and at a speed of approximately 25 miles an hour. Norwalk road is intersected at right angles at a certain point by a narrow road approximately 15 feet in width. The employees of the appellant were operating a truck upon said Norwalk road in a northerly direction just prior to the accident. The truck was 24 feet long and carried a steel girder 47½ feet in length, known in oil field terms as a Kelley, diagonally across the bed thereof. It was the purpose of the driver of the truck to back it in a westerly direction into the narrow intersecting road, and to accomplish this purpose he turned the steering wheel so as to face the truck in an easterly direction down the intersecting road, intending later to back in a westerly direction. While the truck and its load were thus obstructing the entire width of the Norwalk road the deceased came upon the scene in his automobile. He was on the westerly and proper side of the Norwalk road when his car collided with that portion of the steel girder which protruded beyond the rear end of the bed of the truck. The deceased died shortly thereafter from the injuries thus incurred.

At the time of the accident, as established by the evidence and conceded by appellant, the front end of the truck was approximately 3 feet east of the easterly edge of the paved portion of the Norwalk road and the girder protruded about 3 feet beyond said front end of the truck. In this position the rear end of the truck extended beyond the center line of the highway and into the westerly half thereof and the girder extended well beyond the westerly line of said highway.

The evidence of one of the appellant's employees engaged on the truck at the time is to the effect that the deceased was first seen to be proceeding in the direction of the truck at a speed of 25 miles an hour when he was approximately 1,200 feet away. This witness also testified that the deceased's car struck the girder about 20 seconds after he had first been seen approaching the truck. Mathematical computation reveals that the witness was not seriously in error in estimating this period of time. There is further evidence to the effect that the engine of the truck was "dead" at the time of the accident and that there was "considerable" traffic passing along the Norwalk road or highway at said time.

Under the circumstances herein presented, we are of the opinion that the trial court properly determined that it was an act of negligence upon the part of the appellant's employees to place their vehicle with its load entirely and completely across the Norwalk road at a time when the traffic on said highway would be endangered thereby. To place a truck carrying a steel girder 47½ feet long across said highway after dark and at a time when traffic upon said highway would reach the position of the truck in less than one-half minute constituted a breach of duty upon the part of the appellant's servants and agents to operate the motor truck in such a manner as not to injure third parties. The breach of said duty was clearly the proximate cause of the deceased's death.

We are not unmindful that one of the appellant's employees attempted to warn the deceased of the impending accident by leaving the truck and waving his arms. This action proved ineffective and futile in the darkness, however, as said employee was without an illuminated signal. The incident cannot serve to relieve the appellant of liability. The mere fact that a lighted lantern had been attached to either end of the steel girder likewise would not serve to relieve the appellant of responsibility, for, as indicated in the above summary statement of the evidence, the ends of the girder protruded beyond the paved limits of the Norwalk road, and lanterns attached thereto would in all probability be assumed by approaching motorists to indicate the situation of obstructions adjacent to the highway. This would seem to be well illustrated by the instant case, as the evidence tends to show that the deceased, in an effort

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

to avoid striking the appellant's truck, altered the course of his automobile, and by so doing brought it into contact with that part of said steel girder which protruded beyond the rear end of the truck.

[3, 4] All of these matters were for the trial court to consider and weigh. When there is evidence ample to justify the findings and judgment of the court below this court will not, under the well-settled rule, disturb said findings and judgment. In our opinion the evidence herein is sufficient to warrant a finding of negligence on the part of the appellant's servants and agents, which negligence was the proximate and sole cause of the deceased's death.

Appellant's contention touching the condition of the headlights and brakes on the automobile driven by the deceased is without merit, for there is an utter lack of evidence tending to show that they were defective.

For the foregoing reasons, the judgment appealed from is hereby affirmed.

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80 Cal. App. 371

SAN JOAQUIN GROCERY CO. v. TREWHITT et al. (Civ. 5617.)

(District Court of Appeal, First District, Division 2, California. Dec. 20, 1926.)

1. Adjoining landowners 🔑8—Evidence held insufficient to show damage to adjoining property by water was caused by water discharged by defendant contractor.

Owner of building on adjoining lot *held* not entitled to recover damages from foundation contractors, in absence of evidence that water discharged by them, as distinguished from water subsequently discharged by brick masons employed by another independent contractor, "drained, seeped, and percolated" into plaintiff's basement, as alleged in complaint.

2. Appeal and error 🔑1067—Refusal of instruction to find for foundation contractors, if brick masons' negligence caused water damage to goods in adjoining building, held prejudicial error.

In action for damages to goods in building by water discharged on adjoining land by defendant, foundation contractors, refusal of instruction to find for defendants, if damage was caused by negligence of brick masons as employees of independent contractor, *held* prejudicial error, though defendants did not plead that such masons' employer was an independent contractor.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by the San Joaquin Grocery Company against W. D. Trewhitt and another, copartners doing business under the firm name of the Trewhitt-Shields Company, and another. Judgment for plaintiff, and defendant partners appeal. Reversed.

Chester H. Warlow, of Fresno, for appellants.

Gearhart, Carling & Cummings, of Fresno, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendants to recover a judgment for damages. The defendants answered, and a trial was had in the lower court before the court sitting with a jury. The jury returned a verdict in favor of the plaintiff and a judgment was entered thereon. The defendants moved for a new trial on all the statutory grounds; the motion was denied. Thereafter the defendants appealed from the judgment under section 953a of the Code of Civil Procedure.

The appellants present several points, each of which they claim would support a reversal, but in the view that we take of the record it will be unnecessary to consider anything except the claim that the evidence is insufficient to justify the verdict and that the trial court erred in refusing to give one of the instructions requested by the appellants. We will take those points up in the order stated, but before doing so it is necessary to make a statement of facts.

The plaintiff is a corporation engaged in conducting a grocery store in the city of Fresno. It also maintains a warehouse, which is located on Fulton street a short distance south of Los Angeles street. Back of the warehouse on the eastern side is an alley. The plaintiff's holding includes lots 18 to 26. The property on the northerly side of the warehouse and bounded by Fulton street, Los Angeles street, the alley, and by plaintiff's warehouse, was purchased by Ben Tyre. The Tyre holding includes lots 27 to 32. When Mr. Tyre purchased his lots some of them were occupied by dwellings. He proceeded to wreck the dwellings, to level up the ground, and to construct a building covering his holding. Some of the dwellings had cellars. Those cellars were filled up and the grounds were scraped so as to make the surface level. In this behalf, in its complaint, the plaintiff alleges:

> "That on or about the 12th day of February, 1923, the defendants, their employees, agents, and servants, leveled, scraped, and checked by means of levees all of said lots 27, 28, 29, 30, 31, and 32 of said block 202 to a depth of about 8 inches, and made numerous excavations on the said lots to a depth of about 6 feet, for the construction of certain concrete piers, particularly near the common boundary of said lots 26 and 27 and along the easterly boundary line of said lot 27; that in the course of said leveling, scraping, excavating, and construction the defendants, their employees, agents, and servants, with gross carelessness and negligence caused and permitted large quantities of water

to be poured and to pour onto said lots 27, 28, 29, 30, 31 and 32 and into the said excavations and to flood the same; that on or about the 12th day of February, 1923, by reason of said gross carelessness and negligence on the part of said defendants, their employees, agents, and servants, the said water accumulated along the wall of the said building of said plaintiff on said lot 26 near the said common boundary line of said lots 26 and 27, and the said water drained, seeped, and percolated into the said basement of plaintiff, and, without any fault or lack of care on the part of the plaintiff, the said water flowed into, upon, and around the goods which this plaintiff then owned and had there stored, and injured, damaged, and completely destroyed and rendered valueless large quantities of same, all to the great injury and damage of this plaintiff in the sum of one thousand ($1000.00) dollars."

The defendants denied the allegations contained in said paragraph, and on the trial it transpired that the Tyre lots were graded, filled, and scraped; that after the same had been leveled checks were made so that each lot was surrounded with a check, and thereafter water was run onto each lot for the purpose of causing the dirt to settle, and thereafter certain holes were dug for the purpose of putting in piers to obtain a support on which to rest the roof. Along the northern boundary of the plaintiff's property a trench was dug and a foundation of concrete was placed in the trench, and thereafter the dirt was thrown up against the concrete foundation so constructed. At the end of that wall, and at every 20 feet, a pier was set down on a level with the bottom of the plaintiff's wall, and later the soil was replaced around the piers and settled with water. That process had been completed two weeks before February 12, 1923. After Friday, February 9, 1923, the defendants were not on the job. The brick masons were there doing the brick work. When the foundation was ready brick masons came forward and proceeded to lay brick walls on top of the concrete foundation. In doing their work the brick masons let water through a hose to make mortar and wet the brick. On Monday, February 12, 1923, the southerly wall of the Tyre building had progressed to the point where it was about 9 feet in height above its foundation. That was the result of 2½ days' work by the brick masons. Some of the witnesses testified that the running of water to settle the soil stopped on Wednesday, February 7; however, Mr. Peterson, the general manager of the plaintiff, testified that he was about the new building on Thursday, Friday, and Saturday, that is, February 8th, 9th, and 10th and, to use his language, "It is my impression, and as far as my memory serves me, I believe there was (water spread about the property); in fact, I am quite sure." On Sunday, February 11th, between 8:05 a. m. and 12:50 p. m. there was a rain of .39 of an inch. Several witnesses testified that on Saturday afternoon they saw water running out of a three-quarter inch hose at a point on the Tyre property 20 feet north of the plaintiff's building and 50 feet west of the alley. There was further testimony that said stream of water was still flowing Monday morning February 12, 1923. Witnesses testified that between 8 o'clock Monday morning and noon of that day they went down into the basement of the plaintiff's store, and there they saw, at a point about 50 feet west of the alley water coming through the north wall of plaintiff's building, and that there was in the neighborhood of 2½ inches of water on the floor of the basement. No witness testified to any fact or facts showing where the water had come from which percolated through the north wall. Mr. Peterson testified that his building had a roof of such nature that the rain falling thereon would run to drains which emptied on the Fulton street side. The evidence is without conflict that the work done on the Tyre property before the brick masons commenced to lay brick was done by the defendants under an independent contract and that the brick work was done by Paul Kindler, an independent contractor.

[1] There is evidence in the record that when the foundation wall for the Tyre building was being constructed along the north line of the plaintiff's property that the soil was excavated up against the north wall of the plaintiff's property and to a depth of about 3 feet. A strip of land 4½ inches in width along the north side of said wall was on the plaintiff's side of the property line. There is no evidence that the soil in the territory 4½ inches wide was of any peculiar quality or that it was impervious to water. Neither is there any evidence in the record that the 4½ inches of soil was not afterwards put in place or that it was improperly put in place. When the case went to the jury there were the possibilities that the water which was afterwards found in the plaintiff's basement was (1) rainwater; (2) water used for settling soil by the defendants as independent contractors; (3) water escaped from the three-quarter inch hose used by the masons; and (4) waters coming from other sources. There was no evidence of a water channel, natural or artificial, or that waters percolated through soil in any place leading to the body of water found in the plaintiff's basement. When the case went to the jury there was no evidence showing that the water which the defendants had discharged on the Tyre property "drained, seeped and percolated into the said basement of plaintiff. * * *" Such proof was necessary. In Puckhaber v. Southern Pacific Co., 132 Cal. 363, at page 365, 64 P. 480, 481, the court said:

> "It is as necessary for the plaintiffs to show that defendant's negligence caused the injury, as it is for them to show that defendant was guilty of negligence, or that the party was injured."

In Albert v. McKay & Co., 53 Cal. App. 325, at page 327, 200 P. 83, 84, this court said:

> "Resting on circumstantial evidence the plaintiff's case is not sufficient merely because the circumstances proved are consistent with the plaintiff's theory; but, the circumstances must show, when weighed with the evidence opposed to them, that the circumstances relied on have more convincing force substantiating the theory contended for, and from which theory it results that the greater probability is in favor of the party upon whom the burden rests. Wilbur v. Emergency Hospital Ass'n, 27 Cal. App. 751, 759, 151 P. 155; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 366, 64 P. 480; Union Investment Co. v. San Francisco Gas, etc., Co., 168 Cal. 58, 62, 141 P. 807."

In the case entitled Estate of Wallace, 64 Cal. App. 107, 220 P. 682, Mr. Presiding Justice Finlayson, speaking for the court, at page 110 (220 P. 683), said:

> "An inference cannot be said to be established by circumstantial evidence, either in a civil or a criminal case, unless the circumstances relied upon are of such a nature and so related to each other that it is the only inference which can fairly or reasonably be drawn from them. If other inferences may reasonably be drawn from the facts in evidence, the evidence does not support the inference sought to be deduced from it. This rule is stated in Neal v. Chicago, etc., Co., 129 Iowa, 5, 105 N. W. 197, 2 L. R. A. (N. S.) 905, as follows: 'If it appears that the facts and circumstances from which a conclusion is sought to be deduced, although consistent with that theory, are equally consistent with some other theory, they do not support the theory contended for.' In Puckhaber v. Southern Pac. Co., 132 Cal. 366, 64 P. 480, the court quotes from Stringert v. Ross Tp., 179 Pa. 614, 36 A. 345, as follows: '* * * The question then arises whether the inference that the death was caused by the negligence of the defendant is the only inference that can be drawn from the facts that are in evidence. If it is not, and other inferences may be drawn from the same facts, then there is nothing for the jury but mere guesses or conjectures, and upon these no verdict can be founded.' See, also, 10 R. C. L. p. 1007."

In the case of California, etc., Co. v. Indus. Acc. Com., 59 Cal. App. 225, at page 228, 210 P. 524, 525, Mr. Presiding Justice Langdon, speaking for the court, said:

> "A failure to sustain a burden of proof cannot be remedied by a finding based upon guess, conjecture, or surmise. Glass on Workmen's Compensation Law, pp. 39, 40; Puckhaber v. Southern Pac. Co., 132 Cal. 363, 64 P. 480."

So in this case the jury were left to merely guess where the waters found in the plaintiff's basement had come from—whether said waters were those in division (1), (2), (3), or (4), as hereinabove indicated.

[2] The instruction requested and which was not given, and concerning which the appellants complain, was worded as follows:

> "You are instructed that the defendants are responsible for their own negligence and for the negligence of their servants and agents within the scope of their employment, but defendants are not responsible for the negligent acts of the independent contractors or the negligent acts of the servants or agents of the independent contractors. If you believe from the evidence in this case that the brick masons and plasterers were the employees of an independent contractor and not of the defendant, and that the cause of the damage suffered by the defendants, if any, was the negligence of the brick masons or plasterers permitting water to run upon the ground from a hose used by them, if you believe that water did run upon the ground from a hose used by them, you should find for the defendants."

From what has been said above, it is patent that it was altogether material and that the respondent in introducing its case should have shown that the waters which injured its property were the waters discharged by these appellants as independent contractors as distinguished from the waters discharged by Paul Kindler as an independent contractor. We note that the respondent contends that the appellants had not pleaded the facts that Paul Kindler was an independent contractor; nevertheless the respondent had pleaded that the waters which injured him were the waters which the "said defendants, their employees, agents, and servants * * *" discharged on the Tyre property. In making the contention which the appellants are making they are but negativing the allegation of the plaintiff's complaint. They are not introducing new matter. It was therefore prejudicial error for the trial court to refuse to give the instruction requested.

The judgment is reversed.

We concur: PRESTON, Presiding Justice pro tem.; NOURSE, J.

80 Cal. App. 520

WALKER v. CLARK. (Civ. 5583.)

(District Court of Appeal, First District, Division 2, California. Dec. 29, 1926.)

1. Evidence ⚷594—Where defendant's allegation was supported by testimony which was uncontradicted, she was entitled to finding that allegation was true.

In suit for specific performance of contract for exchange of property, where defendant's allegation that certain parties acted as agents of plaintiff was supported by testimony of defendant and two agents mentioned, which was uncontradicted, she was entitled to finding that allegation was true.

2. Specific performance ⚷117—Adequacy of consideration as to party against whom specific performance is sought must be pleaded and proved (Civ. Code, § 3391).

In suit for specific performance, adequacy of consideration as to party against whom specific performance is sought must be pleaded and proved, in view of Civ. Code, § 3391.

3. **Appeal and error 🔑840(4)—In determining whether findings in language of pleading supported judgment, where defendant had no opportunity to demur, appellate court could consider question in same view as demurrer to complaint.**

Where findings were in language of pleading and defendant did not have opportunity to demur, question whether findings supported judgment could be considered by appellate court in same view as trial court would consider demurrer to complaint for failure to state sufficient facts.

4. **Appeal and error 🔑1071(6)—In suit for specific performance, failure to find in accordance with uncontradicted evidence disclosing inadequacy of consideration held prejudicial error.**

In suit for specific performance of contract for exchange of real property, failure of court to find in accordance with uncontradicted evidence disclosing inadequacy of consideration *held* prejudicial error.

5. **Appeal and error 🔑931(9)—Where fact is not pleaded and trial court has not found on issue, appellate court could assume that evidence was insufficient to support such finding.**

In suit for specific performance, where adequacy of consideration was not pleaded and trial court failed to find on issue, appellate court could assume that evidence was insufficient to support such finding.

6. **Specific performance 🔑123—Absence of finding of adequacy of consideration, in suit for specific performance, required reversal of judgment for plaintiff (Civ. Code, § 3391).**

In suit for specific performance of contract for exchange of real property, absence of finding that there was adequate consideration required to enforce specific performance, under Civ. Code, § 3391, required reversal of judgment for plaintiff.

Appeal from Superior Court, Orange County; F. C. Drumm, Judge.

Suit for specific performance of contract to exchange real property and for damages by C. E. Walker against Mary Kinsey Clark. From a judgment for plaintiff, defendant appeals. Reversed.

Richard Kittrelle, of Los Angeles, for appellant.

Chas. D. Swanner and Roland Thompson, both of Santa Ana, for respondent.

NOURSE, J. Plaintiff sued for the specific performance of a written contract for the exchange of real property and for damages in the sum of $600. Plaintiff had judgment decreeing a performance of the contract as prayed and awarding him $627.33. From this judgment the defendant has appealed on a typewritten record.

By the terms of the contract, the plaintiff agreed to transfer to the defendant property which he represented to be of the value of $10,000, and the defendant agreed to transfer to the plaintiff property which she represented to be of the value of $8,500. The plaintiff agreed to assume a mortgage of $1,370 which was outstanding upon the defendant's property, and the defendant agreed to place upon plaintiff's property, after the transfer, a mortgage of $2,870 which was to be delivered to plaintiff.

[1] The appellant complains that the findings made by the trial court are not supported by the evidence. Particular criticism is directed to the finding that all the allegations in the amended answer are untrue. Appellant correctly states that in some instances, the allegations of her amended answer were supported by evidence which was without contradiction and which required a finding favorable to her. She points out that, in her amended answer, she alleged that Sweetzer and Wallace were acting as agents of the plaintiff, and that the truth of this allegation was shown by the testimony of the respondent and that of the two agents mentioned. No evidence appears to the contrary, and appellant was entitled to a finding that the allegation was true.

The trial court found that the reasonable market value of appellant's property at the time of the agreement was the sum of $7,000, and this finding is complained of because the only evidence in the record on which a finding of the market value of that property could have been based showed that its market value at the time of the agreement was between $7,500 and $8,500. The same criticism is directed to the finding that the allegation in paragraph 5 of defendant's amended answer is untrue. It was there alleged that the property which plaintiff agreed to exchange to the defendant was not reasonably worth $10,000, as represented by him. Though the trial court held that this allegation in the amended answer was not true, it at a later time found that the reasonable value of the plaintiff's property was only $8,500. The trial court found that there was no misrepresentation, fraud, or deceit on the part of plaintiff or any one acting in his behalf, and also found that if any such misrepresentation, fraud, or deceit was practiced upon the defendant she did not rely upon it because she had an opportunity, either personally or through her husband, to make a full and complete investigation. The findings referred to are open to the criticism directed by the appellant in each instance, and the inconsistency between the two findings on the issue of misrepresentation, fraud, or deceit seems the more apparent and important to the appellant from what is hereafter said.

[2] The more serious question presented on this record is the failure of the plaintiff to

plead and prove adequacy of consideration to the defendant and the failure of the trial court to find on that issue. The rule is statutory. Section 3391 of the Civil Code provides that:

> "Specific performance cannot be enforced against a party to a contract in any of the following cases: 1. If he has not received an adequate consideration for the contract; 2. If it is not, as to him, just and reasonable."

In Morrill v. Everson, 77 Cal. 114, 116, 19 P. 190, the Supreme Court, in reference to this section, said:

> "Here the inadequacy of consideration seems to be mentioned as a distinct ground from the injustice and unreasonableness; and the provision seems to be explicit and absolute."

The necessity of pleading and proving adequacy of consideration as to the party against whom specific performance is sought has been repeatedly determined. Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67; Haddock v. Knapp, 171 Cal. 59, 62, 151 P. 1140; Salisbury v. Yawher, 184 Cal. 783, 795, 195 P. 682; Baker v. Miller, 190 Cal. 263, 267, 212 P. 11.

To meet the demands of the statute, the original complaint alleged that the agreement—

> "was and is a just and reasonable contract * * * that the exchange therein agreed to be made * * * was a reasonable and fair exchange * * * and said contract at the time of its execution was, and is now a just, equitable and reasonable contract."

The pleading is in almost the same language as that which was condemned as insufficient in Joyce v. Tomasini, 168 Cal. 234, 237, 142 P. 67, and in many of the cases therein cited.

The cause went to trial upon this complaint and at the close of plaintiff's case defendant moved for a nonsuit, giving as reasons therefor the failure of the plaintiff to show that the contract was fair and reasonable or that the value of the property sought to be transferred to her was an adequate consideration for her property. In support of the motion, section 3391 of the Civil Code was cited. The attention of the plaintiff was thus called to his failure to show adequacy of consideration as well as justness and reasonableness of the contract, but the motion for a nonsuit was denied without argument. On July 1, 1924, about six months after the trial of the case, findings of fact and conclusions of law were filed, and on the same day plaintiff filed what is designated as an amended complaint, filed to conform with the proof, wherein it was alleged that the reasonable market value of the property which he proposed to transfer to the defendant was $8,500 and that the reasonable market value of the property which the defendant proposed to transfer to him was $7,000, that defendant's property was subject to a mortgage of $1,370 which the plaintiff agreed to assume, and that the defendant agreed to place a first mortgage on the property, which she acquired from the plaintiff, in the sum of $2,870. Following this, appear the same allegations as to the justness and reasonableness of the contract as appeared in the original complaint, but in neither case do we find any allegation relating to the adequacy of the consideration or the other elements mentioned in section 3391, Civil Code.

[3] We have called attention to the fact that the amendment to the complaint was filed on the same day as the findings were filed for the purpose of explaining defendant's failure to demur thereto. The findings were in the language of the amended pleading and the question is, therefore, whether the findings support the judgment. As the defendant did not have an opportunity to demur, this question is to be considered by us in the same view as a trial court would consider a demurrer to a complaint for failure to state sufficient facts. We are not therefore concerned with the question of the sufficiency of the pleading, but with the question of the sufficiency of the findings to support the judgment, and consequently the case is not controlled by the rule of Estate of Behrens, 130 Cal. 416, 418, 62 P. 603, and similar cases, holding that where no demurrer is interposed the pleadings will be held good after judgment.

[4] By the express terms of the Code a party is not entitled to the specific performance of a contract, unless he shows that the consideration therefor is adequate to the other party, and that as to him it is just and reasonable. Conceivably a contract may be just and reasonable, though it may not carry an adequate consideration to one of the contracting parties, and it is just as important to prove one of these elements as to prove the other. If the question had arisen before the trial court on a demurrer to the amended complaint which was filed to conform to the proofs, the fact that the amendment failed to plead the uncontradicted evidence affirmatively showing an inadequacy of consideration would have required an order sustaining the demurrer. With the question as it is presented here, we must say that the failure of the trial court to find in accordance with this uncontradicted evidence, disclosing an inadequacy of consideration, was error prejudicial to the defendant.

Thus, though we assume that the evidence was insufficient to support a finding of misrepresentation on the part of the plaintiff or his agent, there can be no doubt that the uncontradicted evidence did disclose that there was concealed from the defendant the fact that the plaintiff's property required an annual outlay for upkeep of over $800 above all possible income. The value of plaintiff's property was represented to be $10,000, and on that basis the defendant agreed to execute a mortgage in plaintiff's favor for $2,870. Manifestly, a mortgage of this amount is a greater burden against a property valued at $8,500 than it is against a property valued at $10,000. Evidence was offered that representations were made to the defendant that she might easily retire this mortgage through the income from the property. The evidence demonstrated that this could not be done because the annual income from plaintiff's property was some $800 less than the cost of upkeep. Since the annual income of defendant's property was more than $500 above the cost of upkeep, the inadequacy of the consideration moving to the defendant is apparent.

[5, 6] There has been no departure from the rule that it is necessary to plead sufficient facts to show that the consideration for the contract was adequate and that the burden of proving that issue is upon the party who would have the contract enforced. Where the fact is not pleaded and the trial court has failed to find on the issue, it is proper to assume that the evidence was insufficient to support such a finding, and it is therefore unnecessary for us to give any further consideration to the evidence in this record. As the finding is a necessary and essential prerequisite to a judgment in specific performance, the absence of the finding requires a reversal of the judgment.

Judgment reversed.

We concur: PRESTON, Presiding Justice pro tem.; STURTEVANT, J.

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80 Cal. App. 393

SHEEHAN v. ALL PERSONS, etc. (Fidelity Bond & Mortgage Co., Respondent).★

(Civ. 5545.)

(District Court of Appeal, First District, Division 2, California. Dec. 22, 1926. Hearing Denied by Supreme Court Feb. 17, 1927.)

1. Judgment ⟹18(2)—Judgment on insufficient complaint is not void, if court has jurisdiction.

Judgment is not void, if court has jurisdiction of parties and subject-matter, irrespective of whether complaint states cause of action, if it apprises defendant of nature of demand.

2. Process ⟹55—Plaintiff's attorney is not "party to action" and is competent to serve summons (Code Civ. Proc. § 410).

Under Code Civ. Proc. § 410, plaintiff's attorney is not a "party to action" and is competent to serve summons.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Party to Suit or Proceeding.]

3. Judgment ⟹497(2)—Recital that defendant was served and failed to appear or plead, and default was entered, held conclusive on collateral attack.

Judgment, reciting that defendant was duly served with summons and complaint and failed to appear or plead, and that default was duly and regularly entered, *held* conclusive on collateral attack.

4. Judgment ⟹279—Findings of fact and conclusions of law form no part of judgment roll.

Findings, in default case, of fact and conclusions of law, are entirely unnecessary, and form no part of judgment roll.

5. Execution ⟹345—Title of purchaser at sheriff's sale held not void for error in return.

Where sheriff was authorized to make sale on execution issuing July 18, 1910, and made sale thereunder, it was not invalid, though return erroneously showed that sale was made on execution issuing October 13, 1910.

6. Execution ⟹319—Misrecital of execution in sheriff's deed held not to affect validity, if sheriff had authority.

Misrecital of execution will not affect validity of sheriff's deed, if sheriff had authority; purchaser being only required to show sale and officer's authority.

7. Execution ⟹319—Judgment and execution prove authority of sheriff, and deed proves sale.

In execution sale, judgment and execution prove authority of officer to make sale, and deed proves the sale.

8. Execution ⟹260—Purchaser need see only that there is valid judgment and execution regular on its face.

All that purchaser at execution sale is bound to do is to see that there is judgment which is not void and execution which is regular on its face.

9. Execution ⟹345—Validity of title under sheriff's deed at execution sale is not dependent on his return.

Validity of title to property, conveyed by sheriff's deed at execution sale, is not dependent on sheriff's return; title being derived from previous sale by sheriff by authority of writ of execution.

10. Execution ⟹319—Sale and sheriff's deed are sufficient evidence of title, if sheriff had authority to sell.

Sale and sheriff's deed are sufficient evidence of title, if purchaser can show that sheriff was authorized to sell.

11. Execution ⟹316—If sheriff's deed is defective, he may be compelled to make another.

Where sheriff's deed is defective, he has right to make another deed, and may be compelled to do so.

★Hearing denied by Supreme Court.

12. Adverse possession 🔑13—Possession must be actual, open, notorious, hostile, continuous, and uninterrupted for statutory period to give title; "adverse possession."

Before one can acquire title by "adverse possession," possession must be actual, open, notorious, continuous, and uninterrupted for statutory period; exclusive, hostile, and under claim of right, and taxes must be paid by adverse claimant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

13. Tenancy in common 🔑15(2)—Plaintiff's possession of undivided portion of lot held not adverse.

Exclusive possession of entire lot, half of which was owned by plaintiff as tenant in common, *held* not to show his possession was adverse to co-owner or her successors.

14. Tenancy in common 🔑15(2)—Tenant in common cannot gain title by adverse possession against cotenant by merely refusing to recognize cotenant's rights.

While tenant in common in possession may gain title by adverse possession against cotenant, he cannot do so by merely refusing to recognize rights of cotenant; it being insufficient to raise presumption of ouster.

15. Tenancy in common 🔑15(10)—To react presumption that possession of one tenant is that of all, it must be shown that possession was with intent to hold adversely.

Possession of one tenant in common is presumed to be possession of all, and to react presumption and make possession adverse, it must be shown that possession was with intent to hold adversely; intent being indicated by acts calculated to exclude cotenant.

16. Tenancy in common 🔑15(1)—Cotenant not in actual possession cannot rely for adverse possession against cotenant, on possession of third cotenant.

One cotenant out of actual possession cannot rely for adverse possession against another cotenant out of possession, on possession of a third cotenant.

Appeal from Superior Court, City and County of San Francisco; Benjamin K. Knight, Judge.

Action by James C. Sheehan against all persons claiming any interest in or lien upon the real property described or any part thereof. From a judgment for defendant, the Fidelity Bond & Mortgage Company, plaintiff appeals. Affirmed.

See, also, 195 Cal. 546, 234 P. 1113.

George D. Collins, Jr., of San Francisco, for appellant.

Harding & Monroe, of San Francisco (Julia M. Easley, of San Francisco, of counsel), for respondent.

PRESTON, Presiding Justice pro tem. Plaintiff, James C. Sheehan, brought this action under the provisions of the McEnerney Act (St. 1906 [Ex. Sess.] p. 78) to quiet title to a lot of land situated at the northwest corner of Broderick and Greenwich streets, in the city and county of San Francisco. Defendant Fidelity Bond & Mortgage Company answered, alleging that it was the owner in fee simple of an undivided one-half interest in said property, and praying that its title thereto be quieted. The case was tried by the court and judgment was entered quieting the title to an undivided one-half interest in the plaintiff, James C. Sheehan, and the other undivided one-half interest in the defendant Fidelity Bond & Mortgage Company. From this judgment the plaintiff, James C. Sheehan, has prosecuted this appeal.

The record before us discloses these facts: Hannah Sheehan, at the time of her death, was the owner of the entire title to the real property in question and resided thereon with her son, James C. Sheehan, the plaintiff, and her daughter, Anna Sheehan. Hannah Sheehan died testate in the city and county of San Francisco on the 1st day of December, 1904. Her estate was duly probated and this property was on July 31, 1905, distributed according to her last will to James C. Sheehan and Anna Sheehan (now Anna De Vries) in equal, undivided interests. Anna Sheehan moved from the property about three months after the death of her mother and has never returned to live upon the property. James C. Sheehan continued to live in a small cottage on the property from the death of his mother up to the commencement of this action. The property has at all times been inclosed by a substantial inclosure and James C. Sheehan has paid all taxes and street assessments levied or assessed against the entire property from the date of the death of his mother to the time of the commencement of this action.

On June 16, 1908, one A. J. Harford commenced an action in the superior court of the state of California, in and for the county of Contra Costa, against Anna De Vries (formerly Anna Sheehan), and on July 28, 1908, obtained judgment against her for the sum of $671 claimed to be due for board furnished to minor children of Mrs. De Vries. Although Anna De Vries did not appear in said action, and a default judgment was entered against her, nevertheless, the court made and filed findings of fact and conclusions of law. The summons was served on the defendant Anna De Vries by R. E. Hewitt, the attorney for plaintiff in the action. On this judgment an execution was issued on July 18, 1910, and placed in the hands of the sheriff of the city and county of San Francisco, with instructions to levy upon and sell all of the right, title, and interest of Anna De Vries in and to the property here in question. Another execution was apparently issued on October 13, 1910, and also placed in the hands of the sheriff. The sheriff advertised the property and sold it on the 23d day of September, 1910, to the plaintiff, A. J. Harford, for the sum of $100. The sheriff's return of sale was attached to the execution dated October 13, 1910. On December 22, 1911, a sheriff's deed was duly executed and delivered to A. J. Harford, which recited that the execution sale occurred on September 23, 1910, upon an execution issued October 13, 1910.

On April 7, 1923, Anna Sheehan executed a deed to James C. Sheehan, the plaintiff, for all her right, title, and interest in and to this property. On August 4, 1923, after A. J. Harford had died, a corrected deed was obtained from the sheriff to A. J. Harford, correcting the recitals as to date of execution in the sheriff's deed of December 22, 1911.

On June 11, 1912, A. J. Harford and Maggie Harford, his wife, conveyed their interest in the property in question to Melvin E. Lyons and on September 5, 1922, the said Melvin E. Lyons conveyed the same property to the defendant and respondent Fidelity Bond & Mortgage Company.

The appellant, James C. Sheehan, assails the judgment in the case of Harford v. Anna De Vries on a number of grounds and we will notice briefly all of the contentions made for a reversal of the judgment.

[1] The appellant contends that the judgment in Harford v. De Vries is void because the complaint in that case does not state facts sufficient to constitute a cause of action. It is thoroughly settled in this state that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether or not the complaint states a cause of action, so long as it apprises the defendant of the nature of plaintiff's demand. Christerson v. French, 180 Cal. 523–525, 182 P. 27; Blondeau v. Snyder, 95 Cal. 521, 31 P. 591; Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595; In re James, 99 Cal. 374, 33 P. 1122, 37 Am. St. Rep. 60; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301; Brush v. Smith, 141 Cal. 466, 75 P. 55; Crouch v. Miller & Co., 169 Cal. 341, 146 P. 880; Gillespie v. Fender, 180 Cal. 202, 180 P. 332; California Casket Co. v. McGinn, 10 Cal. App. 5, 100 P. 1077, 1079; Baldwin v. Foster, 157 Cal. 643, 108 P. 714; Lemon v. Hubbard, 10 Cal. App. 471–475, 102 P. 554; Crane v. Cummings, 137 Cal. 201, 69 P. 984; Estate of Ross, 180 Cal. 643, 182 P 755.

In the Estate of Ross, 180 Cal. 651, at page 659, 182 P. 752, 755, the Supreme Court, speaking through Mr. Chief Justice Angellotti, said:

> "It is thoroughly settled in this state that the failure of a complaint to state a cause of action is not a defect going to the jurisdiction of the superior court, and that a judgment given upon such a complaint cannot be held void upon collateral attack. In this connection it is only necessary to refer to our recent decision in Gillespie v. Fender, 180 Cal. at page 202, 180 P. 332."

We have examined the complaint that is assailed, and, while it is inartfully drawn, we think it sufficiently clear and certain to inform the defendant therein of the nature of the claim against her, and sufficient to give the court complete jurisdiction of the cause. Certainly the default judgment rendered thereon could not be held void upon this collateral attack under the authorities above cited.

[2] Appellant also contends that the court had no jurisdiction to enter the default, or render judgment against Anna De Vries, because the summons was served upon the defendant Anna De Vries, formerly Anna Sheehan, by one R. E. Hewitt, who was also the attorney for the plaintiff in said action. Two or three sufficient answers may be readily made to this contention: First, the record does not reveal that the R. E. Hewitt who signed his name as attorney for plaintiff in that action is the same R. E. Hewitt who served the summons upon Mrs. De Vries; second, but assuming that it is the same person and that the service was made by the attorney for the plaintiff, still it did not affect the jurisdiction of the court in said action.

Section 410 of the Code of Civil Procedure provides in part:

> "The summons may be served by the sheriff of the county where the defendant is found, or by *any other person* over the age of eighteen, *not a party to the action*," etc.

See, also, 21 Cal. Jur. pp. 534–536.

The plaintiff's attorney was not a party to the action and was competent to serve the summons.

In 32 Cyclopedia, p. 454, it is stated:

> "If by statute, any person not a party may serve the summons, plaintiff's attorney is competent. * * * One who makes service ot the writ will be presumed to be a proper person in the absence of any showing to the contrary."

[3] Third, the judgment recites:

> "That said defendant was duly served with summons and complaint herein, and failed to appear or demur or answer herein, and that the default of said defendant was duly and regularly entered herein."

This is conclusive upon a collateral attack, such as the one made here. Crouch v. Miller & Co., supra; Sacramento Bank v. Montgomery, 146 Cal. 745, 81 P. 138.

[4] It is also contended by appellant that there is no authority in law for a judgment upon findings in a default case, and, because the court made its findings of fact and conclusions of law in the action of Harford v. De Vries, the judgment is a nullity and void. This contention is wholly without merit. The

Supreme Court has repeatedly held that the filing of findings of fact and conclusions of law in a case where they are not required is a mere irregularity, or error, and is harmless and cannot in any way affect the judgment. Estate of Morey, 147 Cal. 495–506, 82 P. 57. In such a case, findings, if made, are entirely unnecessary and form no part of the judgment roll. Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 97; Thomson v. Thomson, 121 Cal. 11, 53 P. 403; section 670, Code Civ. Proc.

[5] Appellant also makes this contention:

> "The alleged execution sale is clearly void. The sheriff's return of sale shows that the alleged sale to Harford was made on September 23, 1910, on an execution issued October 13, 1910. This return of the sheriff is in law prima facie evidence of the truth of its contents. * * * There is no evidence in the case at bar, nor in the record, to rebut this prima facie proof. * * *"

It is true, according to the record, that for some reason two executions were issued on the Harford judgment, but it clearly appears that the sale was made pursuant to the execution of July 18, 1910, and by some inadvertence the sheriff's return of sale was attached to the execution issued October 13, 1910, but the only levy the sheriff made in pursuance of the execution was made on the execution of July 18, 1910, and the notice of sale and all of the proceedings based on the execution sale show beyond question that the execution referred to was the one of July 18, 1910, and that the recital in the deed of December 22, 1911, was obviously a mistake made by the sheriff. There appears to be no question of the authority of the sheriff to make the sale from the record.

[6-11] It is settled law in this state that a misrecital of the execution in the sheriff's deed will not affect the validity of the deed if the sheriff had the authority. Shirran v. Dallas, 21 Cal. App. 415, 132 P. 454, 462, and cases therein cited. The purchaser is only required to show a sale and the authority of the officer to make it. The judgment and execution prove the authority and the deed proves the sale. All the purchaser is bound to do is to see there is a judgment which is not void, and an execution which is regular upon its face. As to all of the acts of the officer under execution, which precede the sale, he may rely upon the legal presumption that they have been fully performed. The validity of title to property conveyed by sheriff's deed at execution sale is not dependent upon the sheriff's return. The title is not created by the return, but is derived from the previous sale made by the sheriff by authority of his writ of execution. The sale and the sheriff's deed are sufficient evidence of title, and, if a purchaser can show that the sheriff had authority to sell, it is enough and he need look no further. Blood v. Light, 38 Cal. 653, 99 Am. Dec. 441; Ritter v. Scannell, 11 Cal. 248, 70 Am. Dec. 775; Hibberd v. Smith, 67 Cal. 564, 4 P. 473, 8 P. 46, 56 Am. St. Rep. 726; Porter v. Pico, 55 Cal. 172; McFall v. Buckeye, etc., Ass'n, 122 Cal. 468, 55 P. 253, 68 Am. St. Rep. 47; Weldon v. Rogers, 157 Cal. 413, 108 P. 266; Wilson v. Madison, 55 Cal. 5; Shirran v. Dallas, supra; 2 Freeman on Executions, § 274. It is likewise well settled that, where a sheriff's deed is defective, he has a right to make another deed and he may be compelled to do so. 23 Corp. Jur. 740.

Appellant also contends that he has acquired title to the undivided one-half interest formerly belonging to his sister, Anna Sheehan, by adverse possession. Under the evidence in this case, we find no basis for this contention. It will be remembered that Anna Sheehan and James C. Sheehan received the title to this property from the estate of their mother in 1905, and were tenants in common until Anna Sheehan's interest was divested by the execution sale hereinabove discussed. The testimony shows that Anna Sheehan removed from the property about three months after the death of her mother and never returned to live upon the property; neither did she pay any taxes upon the property.

[12] The law is well settled that, before one can acquire title by adverse possession, the possession must be actual, open, notorious, continuous, and uninterrupted for the statutory period; exclusive, hostile and under a claim of right, and taxes must be paid by the adverse claimant. Barlow v. Frink, 171 Cal. 165, 152 P. 290; Franz v. Mendonca, 146 Cal. 640, 80 P. 1078; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Unger v. Mooney, 63 Cal. 589, at page 595, 49 Am. Rep. 100. An adverse holder who fails to establish any one of these elements cannot acquire title by adverse possession.

[13-15] It clearly appears, therefore, that, as far as Anna Sheehan is concerned, she has no basis for a claim of title by adverse possession. Appellant is the undisputed owner of an undivided one-half interest in this property and under the evidence he never attempted to claim the other half as his own until he received the purported deed on April 7, 1923, from his sister, Anna Sheehan. His claim all this time was that he owned one-half and the other half belonged to his sister. It is true that he occupied the property from the death of his mother up to the commencement of this action, and it was inclosed by a substantial fence, and he paid the taxes thereon, and his possession was, no doubt, *exclusive* of the entire lot, but from this it does not follow that his possession was *adverse* to his sister or Harford and his successors in interest as to the other half; he was a tenant in common with them. While it is the law that one tenant in common, in pos-

session, may gain title by adverse possession against his cotenant, he cannot do so by merely refusing to recognize the right of his cotenant as James C. Sheehan seems to have done in the case at bar. This is not sufficient to presume an ouster. Colman v. Clements, 23 Cal. 245, and cases there cited. The possession of one tenant in common is presumed to be the possession of all, and in order to react this presumption and make the possession adverse, it must be shown that the possession was with the intent to hold *adversely*, and such intent must be indicated by acts calculated to exclude the cotenant. Colman v. Clements, supra.

It appears to us from a careful examination of the entire record, including the evidence, that appellant, James C. Sheehan, has wholly failed to meet these requirements, and we conclude that his possession was not adverse to his cotenants.

[16] If appellant claims adverse possession in Anna Sheehan by reason of his own possession of the property, it must fail, for one cotenant out of actual possession cannot rely for adverse possession against another cotenant out of possession, upon the possession of a third cotenant; or, to state it another way, Anna Sheehan cannot rely for adverse possession against Harford and his successors in interest upon the possession of James C. Sheehan. 1 Cal. Jur. 543; Gage v. Downey, 94 Cal. 241, 29 P. 635.

We are of the opinion that the judgment should be, and it is hereby affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

200 Cal. 215

HUGHES v. MUNICIPAL COURT OF CITY OF LOS ANGELES et al. (L. A. 9403.)

(Supreme Court of California. Dec. 31, 1926.)

1. Statutes 🔑124(1)—Any provision, in statute creating municipal court, that continues small claims courts in existence, held within title prescribing "jurisdiction" of municipal courts (St. 1925, pp. 650, 657, §§ 4, 26, 27; Const. art. 4, § 24).

Any language in St. 1925, pp. 650, 657, §§ 4, 26, and 27 that can be construed to continue in existence small claims courts after establishment of municipal court, is not void as being in contravention of Const. art. 4, § 24, since it is included within title to act "authorizing establishment of municipal courts, prescribing their constitution, regulation, government, procedure, and jurisdiction."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (of Courts).]

2. Courts 🔑188(1)—Municipal court must accept for filing small claim, under statute creating small claims courts (St. 1925, p. 657, §§ 26, 27; St. 1921, p. 117; Amendment of Nov. 4, 1924, to Const. art. 6, §§ 11, 11a).

Municipal court, created under St. 1925, p. 648, must accept small claim for filing under St. 1921, p. 117, creating small claims courts, in view of St. 1925, p. 657, §§ 26, 27, notwithstanding amendment of November 4, 1924, to Const. art. 6, §§ 11, 11a, since small claims court is not separate court, but merely separate procedure; but Legislature may create inferior courts to relieve congestion in municipal courts.

3. Courts 🔑160—Small claims court procedure held not abolished by Code Civ. Proc. (Code Civ. Proc. § 831e et seq. [added by St. 1925, p. 945]).

Procedure adopted by Code Civ. Proc. § 831e et seq. (added by St. 1925, p. 945), is inapplicable to small claims court matters, and was not intended to abolish the small claims court procedure.

In Bank.

Application for a writ of mandate by Robert J. Hughes, doing business under the firm name and style of the Roberts Mutual Paint Company, prayed to be directed to the Municipal Court of the City of Los Angeles and others, requiring them to accept for filing a claim under the statute creating small claims courts. Writ granted.

Frank M. Smith, of Los Angeles, for petitioner.

Everett W. Mattoon and R. C. McAllaster, both of Los Angeles, for respondents.

Arthur L. Johnson, of San Francisco and Chas. F. Lowy, of Los Angeles, amici curiæ, for Bureau of Labor Statistics.

J. M. Friedlander, City Prosecutor, and Vernon S. Gray, Deputy City Prosecutor, both of Los Angeles, amici curiæ, for Municipal Court.

SEAWELL, J. Petition for writ of mandamus. James Wallace was indebted to petitioner, Roberts Mutual Paint Company, in the sum of $40.21. Petitioner, upon the authority of the statute creating small claims courts (Stats. 1921, p. 117, adding sections 927-927p to the Code of Civil Procedure), presented to respondents Hon. Henry M. Willis and W. S. Dinsmore, presiding judge and clerk, respectively, of the municipal court of the city of Los Angeles, said claim, and requested the same to be filed. Respondents and each of them refused to permit said claim to be filed in said court, and refused to assume jurisdiction of the subject-matter of the action or to at all entertain the proceeding, assigning as the grounds of their refusal that, by the amendment of article 6, § 11, state Constitution, adopted November 4, 1924, all existing inferior courts upon the organization of a municipal court as provided therein were abolished, and that, at the time the proceeding herein was attempted to be initiated, said municipal court of the city of Los Angeles was fully organized and functioning as such court. It is further argued that courts of inferior jurisdiction cannot exist in cities where municipal courts are established without affirmative action on the part of the Legislature creating them, and, inasmuch as no inferior or small claims court has been created by any act of the Legislature, none exists in the city of Los Angeles, and hence respondents are justified in their refusal to entertain said action.

[1] In brief, it is the contention of respondents that, by reason of the provisions of the Constitution providing for the organization of municipal courts, by virtue of which the respondent court was created, and by reason of the omission of the Legislature to provide by appropriate statute an inferior court in and for the city of Los Angeles, the jurisdiction of which court should not extend to cases wherein the claim or demand is more than $50, there no longer exists in said city a forum in which claims or demands of $50 or less may be tried in accordance with the procedure prescribed by the general act creating small claims courts. Code Civ. Proc., §§ 927–927p; Stats. 1921, p. 117. It is further contended that, conceding certain language employed in sections 4, 26, and 27 of the act authorizing the establishment of municipal courts (Stats. 1925, p. 648) is susceptible of a construction that would continue in existence inferior or small claims courts, the title of the act does not express this subject, and therefore the provisions of said act which attempt to continue in existence said courts are void and without effect as being in contravention of article 4, § 24, of the Constitution. We are of the opinion that the subject of the act is expressed by its title, which is in the following language:

"An act authorizing the establishment of municipal courts, prescribing their constitution, regulation, government, procedure and jurisdiction. * * *"

The language of the title is quite comprehensive, and unquestionably expresses the subject, to wit, the regulation, government, procedure, and *jurisdiction* of said courts.

[2] In the instant case the Legislature has not met in biennial session since the organization of respondent court, and no courts of an inferior jurisdiction have been created to perform the services formerly rendered by justice's courts. The provision of the Constitution which authorized the Legislature to create courts inferior to the municipal courts reads:

> "The Legislature may, however, provide for the establishment of courts inferior to municipal courts in cities and cities and counties where municipal courts are established; provided, however, that the jurisdiction of such inferior courts shall not extend to cases in which the claim or demand is more than fifty dollars." (Article 6, § 11a, adopted Nov. 4, 1924).

The foregoing language, construed with reference to all the other provisions of the amendment and the statute establishing small claims courts, forces the conclusion that it was not the intention of the lawmaking body to deprive any judicial district of the state of the benefits of the summary procedure conferred by statute which it had formerly enjoyed, but, on the contrary, it was the evident intent of the amendment to continue in force said summary procedure as a part of the judicial system of the state, and, if necessary for the accomplishment of the object for which small claims courts were created, to authorize the Legislature to create such additional inferior courts as the business of each municipality or community may require. The small claims court was created primarily to avoid wasteful litigation and to reduce to a minimum costs of trial in cases where the demands are small. Leuschen v. Small Claims Court, 191 Cal. 133, 215 P. 391. Considering the history of the entire subject, we think there is greater reason for concluding that the clause of the Constitution last above cited was intended solely to confer upon the Legislature the means of expediting litigation by relieving the municipal courts of congestion, rather than to deprive persons who reside within municipal court districts of a privilege equal with those who reside without the jurisdiction of said courts.

The Municipal Court Act provides that any city or city and county or township, by complying with the constitutional requirements, may establish a municipal court. Such a court is given enlarged jurisdiction over justice's courts, and is designed to supplant those courts in case the people of said municipalities or political subdivisions elect to avail themselves of the privilege of establishing courts of enlarged jurisdiction. The justice's courts and other inferior courts of like jurisdiction cease to exist upon the establishment of a municipal court. The central thought running through the act is to abolish the justice's courts and their procedure in cities and townships which adopt the municipal court system. The amendment (Const. art. 6, § 11a) expressly provides that—

> "Pending actions, trials, and all pending business of inferior courts within such city or city and county or township, upon the establishment of any such municipal court, shall unless otherwise provided by law be transferred to and become pending in such municipal court, and all records of such inferior courts be transferred to and thereafter be and become records of such municipal court."

The Legislature may relieve the municipal court of the duties with which it is charged by the Small Claims Court Act by establishing a court of inferior jurisdiction, which it is authorized to create, and, unless the municipal court is so relieved by the Legislature, it is required to finish all unfinished business pending in the court which it supplants and perform the duties that the law imposed upon the justice's court. There is nothing in the language of the constitutional amendment that would justify the conclusion that the municipal court is required only to complete the unfinished business of the justice's court or other inferior court which it was established to succeed, and that it may refuse to perform the service that was a part of the duty of the court which it succeeded. The Legislature, by providing the small claims court procedure did not set up a separate, independent judicial tribunal, to be presided over by a judge elected or appointed exclusively to perform the duties prescribed by the small claims court statute, but made it the duty of the several justices of the peace of the state to enforce its provisions. In other words, additional duties were imposed by statute upon the justices of the peace. The amendment provides that, when a municipal court supplants a justice's court, the former court is clothed with the powers which said justice's court had over all matters of which the justice's or inferior court exercised jurisdiction, and it is further charged with the performance of every duty which the law imposed upon the court to whose power and jurisdiction it has become the successor, unless it is otherwise provided by law. Respondents rely largely in support of their contention upon the meaning of the clause of the amendment which provides that, where a court is established in any city or in any city and county or township, "there shall be no other court inferior to the superior court except as herein provided." This clause, in our view, was intended by the Legislature to apply only to the establishment of distinct or independent judicial bodies constituted in the usual and ordinary manner in which courts are created.

Sections 927–927p, Code of Civil Procedure, in defining the jurisdiction conferred by the statute adding said Code sections, provides that:

> "All justices of the peace shall exercise the jurisdiction conferred by this title and while sitting in the exercise of said jurisdiction shall be known and referred to as the small claims court." Section 927.

Thus it will be seen that a separate, formally constituted court was not created, but a certain procedure was merely adopted as to small demands, and the justices of the peace were required to conform to it in actions where the demand was $50 or less. The justice's courts always had jurisdiction of the subject-matter of the actions affected by the small claims court procedure. The practical effect of the statute was to lay additional burdens upon the justices of the peace as to matters of procedure. We think it apparent that it was not the intention of the Legislature to establish a separate court of justice in the sense that courts are ordinarily constituted.

Section 26 of the act establishing municipal courts reflects the view of the Legislature as to the meaning of the language of the amendment providing for the establishment of municipal courts. It reads:

> "Sec. 26. The municipal court and each judge thereof shall have and exercise all of the powers and shall do and perform all of the acts which were conferred upon, or required of, any police court, justice's court, police judge or justice of the peace, by law, whenever any such inferior court shall have been superseded by a municipal court and whenever any such police judge or justice of the peace shall become a judge of the municipal court by reason of any of the provisions of this act, and all such laws, not inconsistent herewith, are made applicable to any such municipal court and to each judge thereof." St. 1925, p. 657.

This section makes it quite clear that the duties appended to justice's courts by the Small Claims Court Act are transferred to the municipal courts unchanged in any material respect. Section 27 is to the same effect.

[3] The procedure adopted by sections 831e et seq., Code of Civil Procedure (added by St. 1925, p. 945), is inapplicable to small claims court matters, and we think the procedure therein provided was not intended to abolish the small claims court procedure. To abolish the procedure would, in fact, be to abolish the court. There does not appear anywhere in the municipal court law an express or implied intention on the part of the lawmaking body to repeal or suspend the operation of the earlier statute establishing small claims courts, but, on the contrary, the continuation of said court seems to be contemplated. Without the procedure, the court cannot exist. The application of the superior court procedure would entirely nullify the beneficent purpose of the court. From an examination of the entire subject, it is reasonable to conclude that it was the intention of the Legislature that the procedure which as a matter of fact creates the small claims court should continue in effect and apply uniformly throughout the state. Any other conclusion would manifestly lead to absurd results.

We are of the opinion that the amendment and statute before us are not susceptible of the construction placed upon them by respondents. Emphasis is laid upon the fact that much of the time of the municipal court judges will be consumed by small claims litigation to the neglect of municipal court affairs. While this may be so, the Legislature is authorized by the Constitution to relieve a congested situation by the creation of inferior courts which may engage exclusively in the dispatch of small claims matters. The small claims court is a useful and important arm of our judicial system, and we are not privileged to limit its operation.

Let the writ issue as prayed for in the petition.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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200 Cal. 170

DOYLE et al. v. JORDAN, Secretary of State.
(S. F. 11978.)

(Supreme Court of California. Dec. 30, 1926. Rehearing Denied Jan. 28, 1927.)

1. Highways ⚷90 — Names cannot be withdrawn from petition to public officials, for formation of bridge and highway district, after determination of jurisdiction of body authorized to act.

Right to withdraw names from petitions to be presented to and acted on by public officials, for formation of bridge and highway districts, may not be exercised so as to defeat jurisdiction after jurisdiction of body authorized to act has been determined.

2. Highways ⚷90—Withdrawal of names from petition for formation of bridge and highway district, after certification by county clerk and filing with secretary of state, held too late (St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715).

Attempt of signers of petition for formation of bridge and highway district, under St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, to withdraw their names after petition was certified to as sufficient by county clerk and filed with secretary of state, *held* too late.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Highways 🔑90—County board could not repeal ordinance declaring intent to join bridge and highway district after petition was certified and presented to secretary of state (St. 1925, p. 452, §§ 2, 3).

County board of supervisors could not repeal ordinance declaring intent to join bridge and highway district, as required by St. 1923, p. 452, § 2, after petition provided for by ordinance was circulated, signed, certified, and presented to secretary of state, pursuant to section 3.

4. Highways 🔑90—County board could not withdraw ordinance declaring intent to join bridge and highway district after other counties adopted like ordinances and took all statutory proceedings to join district (St. 1923, p. 452, §§ 1–3; St. 1925, p. 715).

Ordinance, passed by county board of supervisors, declaring county's intention to join bridge and highway district, could not be withdrawn, even if only an offer or proposal, where five other counties accepted it by adopting like ordinances and taking all proceedings required by statute (St. 1923, p. 452, §§ 1–3; St. 1925, p. 715) to join district.

5. Highways 🔑90 — Acceptance of county's offer in ordinance to unite with counties adopting like ordinances to form bridge and highway district held not precluded by two counties' refusal to join (St. 1923, p. 452, § 2).

County board of supervisors' ordinance, purporting to have been enacted in accordance with St. 1923, p. 452, § 2, "to unite with such other counties as may adopt like ordinances," to form bridge and highway district, *held* not an offer to join only proposed district of eight counties, so as to preclude acceptance thereof after refusal of two counties to join.

6. Highways 🔑90—Failure to describe project in petition to form bridge and highway district and county board's ordinance held not fatal defect (St. 1923, p. 452, §§ 1–3, 13, 14; St. 1925, p. 715).

Proceedings under St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, to incorporate a bridge and highway district, *held* not fatally defective because project was not set forth or mentioned in county board of supervisors' ordinance or electors' petition, where definitely designated in written applications, pursuant to which board of each county in district passed like ordinances under section 3; sections 13 and 14, requiring only that project be definitely designated somewhere in proceedings.

7. Highways 🔑90—Petition for incorporation of "Golden Gate bridge and highway district" held sufficient to put electors on inquiry as to real project (St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715).

Petition under St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, for incorporation of district, "to be known as the Golden Gate bridge and highway district," *held* sufficient to put electors on inquiry as to real project contemplated, which was to bridge the Golden Gate.

8. Constitutional law 🔑278(2) — Bridge and Highway Act authorizing incorporation of districts held not to violate due process clause (St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715).

St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, providing for incorporation of bridge and highway districts, *held* not invalid as seeking to deprive persons of their property without due process of law.

9. Eminent domain 🔑19—Bridge and Highway Act held not invalid as seeking to take private property for private use (St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715).

St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, providing for incorporation of bridge and highway districts, *held* not invalid as seeking to take private property for private use.

10. Statutes 🔑107(9)—Title of Bridge and Highway Act held not to embrace more than one subject (St. 1923, p. 452).

St. 1923, p. 452, entitled "An act to provide for the incorporation and organization and management of bridge and highway districts, * * * acquisition and construction by said districts of bridges and approaches, * * * acquisition of all property necessary therefor, * * * issuance and payment of bonds, * * * levying of taxes and the collection of tolls by said districts * * * and annexation of additional territory thereto," *held* not invalid as embracing more than one subject in title.

11. Highways 🔑90—Provision of statute empowering boards of directors of bridge and highway districts to levy and collect taxes, and absence of provision for equalization of assessments in different counties, held not to invalidate proceedings to incorporate district (St. 1923, p. 452, §§ 1–3; St. 1925, p. 715).

Provisions of St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, as to duties of boards of directors of bridge and highway districts organized thereunder, especially powers given them to levy and collect taxes, and absence of provision for equalization of assessments of property in different counties of district, *held* at most mere defects, curable by proper legislation, and not invalidating proceedings under statute to incorporate district.

12. Constitutional law 🔑63(1) — Bridge and Highway Act held not violative of Const. art. 11, § 13 (St. 1923, p. 452, §§ 1–3; St. 1925, p. 715).

St. 1923, p. 452, §§ 1–3, and St. 1925, p. 715, providing for incorporation of bridge and highway districts, *held* not violative of Const. art. 11, § 13.

In Bank.

Original application by Frank P. Doyle and another for a writ of mandate to Frank C. Jordan, as Secretary of the State. Peremptory writ granted.

Rehearing denied; PRESTON, J., dissenting.

Frank L. Coombs and Nathan Coombs, both of Napa, and George H. Harlan, of San Rafael, for petitioners.

U. S. Webb, Atty. Gen., for respondent.

Charles A. Strong, of San Francisco, Charles M. Mannon, of Ukiah, and Casper A. Ornbaum, of San Francisco, amici curiæ.

CURTIS, J. The petitioners herein by this proceeding seek from this court a writ of mandate directed to the respondent, the secretary of state, commanding him as such public officer to publish certain notices which petitioners claim respondent is by law required to publish by virtue of certain proceedings set forth in the petition herein, which proceedings were taken under the authority of and in compliance with the provisions of a certain act of the Legislature providing for the incorporation, organization, and management of bridge and highway districts. Said act is entitled:

> "An act to provide for the incorporation and organization and management of bridge and highway districts and to provide for the acquisition and construction by said districts of bridges and approaches thereto, and for the acquisition of all property necessary therefor, and also to provide for the issuance and payment of bonds by said districts, for the levying of taxes and the collection of tolls by said districts and for the annexation of additional territory thereto." St. 1923, p. 452.

This act was amended in some of its essential features by an act of the Legislature in 1925 (St. 1925, p. 714). Sections 1 and 2 and a portion of section 3 of said act are as follows:

> "Section 1. A bridge and highway district may be organized and incorporated and managed as herein expressly provided, and may exercise the powers herein expressly granted or necessarily implied. The word 'county' as used herein shall include county, and city and county.
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> "Sec. 2. A bridge and highway district may be organized consisting of one or more counties or parts of a county or counties, and including a city and county, under the provisions of this act, by proceeding as follows: The several boards of supervisors of said counties, or parts of counties, may adopt an ordinance to the effect that the county, or part of county, intends to unite with such other counties as may adopt like ordinances to form such district, or such ordinance may, in one or more of said counties, be adopted by the electors of the county under the provisions of the law applicable to the passage of ordinances by the initiative. Each of said counties shall be contiguous to another county therein; provided, that counties separated by any of the waters of this state are contiguous within the meaning of this act. In such ordinance it shall be directed that a petition be circulated therefor, and the board shall, by resolution, name and appoint persons to circulate and secure signatures for the same.
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> "Sec. 3. Such petition which may consist of any number of separate instruments shall be presented to the secretary of state, signed by qualified electors, residing within the boundaries of the proposed bridge and highway district, equal in number to at least ten per centum of the number of such qualified electors in each county from which such petitions are presented voting for governor of this state at the last general election prior to the presentation of such petition. The board of supervisors of any county may, in lieu of proceeding by petition, call an election, as provided for the calling of special elections under the laws pertaining thereto, to be held in conformity therewith, where and when the same may be determined by a majority vote of the electors voting thereat.
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> "Such petition shall set forth the extent of the district, either by describing its exterior boundaries, or by naming the counties proposed to be included therein, as having been determined by said ordinance and in case only part of any county is proposed to be included therein, the extent of the part of the county included may be indicated by naming the county and excepting therefrom, some administrative or governmental subdivision or subdivisions thereof, such as townships, school districts or other similar subdivisions, or such excluded portion may be described by its boundaries, and in any of said descriptions of included or excluded territory, reference to recorded instruments may be made for the purpose of defining such boundaries, and shall contain a prayer that such proposed bridge and highway district be incorporated under the provisions of this act. Attached to each of the petitions shall be a copy of the said ordinance. The said ordinance may be enacted by the board of supervisors at any time after application shall be made to them for such purpose, but in case such board shall neglect to act upon such application for a period of sixty days thereafter, the said ordinance may be submitted to the electors of such county or city and county under the provisions of the initiative applicable thereto. In case said ordinance shall be passed by the board of supervisors, it shall be subject to the referendum provisions applicable to ordinances generally in such county or city and county. The said petitions from any county shall be grouped or fastened together and shall contain a certificate of the county clerk of such county that the same contains the requisite number of qualified signatures of qualified electors. The said county clerk shall have ten days time for the examination of such petitions when left with him for verification and it shall be his duty to verify the same, attach his certificate thereto within said period of time and forward the same to the secretary of state with his certificate that the same is sufficient and if from such examination he shall find that said petition is not signed by the requisite number of qualified electors residing within his county he shall also certify to the number of qualified electors required to make such petition sufficient, and it may be amended by filing a supplemental petition or petitions within twenty days from the date of such certificate, either by the same persons theretofore appointed to secure signatures, or by other persons appointed by the board of supervisors for that purpose. The county clerk shall within ten days after the filing of such supplemental petition or petitions make like examination of the same and certify to the result of such examination as hereinabove provided. If his certificate shall

show any such petition or said petition as amended to be insufficient it shall be filed by him with the secretary of state and kept by him as a public record without prejudice however to the filing of a new petition to the same effect, but if, by the certificate of the county clerk such petition or said petition as amended is shown to be sufficient the county clerk shall present the same to the secretary of state without delay. If any supplemental petition be filed all of the signatures appended to the petition or to the supplemental petition or petitions shall be considered in determining the number of qualified electors signing the petition. In case an election is had in any county in the place of said petition, the county clerk shall certify to the secretary of state the result thereof, with a copy of the action of the board of supervisors authorizing said election.

"After the certificate is issued by the secretary of state for the incorporation of such proposed bridge and highway district, the sufficiency of such petition in any respect shall not be subject to judicial review or be otherwise questioned. If any county within the boundaries of such proposed bridge and highway district shall have a registrar of voters other than the county clerk the said registrar of voters shall perform the duties herein required to be performed by the county clerk respecting the examination, certification and filing of the petition, and said registrar of voters shall return said petition immediately upon the completion of such examination, together with his certificate showing the result of such examination to the secretary of state. When all said petitions, or certifications of the result of elections when such elections are held, have been received from the several county clerks of counties having any portion of their territory within said proposed bridge and highway district the said secretary of state shall publish the text of such petition for at least three weeks before the time set by him as the time up to which protests may be received as hereinafter provided in at least one and not to exceed three newspapers printed and published in each of the counties from which such petitions have been presented, together with a notice stating the time which he has fixed up to which protests will be received against the inclusion of property within such proposed bridge and highway district. The names attached to said petition need not be published therewith, nor the certificates of any of the county clerks or registrars of voters, but it shall be sufficient to state that the same has been signed by a certain number of electors, naming it, and duly verified by such county clerks or registrars of voters.

"At any time before the time set by the secretary of state up to which protests may be received, any owner of property subject to taxation within said proposed bridge and highway district, may file, with the secretary of state, his protest in writing against the formation of such district, and stating therein such grounds as he may have for claiming that his said property, or any portion thereof, will not be benefited by the formation of the proposed bridge and highway district. The said protest shall contain the name and address of the person protesting and the name and address of his attorney, if he has one, and all of the protests so received by the secretary of state shall, with the petition filed from the county, be forwarded by the secretary of state to the superior courts in the respective counties from which the same have been received by the secretary of state, and thereupon the said superior courts shall acquire jurisdiction to hear and determine the said protests so received from the owners of lands located within their respective counties. It shall be the duty of the clerk of said superior courts to set the said matters for hearing before said court, and to give ten days' notice thereof in writing to the protestants, and to any person who shall have filed with the secretary of state his name and address as the attorney for the petitioners in said petition, which said attorneys' names and addresses shall be certified from the office of the secretary of state to the respective county clerks at the time of the transmission of the petitions thereto. At the time specified in such notice, or at such other time to which the said hearing may be continued, the said superior courts shall have jurisdiction to hear and determine all matters urged by the protestants against the formation of the said proposed bridge and highway district, or against the inclusion of their lands therein, and the said superior courts shall have jurisdiction to exclude the said lands from said proposed district, together with any other lands contiguous to the excluded lands, and contiguous to the exterior boundaries of the proposed district which are similarly situated to the lands of the protestants, to the end that isolated tracts may not be excluded from the district without also rectifying the boundaries thereof so that the district when finally formed shall be compact, continuous and without tracts of land excluded therefrom which are totally surrounded by other lands which are left within the district.

"The judgment of the said superior courts, when given shall be certified by the clerk to the secretary of state, together with the original petitions and protests theretofore transmitted to him by the secretary of state, and the said judgment shall not be appealable, and all questions of fact therein contained shall be final and conclusive upon the whole world, and shall only be subject to review by the supreme court of this state, upon a writ of review issued out of that court in such cases as writs of review are now permissible against superior courts, or the irregular exercise of the jurisdiction of such courts. Such proceedings for a writ of review must be taken within ten days after the entry of the judgment in the superior courts, and if not so taken all judgments of the superior courts shall become final.

"When all of the protests have been disposed of as hereinabove provided, and the results of the judgments therein certified to the secretary of state, the secretary of state shall thereupon issue his certificate of incorporation declaring the said district with the boundaries as finally established to be duly incorporated, formed and organized and shall file the same in his office, and cause a certified copy thereof to be recorded in the office of the county recorders of each of the counties situated within or partially within said proposed bridge and highway district."

By an amendment to the statute in 1925 it was provided that:

> "In case the board of supervisors of any county named in the petitions from other counties engaged in the formation of a bridge and highway district shall fail or neglect for sixty days after the application submitted to them, to pass such ordinance, and a period of more than sixty days thereafter shall elapse without any proceeding for passing such ordinance under the provisions of law relating to the initiative being on file with the county clerk or registrar of voters, the latter must upon receipt of an affidavit of an elector of the county, setting forth the date of making the original application to the board of supervisors and the failure of such board to act thereon for sixty days thereafter, issue his certificate to the secretary of state attached to such affidavit certifying that on the date of the issuing thereof no proceedings have been filed in his office to submit such ordinance to the electors under the provisions applicable to the initiative, and must forthwith transmit such certificate and affidavit to the secretary of state and the latter shall file the same, and the county from which such affidavit and certificate have been received by the secretary of state shall be excluded by him from the proposed district in the same manner as if the same had been excluded by order of the superior court. * * *"

The act further provides, after the secretary of state has issued his certificate of incorporation, for the appointment by the boards of supervisors of the respective counties comprising the district of directors to conduct and manage the affairs of the district, defines the powers of such board of directors and provides for the incurring of a bonded indebtedness upon a two-thirds vote of the electors of the district whenever the board of directors deem it necessary.

The amended petition herein alleges that written applications were presented to the board of supervisors of the counties of Del Norte, Humboldt, Mendocino, Lake, Sonoma, Napa, and Marin and of the city and county of San Francisco to pass an ordinance as in said act provided, declaring it to be the intention of such counties and of such city and county to form a bridge and highway district to be known as the Golden Gate bridge and highway district; that such ordinances were passed by the board of supervisors of the city and county of San Francisco and of the counties of Del Norte, Mendocino, Sonoma, Napa, and Marin; that thereafter and in each of said last-named counties and in the city and county of San Francisco petitions were circulated identical in form and in all respects as required by said act and praying that said Golden Gate bridge and highway district be formed under the provisions of said act of the Legislature; that each of said petitions was signed by more than 10 per cent. of the votes cast in said respective counties and in said city and county for Governor at the last general election immediately preceding the time when said petitions were circulated; that said petitions with the signatures attached to each thereof were left with the county clerks of said respective counties and with the registrar of voters of the city and county of San Francisco, and were by said last-named officers certified to be sufficient and were thereafter transmitted to the respondent as secretary of state; that there was also filed with the secretary of state certificates and affidavits as required by said act from the county clerks of Humboldt and Lake counties setting forth that no ordinances had been passed as required by said act in said county of Humboldt or in said county of Lake within 60 days after the filing of the application therefor, and that no proceedings for the passage of an ordinance under the provisions of law relating to the initiative were on file with the county clerk of either of said counties. Said amended petition further alleges that said respondent has failed, neglected, and refused to advertise in said counties or in any of them the notice required by law by him to be advertised, and that a demand had been made upon said respondent before the institution of these proceedings that respondent forthwith publish and advertise said official notice so required by him to be made under the provisions of said act; that the respondent after such demand has failed, neglected, and refused to publish said notice in said counties or in any of them.

By the answer and return of the respondent it is admitted that all of the documents and instruments in the matter of the incorporation and organization of the Golden Gate bridge and highway district claimed by the petitioners in their amended petition to have been filed in the office of respondent have been filed therein in accordance with the provisions of said act of the Legislature providing for the incorporation and organization of bridge and highway districts. Said answer and return further shows that all of said proceedings in the matter of the incorporation and organization of the Golden Gate bridge and highway district above referred to had been presented to him and filed in his office by the 2d day of December, 1925, and that thereafter and on the 17th day of December, 1925, there was also tendered to him and received by him in the office of the secretary of state a document purporting to be a copy of Ordinance No. 222 passed by the board of supervisors of the county of Mendocino on the 15th day of December, 1925, entitled "an ordinance repealing Ordinance No. 220, adopted January 27th, 1925, which said ordinance declared the intention of the county of Mendocino to unite with other counties adopting like ordinances to form a bridge and highway district, and directing the circulation of a petition for that purpose," and that there was also on said day presented and tendered to him a resolution passed by the board of supervisors of Mendocino county on the 15th day of December, 1925, purporting to revoke, annul and cancel and set aside said Ordinance No. 220. Furthermore, on the 21st day of January, 1926, there was tendered to and received by him in the office of the secretary of state a document purporting also to be a certified copy of said Ordinance No. 222 passed by the board of supervisors of the county of Mendocino on the 15th day of December, 1925, whereby it was sought to repeal said Ordinance No. 220; furthermore, on the 21st day of January, 1926, there was tendered to and received by him in the office of the secretary of state five several documents, identical in form, and purporting to be signed by 180 electors of the county of Mendocino who had theretofore signed the petition for the formation of the Golden Gate bridge and highway district which had been theretofore circulated in said county of Mendocino and being the same petition which had been certified as sufficient by the county clerk of said county of Mendocino, and by said clerk transmitted to and filed in the office of respondent. The persons signing said last-named five documents each asked to withdraw his name from said petition for the formation of said district. (By deducting said 180 names from the number signed to said original petition by the electors of Mendocino county, the said original petition would be insufficient and would bear the names of less than 10 per cent. of the qualified electors in said county voting for Governor at the last general election immediately preceding the circulation of said petition.)

The position of respondent as set forth in the answer and return is that with the instruments and documents presented to him as above referred to he is uncertain as to the proper course for him to pursue, and he is in doubt whether he shall publish the required notice as prescribed by said act in the county of Mendocino or in the other counties within said proposed district or at all. However, the amici curiæ appearing herein and representing the board of supervisors of the county of Mendocino and various organizations and individuals and taxpayers of said county and of other counties interested, in resisting the formation of the proposed district, take the position that said writ should not issue for any purpose whatever. The first contention of the amici curiæ is that by the withdrawal of the 180 names from the original petition received by respondent from the county of Mendocino, said petition is reduced below the number required by the provisions of said act and is therefore insufficient, and no further action can be taken in the proceedings to incorporate said district, at least so far as said county of Mendocino is concerned. This contention involves the right of the signers of said original petition to withdraw their names therefrom after the same has been certified as sufficient by the county clerk of the county of Mendocino and presented to and filed with the secretary of state as provided by said act.

[1] The right of persons, signing petitions to be presented to and acted upon by public officials, to withdraw their names therefrom has been before the appellate courts of this state on a limited number of occasions. In the case of Locher v. Walsh, 17 Cal. App. 727, 121 P. 712, it appeared that a petition had been filed with the city clerk of the city of Auburn praying that a certain ordinance relating to the regulation of the sale of intoxicating liquors in said city be submitted to the vote of the electors thereof. After the clerk had examined the same and had attached his certificate thereto that said petition was signed by more than 30 per cent. of the qualified voters of said city, certain of the signers of said petition attempted to withdraw their names therefrom by handing to the clerk a request that their names be withdrawn from said petition. The court in this case held:

> "That the clerk had jurisdiction to determine the sufficiency of the petition as filed, and having determined that it was sufficient, and having so found and certified before any request for withdrawal was made, such request was too late for the petitioners to exercise any such right or to divest the clerk of jurisdiction."

This case was followed and approved in the later case of Laam v. McLaren, 28 Cal. App. 632, 153 P. 985. In this latter case a petition was filed to recall a supervisor. The petition was referred to the clerk and certified by him to be sufficient, but, after it had been certified to the board by the clerk as sufficient, certain of the signers attempted to withdraw their names from the petition and thus to reduce it below the number of signers required by law. It was held that upon the certification by the county clerk of the sufficiency of the petition the duty then devolved upon the board of supervisors to order the election and the superior court had no jurisdiction to enjoin the board from so acting on the ground that after such certification and before the calling of the election certain signers to the petition had attempted to withdraw their names therefrom so as to reduce the number below that required to give the board authority to call the election. In Beecham v. Burns, 34 Cal. App. 754, 168 P. 1058, certain signers of a recall petition requested the clerk to withdraw their names therefrom after the petition had been filed with the clerk and before that officer had certified the result of his examination as required by the statute. The court held:

> "In our opinion, the signers of such petitions may not withdraw their names or have their names withdrawn by the clerk at any time after the petition has been filed."

Outside this state we find that the right of persons signing a petition to withdraw their names therefrom has frequently been before the courts of other jurisdictions. In the decided cases from other states we find many which are in accord with those from our own state above mentioned. In Mohr v. Seattle, 59 Wash. 68, 109 P. 309, it was held that under a charter provision that the city controller shall verify the sufficiency of the signatures to a referendum petition and imposing no duty upon the city council in that regard, it was the duty of the controller to determine the sufficiency of the signatures to the petition and after action had been taken by him no name might be withdrawn from the petition. In the case of Sim v. Rosholt, 16 N. D. 77, 112 N. W. 50, 11 L. R. A. (N. S.) 372, the Supreme Court of North Dakota, after an examination of a large number of authorities upon the question of the right of a signer of a petition to withdraw therefrom, arrives at the following conclusion:

> "Upon examination, it will be found that most of these cases relate to petitions for the removal of county seats, or are based upon a statute different from ours; and it will also be found that they do not support the right of petitioners to withdraw their names after the sufficiency of such petition and the qualifications of the petitioners have been passed upon by the board authorized to act thereunder. On the contrary, they will be found to support respondents' theory that, after the board has passed upon the sufficiency of such petition, it is thereafter too late to withdraw therefrom."

In a note to this case found in 11 L. R. A. (N. S.) supra, we find it said that:

> "Even the cases which allow the most liberal margin of time for withdrawal seem to recognize that this right to withdraw may not be exercised so as to defeat the jurisdiction, after the jurisdiction of the body authorized to act has been determined"—citing Littell v. Vermilion County, 198 Ill. 205, 65 N. E. 78.

As against these authorities the amici curiæ have cited but two California cases, McAulay v. Board of Supervisors, 178 Cal. 628, 174 P. 30, and Covell v. Lee, 71 Cal. App. 361, 235 P. 79. In neither of these cases, however, were the withdrawals attempted to be made after the petition had been filed with the person or board whose duty it was to act thereon. In McAulay v. Board of Supervisors, supra, certain signers of a petition for the organization of an irrigation district asked to have their names withdrawn from said petition prior to the time said petition was to be presented to the board of supervisors. This court held that they could effectively withdraw their names therefrom. It will be observed, however, that said petition at the time of said withdrawal had never been presented to the board of supervisors, and accordingly it had never been passed upon by said board or by any officer whose duty it was to examine it and determine its sufficiency. In the case of Covell v. Lee, supra, the petition was one for the organization of a joint union high school district and was directed to the superintendent of schools as the law provided. It was signed by the required number of electors from each of the school districts to be included in the proposed high school district. Before the petition had been presented to the superintendent of schools, three electors from Plainfield school district (one of the districts to be included in said proposed union high school district) who had signed the original petition, signed written requests, addressed to the superintendent of schools, asking that their names be withdrawn from the petition. These written requests were presented to the superintendent of schools before the original petition was presented or filed with such officer. The superintendent of schools in computing the number of names signed to said petition rejected these three names, thus reducing the number of signers thereto from the Plainfield school district below the number required by law. The District Court of Appeal, upon the authority of McAulay v. Board of Supervisors, supra, sustained the action of the superintendent of schools in rejecting said three names and held that they had a right to withdraw from said petition. It will be observed that in this case, like the case of McAulay v. Board of Supervisors, supra, the signers seeking to withdraw from the petition presented their request for withdrawal before the petition had been presented to the officer whose duty it was to act thereon, and, of course, before said officer had taken any action to determine the sufficiency of the same. A large number of cases from other jurisdictions are cited by the amici curiæ in support of the right of the signers to withdraw from petitions which they had previously signed. Many of these arose under statutes entirely unlike our own and in cases where the facts were so different from those in the present proceeding as to detract materially from their value as precedents to be followed in this action. From the study we have been able to give to these authorities we are forced to agree with the author of the note to Sim v. Rosholt, in 11 L. R. A. (N. S.) supra, wherein he stated:

> "Even the cases which allow the most liberal margin of time for withdrawal seem to recognize that this right to withdraw may not be exercised so as to defeat the jurisdiction, after the jurisdiction of the body authorized to act has been determined."

[2] The record in the present proceedings shows that the ordinances passed by the boards of supervisors of Del Norte, Mendocino, Sonoma, Napa, and Marin, and by the board of supervisors of the city and county of San Francisco had all been passed and petitions in compliance with these ordinances

had all been circulated and signed by electors of said counties, respectively, and that all said petitions had been presented to the county clerks of the respective counties and to the registrar of voters of said city and county, and that these officers had certified that the petitions presented to them, respectively, were sufficient and that said ordinances and the said petitions with the certificates of the certifying officers attached thereto had all been filed in the office of the respondent, the secretary of state, and also that the affidavits of the nonpassage of ordinances in the counties of Humboldt and Lake had been filed in the office of the respondent, before the board of supervisors of Mendocino county had adopted the resolution declaring it not for the best interests of Mendocino county to join in said proposed district, and before the board of supervisors of said county had taken any action to repeal or rescind their former ordinance of intention to join said district, and before any copy of said resolution or any copy of said repealing ordinance or before the petition signed by the 180 electors of Mendocino county asking to have their names withdrawn from the original petition had been filed in the office of respondent. To state the matter more briefly, by December 25, 1925, all steps required by the statute to be taken by either the boards of supervisors or the electors of the counties embraced within the boundaries of the proposed district had been taken by said boards of supervisors and by said electors and all the papers, documents, and instruments required by said act to be presented to the respondent in order to require him to publish the notice demanded of him in said proceeding had been presented to and filed by respondent in his said office. It therefore became the duty of respondent upon receipt by him of said documents to publish said notice as required by the statute. Upon the receipt by him of said documents he acquired jurisdiction to proceed under said statute and to perform the duties required of him by the terms thereof. Any attempt thereafter of any of the original signers of any of said petitions to withdraw therefrom, according to the great weight of authority, was ineffectual and could not divest respondent of jurisdiction to proceed as directed by the statute. The first of the documents, whereby Mendocino county sought to withdraw from said district, that was filed in the office of respondent, was the certified copy of the resolution adopted by the board of supervisors of said county on December 15, 1925, and it was filed in the office of respondent December 17, 1925. Thereafter there was filed with respondent two certified copies of the ordinance passed by the board of supervisors of Mendocino county whereby they attempted to repeal the ordinance declaring it the intention of said county to join in said district, and on January 21, 1926, the request signed by 180 of the persons on the original petition from said county attempting to withdraw their names from said original petition was filed with respondent. Under these facts and circumstances we are forced to the conclusion that the attempt by the signers of said petition to withdraw therefrom after said petition had been certified to as sufficient by the county clerk and thereafter filed with respondent was too late and was therefore ineffectual for any purpose whatever.

[3] The same conclusion must be reached, we think, in regard to the attempt of the board of supervisors to repeal the resolution of intention to join said district. "There is, * * * a distinction between the permanent or continuing powers of the board and those that are to be exercised once for all for a specified occasion only, as in the proceedings of the kind before us; for in the latter case the power to repeal the act after it has been finally executed is from the nature of the case clearly excluded." Vernon v. Board of Supervisors, 142 Cal. 513, 516, 76 P. 253. Continuing, the court in this case says:

> "There is no longer any power to rescind, and this, for the double reason that the powers granted to the board have been exhausted, and that vested rights have accrued."

The court in the Vernon Case was considering the right of a board of supervisors to rescind a resolution defining the boundaries of a proposed town and providing for an election to determine whether the territory included within said boundaries should be incorporated under the Municipal Corporation Act. It held that the board's action rescinding its resolution providing for said election was valid as it had been taken before the election was held and under a misapprehension of the real facts before the board at the time of its passage. We refer to this case more particularly for the reason that it brings out clearly the distinction between the general powers of a board of supervisors as to the enactment and repeal of ordinances and those that are exercised in proceedings of the kind before us. The board of supervisors of the county of Mendocino having passed the ordinance required by the statute, and the petition provided for by said ordinance having been circulated, signed, certified, and presented to the respondent (which proceedings might be compared with the holding of an election under the Municipal Corporation Act), it was then too late for said board to repeal said ordinance. The powers granted it under the statute had become exhausted.

[4] Nor do we think that there is any merit in the further contention of the amici curiæ that the passage by the board of supervisors of Ordinance No. 220 declaring it to be the intention of said county to join the bridge and highway district is but an offer or proposal

on the part of the county and that it may be withdrawn or revoked at any time before its acceptance. Conceding it to be an offer or proposal only, it was according to statute and made "to unite with such other counties as may adopt like ordinances." As we have already seen, four of the above counties and the city and county of San Francisco adopted like ordinances as that passed by the board of supervisors of Mendocino county, and following the passage of said ordinances they took all proceedings required of them by said statute in order to join said bridge and highway district. The offer, therefore, made by the county of Mendocino, was fully accepted by the other counties to whom it was made and the attempt of the board of supervisors to withdraw the same thereafter was too late and accordingly ineffectual.

[5] The additional contention of the amici curiæ is also untenable, that is, that the offer was made to join a district composed of eight counties, including Humboldt and Lake counties, and that as these two last-named counties refused to join in said district it was impossible to accept the offer as tendered. The ordinance passed by the county of Mendocino purported on its face to have been enacted in accordance with the act of the Legislature providing for the incorporation of bridge and highway districts, the second section of which provides that:

> "The several boards of supervisors of said counties or parts of counties, may adopt an ordinance to the effect that the county, or part of county, intends to unite with such other counties as may adopt like ordinances to form such district. * * *"

The legal effect of the ordinance passed by the board of supervisors of the county of Mendocino was that it intended to unite, in the language of the statute "with such other counties as may adopt like ordinances." It was clearly the intention of the board of supervisors to adopt an ordinance in compliance with the terms of the statute. In our opinion the ordinance adopted by them met these requirements. Its offer then was to unite with such other counties as might adopt similar ordinances. It was not impossible to accept said offer so long as any one or more of said counties passed a similar ordinance, and the passage of such ordinance by any of said other counties was of itself an acceptance of said offer of Mendocino county to join in said district.

[6] The amici curiæ claim that the proceedings taken by the respective counties to incorporate said bridge and highway district are fatally defective, in that they fail to set forth or describe the project for which the district was proposed to be incorporated. It is true that the project for which it is proposed to form the district is not set forth nor mentioned in either the ordinance passed by the board of supervisors or in the petition circulated and signed by the electors. Nothing in the act provides that the project for which it is proposed to form the district shall be set forth in any particular or specified manner or shall be described or contained in any particular or specified document or instrument which may form a part of the proceedings taken for the incorporation of the district. By section 13 of the act it is made the duty, after the organization of the district, of the board of directors and other officers of the district, "to prepare plans, both engineering and financial, for the purpose of putting into operation the project for which the district has been organized," and in section 14 of said act it is further provided:

> "That no taxes shall be levied by the board under the provisions of this section for the purpose of carrying out new projects after the original project for which the district was formed has been completed."

It would appear from these sections that the project for which the district is formed should be definitely designated somewhere in the proceedings in order, at least, that the board of directors of the district might know the extent and the limits to which they might proceed after the organization of said district. In fact, the object and purpose of the district, or its project, is a matter of first importance to all electors of the counties embraced within its limits. While it is true that the project is not set forth either in the ordinance or in the petition, yet it is claimed by petitioners that it sufficiently appears elsewhere in the proceedings. By section 3 of said act it is provided that:

> "The said ordinance [referring to the ordinance of intention to join the district] may be enacted by the board of supervisors at any time after application shall be made to them for such purpose. * * *"

It is alleged in the amended petition, and not denied in the answer and return that written applications were filed with the board of supervisors of each of the counties and of the city and county originally intended to be included within the boundaries of the proposed district, and "That said applications and each of them definitely designated the bridging of the Golden Gate as the object and purpose for which a bridge and highway district was to be formed." It is further alleged by petitioners, and not denied, that it was in response to these written applications that the board of supervisors of the respective counties and of the city and county passed the ordinances declaring it to be the intention of said counties and of said city and county to join in the organization of said district. It will thus be seen that there is officially of record in each of the counties of said district a document among the proceedings to incorporate said district in which the object and purpose or the project for which said district was to be formed is definitely and distinctly set forth. This, we think, is all that is required under the statute. It will be seen from an examination of the terms of the statute that no directions are contained therein requiring that the project for which said district is to be formed shall be stated either in the ordinance to be passed by the supervisors or in the petition to be circulated and signed by the electors. The boards of supervisors of the respective counties were by the written applications filed with them duly and sufficiently apprised of the project contemplated for the formation of the district.

[7] The petitions signed by the electors of the respective counties contained a prayer for the incorporation of a district under the provisions of said statute, "to be known as the Golden Gate bridge and highway district." Conceding that this was no notice to them that the project of the proposed district was to bridge the Golden Gate, it was sufficient to put them upon inquiry as to the real project contemplated by the incorporation of said district, and from the fact that they signed the petition it must be assumed that they satisfied themselves of the nature of said project and that they favored their county joining in said district. While we consider that it would have been the better practice to have had the project of the proposed district set out either in the ordinance or in the petition or both, yet we are not prepared to say that the failure to so set it out or to refer to it in said ordinance or petition renders the proceedings invalid so long as such project is set forth in full and shown in the written applications on file with the boards of supervisors of the counties to which they were presented.

[8-10] Various constitutional grounds are urged against the validity of the statute providing for the incorporation of bridge and highway districts. Among these grounds are that, by the terms of the statute, it seeks to deprive persons of their property without due process of law and that it seeks to take private property for private use. It is also contended that more than one subject is embraced within the title of said statute. We do not think that there is any merit in any of these contentions, nor do we feel that any extended answer thereto would serve any useful purpose.

[11] A further objection urged against the validity of the statute upon constitutional grounds deals mainly with the provision thereof defining the duties of boards of directors of said districts and particularly with the powers given to said boards by the statute to levy and collect taxes. It is claimed that as the directors of said district are appointed by the boards of supervisors of the counties composing said district and are not elected by the electors of said counties that they have no power to levy taxes. Even assuming that this point is well taken and that the attempt to clothe the directors of said district with power to levy taxes is beyond the constitutional authority of the Legislature, yet we seriously doubt whether this question can be raised in this proceeding instituted for the sole purpose of testing the validity of those provisions of the act providing for the incorporation and formation of said district. The district when incorporated may be a valid and constitutional agency of the state, although some of the powers with which the Legislature may have sought to invest the directors thereof are invalid and unconstitutional. The result would be that in a proper proceeding the court might restrain any attempt on the part of said directors to exercise such illegal and unlawful powers. But these illegal provisions, if any such there are in the statute, present no good ground why the district should not be incorporated, nor will they affect the legality of the district when incorporated. It may be that a board of directors formed as contemplated by the statute would be without power to levy taxes as provided in said act. If this would hereafter be made to appear, undoubtedly the Legislature could, and probably would, provide for some different manner or means of raising taxes in the district, or possibly might provide for the election of said directors by a direct vote of the electors of the respective counties. This would be a mere defect in the machinery of the district and could be cured by proper legislation. It could not be held to invalidate the proceedings taken under the statute to incorporate the district. The same may be said in regard to the objection that there is no provision in the statute providing for the equalization of the assessments of property in the different counties. If by the failure to provide for the equalization of assessments it should be held that any levy of taxes sought to be imposed by the directors of the district was illegal, this defect in the statute could be remedied by proper legislation to be thereafter enacted. In our opinion, therefore, there is no relevancy in any of these objections in so far as they are made or relied upon for the purpose of invalidating or rendering unconstitutional the provisions of the statute providing for the incorporation of such district. It is therefore, unnecessary for us to express any opinion as to the validity of those provisions of the statute conferring upon the board of directors of said district power to levy and collect taxes nor the effect upon said statute of its failure to provide for the equalization of the assessments of property in the various counties of said district. These are matters not properly before us in this proceeding.

[12] The final contention of the amici curiæ is that the act in question is unconstitutional, in that it is violative of article 11, § 13, of the Constitution. Practically the same question was raised to the validity of statutes

creating sanitary districts and county water districts as is now raised by the amici curiæ against the constitutionality of the bridge and highway act. In each case it was held that the statute in question did not violate the above provisions of the Constitution. Woodward v. Fruitvale Sanitary Dist., 99 Cal. 554, 34 P. 239; Henshaw v. Foster, 176 Cal. 507, 169 P. 82. We can see no valid distinction between the questions involved and decided in those cases and that raised by the amici curiæ in the present proceeding under their final contention as to the constitutionality of the bridge and highway act. Upon the authority of these cases we have no hesitancy in holding that the statute under consideration does not violate article 11, § 13, of the Constitution of this state.

It is therefore ordered that the peremptory writ issue as prayed for.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; SULLIVAN, J.

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200 Cal. 161

REDO Y CIA v. FIRST NAT. BANK OF LOS ANGELES. (L. A. 8452.)

(Supreme Court of California. Dec. 29, 1926. Rehearing Denied Jan. 27, 1927.)

1. Trial 🔑339(2)—Refusal to accept verdict contrary to instructions and requiring jury to bring in verdict conforming to instructions held proper (Code Civ. Proc. § 619).

Where jury entirely disregarded law as set forth in court's instructions and brought in verdict opposed thereto, it was proper for court to decline to accept such verdict and to instruct jury to again retire and bring in verdict in conformity with instructions, in view of Code Civ. Proc. § 619.

2. Trial 🔑339(2)—Trial judge exercises supervisory power over verdict of jury, though he cannot control jury in passing on evidence.

While trial judge may not interfere with or control jury in passing upon evidence, he exercises salutary, supervisory power over their verdict.

3. Trial 🔑337—Instructions on law which must be given by court are binding on jury.

Trial court is under duty to instruct jury on law, and instructions are binding on jury in its deliberations.

4. Trial 🔑339(2)—Compulsory reduction of verdict by jury after refusal of first verdict held proper amendment before recording of verdict and discharge of jury.

Reduction of verdict, in action to recover money paid for bills of exchange, so as to conform with court's instructions after court's refusal of verdict first returned, constituted an amendment properly made before verdict had been recorded and prior to discharge of jury, though made by jury under compulsion.

5. Trial 🔑337—Jurors cannot disregard instruction, though erroneous.

Instruction as to lawful limit of liability by defendant, in suit to recover money paid for bills of exchange, indicates only amount for which judgment could lawfully be rendered, and cannot be disregarded by jury, but if erroneous, may be revised and corrected on appeal.

6. Appeal and error 🔑1070(1)—Error in refusing poll of jury all favoring verdict for plaintiff, amount of which was directed by court, held not prejudical.

Where jurors were all in favor of verdict for plaintiff and so announced themselves on return of verdict that was recorded, error, if any, in refusing plaintiff's request for poll of jury was not prejudicial, where court directed amount of verdict in case of plaintiff's recovery.

7. Banks and banking 🔑188½—Verdict for money paid for bills of exchange impliedly determines dishonor of bills by drawee and waiver of protest by drawer.

In action to recover money paid for bills of exchange, verdict for plaintiff impliedly determined that evidence sufficiently showed dishonor of bill by drawee bank and waiver by drawer bank of formality of protest.

8. Appeal and error 🔑719(8)—Correctness of implied findings by jury will not be questioned on appeal, where not attacked.

Where implied findings of jury as to dishonor and waiver of protest on bills of exchange from verdict allowing recovery of money paid for bills were not attacked on appeal, their correctness will not be questioned by Supreme Court.

9. Banks and banking 🔑188½—Negotiable Instruments Act does not apply to action on bill of exchange executed before act took effect (Negotiable Instruments Law, § 3266d, incorporated in the Civil Code by St. 1917, p. 1531).

Negotiable Instruments Law, § 3266d, incorporated in the Civil Code by St. 1917, p. 1531, does not apply in determining amount of damages in action to recover money paid for bills of exchange executed before act took effect.

10. Banks and banking 🔑188½—Drawer of dishonored bill of exchange, in marks, is liable for value of marks as of date of presentment for payment plus damages and interest (Civ. Code, §§ 3234–3239).

Under Civ. Code, §§ 3234–3239, purchaser of bill of exchange, expressed in German marks, dishonored by drawee, may recover of drawer value of marks in United States money at time bill was presented to drawee for payment at existing rate of exchange, protest having been waived, whether decreasing or increasing value of marks, plus statutory damages and interest.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Redo y Cia, a copartnership composed of Mrs. Alejandro de la Vaga de Redo and another, against the First National Bank of Los Angeles. Judgment for plaintiff for part of amount claimed, and it appeals. Affirmed.

Mott & Vallee, of Los Angeles, for appellant.

Flint, MacKay & Bowen, of Los Angeles, for respondent.

SHENK, J. Plaintiff instituted this action to recover $14,200 paid by it to the defendant bank for two foreign bills of exchange drawn by the defendant on the Deutsche Bank of Hamburg, Germany, each being for 40,000 marks.

The plaintiff firm was engaged in the sugar business in Mexico and maintained an office in the city of Los Angeles. In the conduct of its business plaintiff maintained an account with Bartning Gebruder of Hamburg, Germany. On March 22, 1917, plaintiff's Los Angeles manager inquired of the defendant bank the exchange rate on a draft for 40,000 German marks. The defendant bank thereupon wired its correspondent, the Crocker National Bank of San Francisco, and secured from it the rate of exchange, together with its consent to effect the sale. Thereafter and on March 23, 1917, the plaintiff, through its Los Angeles manager, purchased the first bill of exchange for 40,000 marks from the defendant bank. This bill of exchange was drawn on the above-named German bank and was payable to the plaintiff in marks. At the then prevailing rate of exchange the plaintiff paid $6,920 therefor, the exchange rate of each mark being 17.3 cents. On the same day the defendant notified the Crocker Bank of the issuance of the bill of exchange.

The Crocker Bank had an arrangement with the Deutsche Bank Filiale of Hamburg, Germany, dating from the year 1911, under which the latter honored and paid bills of exchange of the former bank and its correspondents to the extent of 500,000 marks at any time, without previous advice or the deposit of funds.

On April 2, 1917, the plaintiff, through its manager, purchased of the defendant bank a second bill of exchange for 40,000 marks similar to the first and paid therefor the sum of $7,280. Upon payment being made each of said bills was delivered by the defendant to the plaintiff's manager. The amount paid for said two bills of exchange totaled $14,200, the sum sued for herein, of which amount the defendant asserts it retained $25 as commission and then remitted the remainder to the Crocker Bank.

A state of war was declared to exist between the United States and Germany on April 6, 1917, and mail service between the two countries was officially discontinued on the following day. Prior thereto the Crocker Bank had addressed and mailed to the Hamburg Bank a separate advice of each draft, both of which were received by the latter bank. Subsequent advices mailed by the defendant bank to the Hamburg Bank were returned marked, "Mail service suspended to country addressed." This information was apparently conveyed to the Crocker Bank by the defendant. The continued existence of a state of war between this country and Germany prevented the plaintiff for a considerable period from sending the two drafts to the latter country by mail. Hostilities were terminated on November 11, 1918, by the signing of the armistice, and on July 15, 1919, mail service and commercial transactions between the two countries were resumed. Approximately one month later, August 14, 1919, plaintiff's Los Angeles manager mailed the two bills of exchange to the home office in Mexico for indorsement to Bartning Gebruder, Germany, together with instructions for their forwarding. The bills were inclosed in a letter bearing date August 20, 1919, and addressed to the indorsee in Germany.

Subsequent to the restoration of peace conditions and the resumption of business relations with Germany, the Crocker Bank effected a new credit arrangement with the Hamburg Bank, being known as the new account, the previous arrangement thereafter being referred to as the old account. No change had apparently been made in the arrangement, however. The bills of exchange were presented by the indorsee to the Hamburg Bank on September 24, 1919, whereupon the latter cabled the Crocker Bank and inquired if they might be paid from the new account, together with "all old drafts." In reply thereto the Crocker Bank cabled to ascertain the status of the old account and to learn "why above drafts cannot be charged against same." On October 1, 1919, the Hamburg Bank cabled the Crocker Bank to the effect that at the close of business the old account had a balance of 100,000 marks, but that "according peace conditions you cannot dispose against same." The Crocker Bank addressed a letter bearing date November 6, 1919, to the Hamburg Bank "regarding the matter of paying drafts drawn against our old account to the debit of our new account, and would thank you to hold this matter in abeyance for the time being, advising us, however, when our old account is again at our disposal." Other correspondence passed between the Crocker Bank and the Hamburg Bank relative to the status of the old and new accounts and the payment of the bills of exchange. The bills here involved were never protested, but, after being held for a time by the indorsee, were returned to the plaintiff at Los Angeles. This action to recover the amount paid for said bills of exchange grew out of the return thereof.

Among other things the trial court instructed the jury that laches was not chargeable to the plaintiff nor was the defendant bank relieved of any liability by reason of any delay in the presentation of the drafts to the Hamburg Bank occasioned by the existence of a state of war between the United States and Germany, and that it was the duty of the jury to determine whether the defendant bank had waived protest of the drafts. The jury was further instructed that, should it determine that the plaintiff was entitled to recover, such recovery would and should be limited to the value of 80,000 marks in United States money on September 24, 1919, the date of presentment to the drawee, or $3,600; that in addition thereto the plaintiff would be entitled to damages of $15 on each $100 thereof, or $540, together with interest on $4,140—the total of the principal sum and damages—from the date of demand made by plaintiff on the defendant, which date was to be determined by the jury.

After deliberating the jury returned a verdict in favor of the plaintiff in the sum of $14,200—the full amount paid by it for the bills of exchange. The verdict was passed to the court, and it declared that:

> "The court cannot accept that verdict. I told you what the extreme amount was that you could find. That is all there is to it. You will retire again."

Considerable discussion thereupon ensued between the court and individual jurors, and the court again instructed them that they could award no more than $4,140 and interest thereon to the plaintiff. The jury again retired and brought in a verdict in accordance with the court's instructions, and judgment thereon was duly entered.

[1] Plaintiff urges as a first ground of appeal that the court erred in declining to receive and record the first verdict brought in by the jury. Appellant contends that:

> "The court was bound in law to receive the first verdict rendered by the jury. It could thereafter, on motion, set it aside and order a new trial, but it had no power to compel the jury to render a verdict different in substance."

[2, 3] We cannot uphold this contention. In its instructions the trial court informed the jury that in the event they found or concluded that appellant was entitled to recover from the respondent, such recovery was to be for $4,140, together with interest. The jurors entirely disregarded the law as set forth in the court's instructions and brought in a verdict opposed thereto. In our opinion the lower court very properly declined to accept such a verdict and acted within its province when it instructed the jury to again retire and bring in a verdict in conformity with the instructions. While the trial judge may not interfere with or control the jury in passing upon the evidence, he nevertheless exercises a salutary supervisory power over their verdict. People v. Knutte, 111 Cal. 453, 455, 44 P. 166. It is the province and the duty of the court to instruct the jury upon the law, and such instructions are binding on the latter in its deliberations. Estate of Sharon, 179 Cal. 447, 460, 177 P. 283. In the case of Logan v. Lewis, 35 Cal. App. 663, 666, 170 P. 851, 852, the jury, at the suggestion of the trial court, accompanied by proper instructions, amended its verdict by reducing the amount of the special damages awarded. The procedure therein pursued was upheld, and the opinion declares that:

> "Inasmuch as the verdict of the jury had not been recorded nor the jury discharged, we think the court was warranted in permitting the jury to make this amendment. Code Civ. Proc. § 619; 38 Cyc. 1893, 1894; 22 Ency. Pl. & Pr. 967, 968; McNutt v. Pabst, 25 Cal. App. 177, 143 P. 77; Conlin v. Lewis Inv. Co., 26 Cal. App. 388, 147 P. 472."

[4] We are of the view that the change made in the verdict constituted an amendment which could properly be made before the verdict had been recorded and prior to the discharge of the jury. This amendment was necessary so that the verdict would be in conformity with the instructions. We do not regard as significant the fact that the amendment was made by the jury under compulsion. If it were held otherwise "the refractory jurors would be able to compel a new trial and thus defeat the exercise by the court of a power which it clearly possesses." Estate of Sharon, supra.

[5] When the court instructed the jury as to the lawful limit of liability on the part of the defendant, if the jury should find the defendant liable at all, the court thereby indicated the only amount for which a judgment could lawfully be rendered. The jurors were not at liberty to refuse obedience to this instruction. If the court be in error in giving such an instruction, the error may be revised and corrected on appeal.

Nothing said herein is opposed to the principles enunciated by the several cases referred to in appellant's briefs. In none of those cases did the jury disregard the instructions of the court upon a question of law and bring in a verdict contrary thereto. In the main those cases presented instances where the jury had passed upon questions of fact and the trial court had attempted to substitute its opinion in the place and stead thereof. As declared in one of said cases:

> "The functions of the jury in determining the facts of the case were usurped by the judge." Langdon v. Superior Court, 65 Cal. App. 41, 43, 223 P. 72, 73.

Such is not this case.

[6] Assuming that error was committed by the trial court in refusing the appellant's request for a poll of the jury, we think no prejudice resulted therefrom, for the reason that the jurors were all in favor of a verdict for the appellant and so announced themselves on the return of the verdict that was recorded. As to the amount of said verdict the polling of the jury would have been a "mere useless ceremony." See Estate of Sharon, supra.

[7, 8] Before considering the amount of damages awarded to the appellant it may be said that by returning a verdict favorable to the appellant the jury impliedly determined that the evidence in the case was sufficient to show a dishonor of the two bills of exchange by the drawee bank and a waiver by the respondent drawer bank of the formality of protest. As these implied findings of the jury are not attacked on this appeal, the correctness thereof will not now be questioned.

[9] It remains to be determined whether the trial court correctly instructed the jury as to the amount of damages that might be awarded to the appellant in the event the jury was of the opinion that appellant should recover. In the solution of this problem we are precluded from having recourse to the provisions of the Uniform Negotiable Instruments Law as incorporated in the Civil Code July 31, 1917 (Stats. 1917, p. 1531). It is appropriate to note, however, that section 3266d of the new law provides:

> "The provisions of this title do not apply to negotiable instruments made and delivered prior to the taking effect hereof. * * *"

The two bills of exchange involved herein were made and delivered on March 23 and April 2, 1917, respectively. Said two bills having antedated the adoption by this state of the Uniform Negotiable Instruments Law, the measure of damages recoverable from the drawer upon dishonor must be found in the law in effect prior to July 31, 1917. Sections 3234 to 3239, inclusive, of the Civil Code, constituted the law of this state when the two bills of exchange were sold, and were determinative of the amount of damages recoverable from the respondent bank upon the dishonor of said bills by the drawee and protest or waiver thereof. Section 3234 provided:

> "Damages are allowed as hereinafter prescribed, as a full compensation for interest accrued before notice of dishonor, re-exchange, expenses, and all other damages, in favor of holders for value only, upon bills of exchange drawn or negotiated within this state, and protested for nonacceptance or nonpayment."

Section 3235 provided:

> "Damages are allowed under the last section upon bills drawn upon any person: * * * (3) If drawn upon a person in any place in a foreign country, fifteen dollars upon each one hundred dollars of the principal sum specified in the bill."

Section 3236 provided:

> "From the time of notice of dishonor and demand of payment, lawful interest must be allowed upon the aggregate amount of the principal sum specified in the bill, and the damages mentioned in the preceding section."

Section 3237 provided:

> "If the amount of a protested bill of exchange is expressed in money of the United States, damages are estimated upon such amount without regard to the rate of exchange."

And section 3238 provided:

> "If the amount of a protested bill of exchange is expressed in foreign money, damages are estimated upon the value of a similar bill at the time of protest, in the place nearest to the place where the bill was negotiated and where such bills are currently sold."

[10] The amount of the bills of exchange involved herein was expressed in foreign money, and under said section 3238 the appellant was entitled to recover the value of said 80,000 marks at the time the bills were presented to the Hamburg Bank for payment, the jury having impliedly determined that protest had been waived. At the then existing rate of exchange, according to the record herein, said 80,000 marks would be the equivalent of $3,600 in United States money. In addition to this principal sum the appellant was entitled under section 3235 to damages of $15 upon each $100 thereof ($540) and interest, under section 3236, on the total of said two sums, or on $4,140, from the time payment was demanded of respondent.

The trial court's instructions upon the damages recoverable by appellant, as set forth in substance above, were in strict accordance with the rule of damages expressly declared by the above sections, and the trial court therefore did not err in confining the appellant's recovery as indicated. If German marks had increased in value the appellant would have been entitled to recover at the current rate. The fact that they depreciated in value could not affect the rule.

In view of the statutory rule of damages fixing the amount of recovery upon dishonored bills of exchange issued prior to the adoption by this state of the Uniform Negotiable Instruments Law, it becomes unnecessary to consider and discuss the numerous cases from other jurisdictions cited by the parties hereto. Since the statutory rule of damages is applicable in all cases of dishonored bills of exchange it is likewise unnecessary to pass upon the several contentions of the parties touching the cause of the dishonor of the two bills herein involved.

As the appellant was awarded the maximum damages to which it is entitled under the law, a review of further asserted errors of the trial court would serve no useful purpose.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SULLIVAN, J.

200 Cal. 247

In re KIMBALL'S ESTATE.

KIMBALL v. TULLY et al.

(S. F. 12030.)

(Supreme Court of California. Jan. 11, 1927.)

1. Executors and administrators 🔑14—Plaintiff held not entitled to appointment as executor under will providing for his appointment if testator and wife died at same time, where testator predeceased wife.

Under will appointing wife sole executrix, but, if testator and wife should die at same time, appointing plaintiff and others executors, plaintiff's right to be appointed executor was dependent on testator and wife dying at same time, and where testator predeceased wife by three days, plaintiff never acquired right to appointment.

2. Executors and administrators 🔑14—Death of executrix after decease of testator terminated her right to letters testamentary.

Under will appointing wife sole executrix and appointing others if wife and testator died at same time, death of wife shortly after testator terminated her right to letters testamentary.

3. Executors and administrators 🔑21(1)—Probate court must appoint qualified administrator with will annexed where estate is left without executor.

Where death of executor after death of testator avoided condition in will for appointment of other executors leaving estate without executor, it was duty of probate court to appoint qualified person to receive letters of administration with will annexed.

4. Executors and administrators 🔑32(2)—Administrator appointed under order not based on alleged invalid nomination by deceased executor will not be removed without showing of disqualification (Code Civ. Proc. § 1426).

General order appointing administrator, not shown to have been predicated on nomination of deceased executrix, was valid under Code Civ. Proc. § 1426, regardless of invalidity of nomination, and in absence of showing of disqualification administrator appointed will not be removed.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petition by Charles H. Kimball to remove Charles F. Tully and another, as administrator and administratrix with will annexed of the estate of Frederick H. Kimball, deceased, and for appointment of the petitioner as executor of the estate of deceased. From an order denying the application to be appointed executor, and from an order of appointment, plaintiff appeals. Affirmed.

Harry I. Stafford and W. F. Stafford, both of San Francisco, for appellant.

Edward M. Leonard, of San Francisco, for respondents.

RICHARDS, J. These appeals are from two orders, one from an order denying the application of the appellant to be appointed executor of the last will and testament of Frederick H. Kimball, deceased, and the other an appeal from an order appointing the respondents Charles F. Tully as administrator, and Sarah J. Ring as administratrix, with the will annexed, of the estate of said decedent. The facts are not disputed. Frederick H. Kimball died testate in the city and county of San Francisco, leaving his last will and testament, the only portions of which presented for consideration upon these appeals are those relating to the appointment of those who were to act as executrix or executor of said will. These portions of said will read as follows:

"To my dearly beloved wife and little sweetheart, Charlotte Frances Kimball, I devise and bequeath all of my property real, personal and mixed of whatsoever nature not otherwise provided for in this my last will, and direct said wife Charlotte Frances Kimball to be the sole executrix of this my last will without bonds or obligations to any one. * * * Should it please the Good Lord to call myself and little wife at the same time, regardless of who died first, it is my wish that my property shall be equally divided between Sarah Ring, Charles H. Kimball, Harold E. Ring, S. J., Mildred Kielty, Camille Vissas, and they to carry out bequest on reverse side of this sheet, and also bequests made in the last will of my dearly beloved wife—and Sarah Ring, Chas. H. Kimball and Harold E. Ring, S. J., shall be Executors without Bond."

The death of Frederick H. Kimball occurred on September 21, 1925. Three days later or on September 24, 1925, his wife, Charlotte Frances Kimball died; but subsequent to her husband's death, viz., on September 22, 1925, she signed and acknowledged a document addressed to the superior court in and for the city and county of San Francisco, whereby she expressly renounced her right to act as executrix of the last will and testament of her deceased husband and appointed Charles F. Tully and Sarah J. Ring, her brother and sister, to act as administrator and administratrix, with the will annexed, of the estate of said decedent. She died two days later. Thereafter said Charles F. Tully and Sarah J. Ring filed said will for probate, together with their application to said court for the issuance of letters of administration thereon, which application, after due notice of the hearing, came on to be heard before said court on October 9, 1925, and was then heard without opposition; and at the conclusion of said hearing said will was duly admitted to probate and an order was made and entered appointing said Charles F. Tully and Sarah J. Ring administrator and administratrix, respectively,

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

with the will annexed, of said estate; and they each thereupon duly qualified and entered upon their duties as such. On December 9, 1925, Charles H. Kimball, the appellant herein, filed his petition in said court praying for the removal of said Charles F. Tully and Sarah J. Ring as such administrator and administratrix, respectively, of said estate and the cancellation of their and each of their letters of administration and that he be appointed the executor of said will. An answer was filed to said petition, and the matter came on for hearing before said court on December 17, 1925, and was then heard and submitted to said court, which, on February 5, 1926, made and entered its order denying the appellant's petition both for the removal of said respondents and for the issuance to appellant of letters testamentary as executor of the will of said decedent.

[1] From each of the aforesaid orders the appeals herein have been taken. These appeals present the contentions of the appellant herein in two aspects. The first relates to the right of said appellant to receive the appointment of executor of said will in accordance with the terms thereof. This asserted right on his part must be predicated upon the fact, if it be a fact, that Frederick H. Kimball and his wife, Charlotte Frances Kimball, died "at the same time" according to the intent and meaning of the testator as expressed in his said will. But obviously this is not the fact in so far as is disclosed by the record herein. Conceivably it might have been shown that the testator had in contemplation when he prepared his olographic will that his wife and he might come to their end in a common casualty and that its peculiar wording had reference to such an eventuality, in which case it would have been immaterial which died first, or even that the one survived the other for a brief period, though dying from the fatal injuries received in the common disaster. Had such a state of things been shown the appellant might have thus created a basis for his claim of right to appointment as the executor of said will. But no such facts have been made to appear, and for all that this record discloses the death of the wife was in nowise connected by any causation with the death of the husband; and, this being so, three days of separation between the two events would be as effectual to defeat the operation of the terms of said will as to the conditional appointment of the appellant to be the executor thereof as any longer period of intermission would have been. It follows that the appellant never attained the right to such appointment, and hence that in so far as his appeal lies from the order of the trial court denying his petition for such appointment is concerned, that portion of its order to that effect must be affirmed.

The second aspect of the appellant's contentions upon these appeals is also twofold, the first relating to the correctness of the order of the trial court appointing the respondents herein administrator and administratrix, respectively, with the will annexed, of the estate of Frederick H. Kimball, deceased, and the second relating to the correctness of its subsequent order refusing to revoke said appointments upon the appellant's petition therefor. As to the first of these the appellant insists that the document executed by Charlotte Frances Kimball two days before she died was ineffectual to form the basis for the appointment of the respondents as administrator and administratrix, respectively, with the will annexed, of the estate of Frederick H. Kimball, deceased, for the reason that since Charlotte Frances Kimball had herself died before the application for such appointment by these respondents, her right of appointment died with her and hence could not suffice to form the foundation of the right of these respondents to be appointed in conformity with its nomination. The appellant presents an interesting legal problem in relation to his foregoing contention, but it is one which we do not feel called upon to decide.

[2-4] Charlotte Frances Kimball, the executrix first named in said will, having died shortly after the decease of her husband, the testator, her right to letters testamentary thereby ceased. But, having survived her husband for a period of time sufficient to amount to an avoidance of the conditions of his will, which depended upon their dying "at the same time," there remained no executrix or executor qualified for appointment as such under said will. It would therefore become the duty of the court wherein said document was offered for probate to appoint some qualified person or persons to receive letters of administration, with the will annexed. The respondents made due application for the probate of said will and for the issuance of letters of administration with the will annexed thereon, and while in their said application they set forth the fact of their nomination by Charlotte Frances Kimball to receive such letters, it is to be noted that they did not pray for such appointment of themselves, but only "that the court may make all necessary and proper orders to be made in the premises." It is also to be noted that the order of the trial court making such appointments was a general order, which did not purport upon its face to be predicated upon the aforesaid nomination of Charlotte Frances Kimball, then deceased. Such being its tenor, it was clearly within the powers of the court as prescribed in the sections of the Code of Civil Procedure relating to the selection of administrators with the will annexed of testate decedents' estates. Section 1426. The respondents were qualified to receive such appointment. The order was a valid order at the time it was made, entirely regardless of the validity or

invalidity of the nomination by Charlotte Frances Kimball, then deceased, of the individuals thus selected, as suitable for such appointment.

This being so, and the appellant herein, upon his later petition for the removal of the respondents and the cancellation of their letters of administration, having made no showing of any disqualification or of any adequate grounds for their removal, the order of the court denying his petition therefor was properly made. The several orders of said court appealed from should therefore be and they are hereby affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

200 Cal. 222

BANDY v. WESTOVER et al. (L. A. 8514.)

(Supreme Court of California. Jan. 7, 1927.)

1. Appeal and error 🔑694(1)—Supreme Court is concluded by trial court's findings in absence of testimony.

The Supreme Court is concluded by trial court's findings, where neither testimony in trial court nor on motion for new trial is before it.

2. Exchange of property 🔑3(1)—Writing in which plaintiff offered to exchange property, reserving right to revoke before defendant's acceptance, was not agreement to sell and lacked consideration (Civ. Code, § 1586).

Writing in which plaintiff offered to exchange her property for that of defendant, reserving right to revoke any time prior to acceptance by defendant, who was then in Europe, was not agreement of sale and purchase, but mere offer to exchange, and lacked consideration in that defendant gave no promise to plaintiff, in view of Civ. Code, § 1586.

3. Exchange of property 🔑3(1)—Plaintiff did not revoke offer to exchange land by notice to her own agents.

Plaintiff *held* not to have revoked offer to exchange land before defendant's acceptance, where she only notified her own agents that she would not make exchange, so that contract became binding on all parties on defendant's acceptance.

4. Exchange of property 🔑6—Plaintiff who offered to exchange land held to have waived objection to failure to make immediate delivery to escrow party (Civ. Code, § 1691).

Plaintiff, having offered to exchange land, *held* to have waived objection to failure to make immediate delivery to escrow party, where indorsements were made on original offer at her request and she was sued for broker's commissions prior to such delivery, especially where she did not offer to restore defendant to his property on attempting rescission, in view of Civ. Code, § 1691.

5. Exchange of property 🔑3(1)—Acceptance of offer to exchange land within four months held within "reasonable time," where offer recognized that the other party was abroad.

Offer to exchange land was not revoked by unreasonable lapse of time before acceptance, where offer recognized that the other party was in Europe and would not return for some months and offer was accepted within four months.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Time.]

6. Set-off and counterclaim 🔑34(1)—In suit to cancel deed, claim for money expended in connection with other property is not proper counterclaim (Code Civ. Proc. §§ 438, 439).

In suit for cancellation of deed, defendant's claim for money judgment for sums expended in connection with other property is not proper counterclaim, in view of Code Civ. Proc. §§ 438, 439.

7. Set-off and counterclaim 🔑34(1)—To constitute counterclaim, claim must qualify or defeat judgment to which plaintiff is otherwise entitled.

Matters set up as counterclaims must be claims which, if established, would in some way qualify or defeat judgment to which plaintiff is otherwise entitled.

8. Pleading 🔑147—Allegations of cross-complaint must state facts sufficient to constitute independent cause of action (Code Civ. Proc. § 442).

Allegations of cross-complaint are insufficient, where they fail to state facts sufficient to constitute independent cause of action, in view of Code Civ. Proc. § 442.

9. Appeal and error 🔑173(11) — Plaintiff's failure to plead to counterclaims does not preclude contention, on appeal, that they were unauthorized.

Failure of plaintiff to demur or move to strike or otherwise plead to counterclaims does not preclude her from making contention, on appeal, that they were unauthorized.

In Bank.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Suit by Minnie D. Bandy, née Minnie D. Boyle, against Myron Westover and others, in which named defendant filed a counterclaim. From a judgment for defendants and for named defendant on his counterclaim, plaintiff appeals. Judgment for defendants affirmed; judgment on counterclaim reversed.

E. Marion Crawford, of Los Angeles, for appellant.

Myron Westover and M. M. Meyers, both of Los Angeles, for respondents.

PRESTON, J. This is an appeal by plaintiff from a judgment in favor of defendants, and also from a judgment in favor of defendant Westover upon an original and also upon an amended and supplemental counterclaim. Neither the testimony taken in the court below nor on the motion for a new trial is before us.

Plaintiff brought this action against the defendants, Myron Westover, W. H. Houghton, Frank H. Purcell, and Walter Bicknell, for cancellation of a deed executed by her to defendant Westover, covering a section of land in Kimball county, Neb., in exchange for a 20-acre orange grove tract, belonging to defendant Westover, situated in Los Angeles county, upon the ground that said deed was not knowingly or intentionally executed and also upon the ground that said deed and the paper writing executed at the same time constituted nothing more than an offer to exchange properties, which offer was revoked and withdrawn; also upon the ground that said deed was induced by fraudulent misrepresentations made to plaintiff by defendants Purcell and Bicknell.

Defendants Purcell and Bicknell answered, denying all the allegations of the complaint. Defendants Westover and Houghton answered separately, alleging that they had no knowledge of the transaction and adopting on information and belief the answer of their codefendants Purcell and Bicknell. Defendant Westover also filed a counterclaim in the sum of $713.23, which was later reduced to $684.13, alleged to be due him on account of escrow charges, revenue stamps on plaintiff's deed, recording deed to her, abstract of title to the Nebraska land, and also charges for labor, water, interest, and insurance accruing after June 1, 1923, in connection with the Westover tract; and said defendant Westover later filed an amended and supplemental counterclaim in the sum of $655.61, additional items of interest, labor, fuel and supplies in connection with the operation of said orange grove tract of land.

The trial court made findings in favor of defendants and also in favor of defendant Westover on both of his counterclaims and later gave judgment for all defendants and also judgment in favor of defendant Westover on the first counterclaim and reserved future action upon the amended and supplemental counterclaim. The court found specifically that the defendants Purcell and Bicknell were the agents of plaintiff in the transaction and not the agents of the defendant Westover; also, that the defendant Houghton was a real estate broker representing the defendant Westover only as such agent. The court also found specifically against the plaintiff as to each and every of her claims of fraudulent misrepresentation; also, as to her alleged ignorance of the execution of the deed and the intention to deliver same, and also as to her claim that she thought the paper executed by her was to be merely evidence of good faith and that same was to be cancelled at her option.

[1] We are thus concluded by these findings as to all these allegations of the complaint. The only question of law presented on this branch of the case by the pleadings and findings is the nature and legal effect of the transaction between the plaintiff and the defendant Westover, when viewed in the light of the acts and conduct of the parties.

[2] Plaintiff contends that the paper writing signed by her and made "Exhibit A" to the complaint, in connection with the deed executed by her as a part of the same transaction, amounts to nothing more than a revocable offer to exchange her Nebraska property for California property of Westover, which said offer was, prior to acceptance thereof by said defendant, withdrawn and revoked by her. The material portion of the said instrument in writing is as follows:

> "The said party of the first part desiring to make an exchange of the property first above described, clear of all incumbrances, for the equity in the property second above described and understanding that the owner of the said described property is in Europe on an extended tour, and difficult to communicate with, and whereas the agent W. H. Houghton, for the party of the second part, has endeavored by cablegram to reach the said party of the second part, and whereas the party of the first part waiving all responsibility and liability of the agent in and to this agreement, and desiring to take possession of the property of the party of the second part as above described and not wishing to deliver possession of the property first above described until October 1, 1923,
>
> "Agrees, to execute and deliver in trust, with the Trust Dep. of the Bank of Italy, in the city of Los Angeles, California, a warranty deed conveying the property first above described to Myron Westover, same to be held in trust by them for the benefit of the said Myron Westover till such time as the said Myron Westover and wife can be communicated with and a deed covering the property second above described, be obtained from them to the party of the first part, and that in the meantime the party of the first part shall procure a certificate of title to the lands first above described, showing the property free and clear, and deposit same with said trust, in the Bank of Italy, said papers and deeds are to be delivered when received by the said trust department of the Bank of Italy to the respective parties hereto to complete this exchange and
>
> "Whereas there is certain personal property connected with the property of the party of the second part, which is included in the exchange, and it is agreed that all personal property on the said property of the party of the second part is included, and
>
> "Whereas this agreement having been read and fully understood, the party of the first part agrees to make the above exchange as above stated, by executing and delivering a warranty deed conveying the property first above described, to Myron Westover subject only to possession, which will be October 1st, 1923, and
>
> "Whereas the said Myron Westover when communicated with will be asked to execute and deliver to the party of the first part a full covenant grant deed conveying the property second above described, subject to the right of

way, restrictions, and reservations contained in former deeds, and deliver the property to the first party subject to the two above mentioned mortgages.

"This agreement shall bind the heirs, executors, and assigns of the respective parties hereto.

"In witness whereof the party of the first part has hereunto set her hand and seal this 25th day of May, 1923.

"[Signed] Minnie D. Young Boyle.
"Witness: ——. [Notarial Seal.]

"The above agreement is hereby accepted for Myron Westover by
"[Signed] W. H. Houghton, Agent."

We are in accord with the plaintiff that this writing did not constitute an agreement of sale and purchase between the parties, but on the contrary constituted merely an offer by plaintiff to exchange her Nebraska property for California property of Westover, which offer she was at liberty to revoke at any time prior to acceptance thereof by the defendant Westover in the manner provided in the offer. The rule of law in this behalf is well settled. Such a contract is lacking in consideration in that Westover gave no enforceable or any other promise to plaintiff. Civ. Code. § 1586; Roth v. Moeller, 185 Cal. 415, 419, 197 P. 62; Hamlin v. Barnhart, 26 Cal. App. 632, 147 P. 1188; 6 Cal. Jur. 51, § 29.

[3] But the controlling consideration is: Did the plaintiff, prior to acceptance of the offer by the defendant Westover, withdraw or revoke the same? The findings of the court in this behalf are:

> "On or about June 13, 1923, plaintiff telephoned to said defendants Purcell and Bicknell that she would not make said exchange and demanded that said transaction be canceled, to which said demand defendants Purcell and Bicknell replied by letter dated June 13, 1923, addressed to plaintiff, saying, in regard to her telephone message, that she 'did not want the deal to go through,' that she had investigated the matter before signing said agreement and that they were not in a position to countermand any transaction. And the court finds that on or about June 14, 1923, plaintiff knew that said defendants Purcell and Bicknell considered said agreement and transaction as binding upon her."

The finding also, as noted above, was that Purcell and Bicknell were merely the agents of plaintiff and were not found to be the agents of either the defendant Westover or the defendant Houghton. It is too clear for controversy that any notice given by the plaintiff to the defendants Purcell and Bicknell alone would be of no effect in transmitting notice to the defendant Westover, the defendant Houghton, or to the escrow party in the transaction. Indeed, it appears that the defendants Purcell and Bicknell notified plaintiff that they considered the offer binding upon her and that, as far as the record shows, she acquiesced in their conclusion. At any rate, the offer of plaintiff remained unrevoked until after the defendant Westover returned from Europe about September 15, 1923, and until long after September 22, 1923, upon which latter date he accepted the offer of exchange made by plaintiff by delivering to the escrow party, pursuant to the offer, a conveyance to the Los Angeles county real and personal property. No contention is made that he did not fully comply on said date with the terms of the offer as made by plaintiff. There is no escape from the conclusion that the acceptance by Westover in the manner stated made the contract in all respects binding upon both parties and authorized the escrow party to deliver the respective deeds to the respective grantees named therein. The rule of law in this case is clear and without conflict. Russ v. Tuttle, 158 Cal. 226, 110 P. 813; Smith v. Bangham, 156 Cal. 359, 104 P. 689, 28 L. R. A. (N. S.) 522; 6 Cal. Jur. p. 54, § 30.

[4] We are unable to sustain plaintiff in the claim that because the deed and contract were not actually delivered to the escrow bank prior to June 13th, the said letter of withdrawal on that date to her agents should be held effective against the defendant Westover because the defendant Houghton became the agent of plaintiff to effect the escrow delivery. The facts found show that when deed and offer were executed on May 25th they were at that time delivered to Houghton, who receipted for them as held in escrow. He later, in June, on the request of plaintiff, while still retaining the papers, indorsed on the original offer a confirmation of the personal property to be conveyed as well as a statement regarding taxes for the years 1922 and 1923. Also, on June 1st, Houghton wrote a letter to plaintiff's agents tendering possession of the orange grove. Indeed, on July 9th, plaintiff was sued by the defendants Purcell and Bicknell for commissions as brokers in the transaction, they claiming the offer was binding upon her. In September, the exact date is not stated, the documents were delivered to the Bank of Italy as the escrow party. Under these circumstances, plaintiff must be held to have waived any objections she might have had to the failure of Houghton to make immediate delivery to the escrow party. Common prudence would have required plaintiff to make known to all the interested parties her election to withdraw from the offer. Plaintiff's position is further weakened by the failure to effect or attempt to effect a recission of the transaction by offering to restore to Westover the property he deeded to her. Civ. Code, § 1691. If she were to prevail in this action, the effect would be to restore her own former property to her while at the same time holding title to the property of Westover. No justification of her claim to a judgment that would have this effect can be found in the findings of the court.

[5] The claim that the offer was revoked by the unreasonable lapse of time between May 25th and September 22d is without merit as the offer recognized the fact that Westover was in Europe and would not return for some months. "Reasonable time" is a relative term depending upon the terms of the offer and other circumstances. Simons Brick Co. v. Wiglesworth, 184 Cal. 390, 392, 193 P. 947, 19 A. L. R. 1029; Cal. Jur. vol. 6, p. 55, § 31. The plaintiff made no issue in her complaint as to the claims of unreasonable delay, and no occasion existed for a special finding thereon by the court.

The conclusion above announced renders unnecessary the consideration of any of the other points urged either by the plaintiff in support of her appeal or the defendants in answer thereto. The only other matter left for consideration is the attack by plaintiff upon the counterclaims pleaded by the defendant Westover and upon which the court gave judgment as prayed for on the one, and reserved judgment on the other.

[6] It is manifest that the allowance of either of these claims of defendant Westover as proper counterclaims is erroneous. The counterclaims are controlled by sections 438 and 439 of the Code of Civil procedure. Section 438 provides that the counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of * * * the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action."

Section 439 provides that—

> "If the defendant omits to set up a counterclaim upon a cause arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor."

The provisions of section 439 of the Code of Civil Procedure to the effect that, if defendant omits to set up a counterclaim arising out of the transactions set forth in the complaint as the foundation of plaintiff's claim, neither he nor his assignee can afterwards maintain an action against the plaintiff therefor, make it important that section 438 of the Code of Civil Procedure be not extended to any case which does not fairly come within its provisions.

In the case at bar plaintiff is suing upon the equity side of the court for the cancellation of a deed to real property and in effect to establish title thereto. Defendant, in his counterclaims, however, is claiming a money judgment against plaintiff on account of sums expended by him in connection with the operation of another piece of property. It is true in a remote sense that the claims arise from the same transaction but, by no means, do they arise from the same "foundation" that plaintiff's claim rests upon.

[7] Indeed, the judgment as rendered in this case by the court makes it plain also that a several judgment was not and could not be entered. The judgment has two lines of adjudication within it, one confirming the land transaction and the other a judgment for money due on a contract. Another element of the rule regarding counterclaims is that the matters set up as such counterclaims must be claims which, if established, would in some way "qualify or defeat the judgment to which plaintiff is otherwise entitled." The counterclaims in suit likewise fail to conform to this requirement. The rule of law in this connection is well settled in this state. See Meyer v. Quiggle, 140 Cal. 495, 499, 74 P. 41; Ward v. Goetting, 44 Cal. App. 435, 438, 186 P. 640; Hayward v. Black, 46 Cal. App. 504, 506, 189 P. 460, where the question is fully discussed. Bannerot v. McClure, 39 Colo. 472, 90 P. 70, 12 L. R. A. (N. S.) 126, is to the same effect.

[8] Even if the allegations were to be considered as those of a cross-complaint, still the pleading could not be sustained as it wholly fails, standing alone, to state facts sufficient to constitute an independent cause of action. Code Civ. Proc. § 442; Imperial Water Co. No. 4 v. Meserve, 62 Cal. App. 593, 598, 217 P. 548.

[9] The failure of plaintiff to demur or move to strike out or otherwise plead to the counterclaims of defendant does not preclude her from making the contention that the same are unauthorized under our system of pleading. Macdougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

The above conclusion renders unnecessary the consideration by the court of the contention of plaintiff that the counterclaims as pleadings fail to state the proper averments of a cause of action.

Judgment for defendants is therefore affirmed, and judgment in favor of defendant Westover upon his counterclaims is reversed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.

200 Cal. 147

In re HAUPT'S ESTATE.

HAUPT et al. v. LINDAHL et al.

(L. A. 8728.)

(Supreme Court of California. Dec. 28, 1926.)

1. Wills 🔑166(1)—Evidence held not to show that will was procured through fraud and undue influence.

In proceeding for revocation of probate of will, evidence *held* not to show that execution of will was procured through fraud and undue influence.

2. Wills 🔑155(1)—That officer of bank assisted in redrafting customer's will appointing bank executor and trustee would not support inference of undue influence.

That decedent was a customer of bank named as executor, of which one who assisted in redrafting will and read it over to testatrix before it was executed, was an official, would not support inference of undue influence.

3. Wills 🔑52(1)—Contestants had burden of establishing that testatrix was of unsound mind.

In proceeding for revocation of probate of will, contestants had burden of establishing fact that at time of execution of will the testatrix was of unsound mind.

4. Wills 🔑324(2)—Where evidence did not show that testatrix did not know extent of property, natural objects of bounty, or nature of act, issue of testamentary incapacity was properly withheld from jury.

Where evidence did not show that testatrix, when will was executed, was suffering from such insane delusions that she was not familiar with extent of property, did not know natural objects of her bounty, or did not understand nature of act, issue of testamentary incapacity was properly withheld from jury.

5. Wills 🔑116—Employees of bank named as executor and trustee held competent witnesses to will (Code Civ. Proc. §§ 1618, 1699, 1700).

Where bank named as executor and trustee in will had no further interest than compensation for acting as such, its employees were competent subscribing witnesses to will, in view of Code Civ. Proc. §§ 1618, 1699, 1700.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Petition by Edward Paul Haupt and another by Charles H. Dickinson, their guardian ad litem, for the revocation of the probate of the will of Alma Haupt, deceased, against Sophia Lindahl and others. From a judgment dismissing the petition, petitioners appeal. Affirmed.

Lewis & Fleming, of Los Angeles, and John M. Martin, of Los Angeles, for appellants.

O'Melveny, Millikin, Tuller & Macniel, Lovett & Hervey and Mott & Vallee, all of Los Angeles, for respondents.

SHENK, J. This is an appeal from a judgment of the superior court in and for the county of Los Angeles denying and dismissing the petition of the appellants for the revocation of the probate of the will of Alma Haupt, deceased.

The petition contained four counts. In substance it was alleged that the testatrix was without testamentary capacity at the time the will was executed; that its execution was procured by fraud and undue influence; that the testatrix did not know the contents of the will at the time of its execution; and that the will was not lawfully witnessed. After hearing the evidence on behalf of the appellants the trial court dismissed the petition without submitting the issues involved therein to the jury and the judgment was entered in accordance therewith.

The decedent died in the county of Los Angeles on May 25, 1922, leaving as her only heirs at law, a son William Frederick Haupt, a daughter, Norma Haupt, and the appellants, who are the minor children of a predeceased son. By the terms of her will, bearing date April 17, 1922, the testatrix made certain specific bequests and devised and bequeathed the remainder of her estate to the respondent bank in trust for certain specified purposes. The seventh clause of said will expressly declared that the testatrix purposely omitted to make provision therein for the appellants.

The first contention advanced by the appellants is that:

> "The trial court erred in its refusal to admit competent evidence, which refusal was prejudicial to the rights of the petitioners and appellants."

Hereunder it is urged that error was committed by the court in sustaining objections interposed by respondents to certain questions propounded by appellants and covered by exceptions numbered 1 to 64. We are in accord with the appellants' concession that "it is impracticable to discuss each ruling separately." For like reason it is impracticable for us to pass upon each ruling separately. We have examined all of the rulings complained of. Many of them, standing alone, might properly be held erroneous, but when considered in the light of the evidence elsewhere admitted they are not prejudicial. The trial court very rigidly confined the examination of witnesses upon the issue of the decedent's mental capacity to those limits prescribed and enunciated by this court upon innumerable occasions. Taken as a whole the court exercised a reasonable control over the examination. Section 2044, Code Civ. Proc.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] It is next urged that the execution of the will was procured through fraud and undue influence. In support of this claim it is stated that the decedent at the time of the execution of the will was in poor physical and mental condition; that she did not know whether she was signing the original draft of the will or a corrected copy thereof; and that the witness Spence, being the vice president of the respondent bank, had "tremendous influence" over its customers, of whom the decedent was one. From an examination of the evidence we feel no hesitancy in stating that there is nothing therein that even tends to savor of fraud or undue influence. The appellants' contention that the failure of the witness Spence to inform the decedent whether her suggested changes in the original draft of the will had been made supports the charge of fraud cannot be sustained. After testifying that the decedent requested certain changes to be made in said original draft, the witness Spence testified that he took the redrafted will to her and that he and decedent read it over together; that thereafter no changes were suggested or made; and that the will as redrafted was executed. This uncontradicted evidence was ample to establish that the will as executed was in complete accord with the decedent's wishes and expressed desires. The claim of fraud is without merit.

[2] Nor is there anything in the record which tends to show that decedent would have executed a different instrument had the witness Spence not assisted her in its preparation and execution. As declared in Estate of Perkins, 195 Cal. 699, 235 P. 45:

> "There is an utter lack of any proof of pressure brought to bear upon the testatrix which overpowered her mind and overcame her volition at the very time the will was made. In re Rick's Estate, 160 Cal. 450 [117 P. 532]."

The mere fact that the decedent was a customer of the respondent bank, of which the witness Spence was an official, would not support an inference of undue influence.

[3, 4] As a third ground of appeal the appellants contend that the trial court erred with reference to the "law of the case." It is urged that the presumption of sanity was overcome by substantial evidence and that the issue of testamentary capacity should therefore have been submitted to the jury for determination. With this contention we are not in accord. The case of Estate of Perkins, supra, contains a concise but complete statement of the law bearing upon the question of testamentary capacity. Applying the principles announced in that case the conclusion is inescapable that the contestants failed to sustain the burden of establishing the fact that at the time of the execution of the will the testatrix was of unsound mind. Considering the evidence introduced on behalf of the appellants in a light most favorable to their contention it cannot be said that it is sufficient to establish that on April 17, 1922, the day upon which the will was executed, the decedent was affected with general testamentary incapacity or was suffering from such insane delusions that she was not on that day familiar with the extent of her property, did not know those who would be the natural objects of her bounty, or that she did not know and understand the nature of the act in which she was then engaged. Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Presho, 196 Cal. 639, 238 P. 944. A careful survey of the record reveals that it is devoid of all evidence which would tend to support either a claim of fraud, undue influence, or testamentary incapacity, and the trial court, therefore, was not in error in dismissing the petition for revocation of probate as to said issues without submitting them to the jury. If the cause had been submitted to the jury, and a verdict favorable to the contestants had been returned on any or all of said issues, it would have been the duty of the court, under the evidence, to have set aside the verdict.

[5] Appellants urge as their final ground of appeal that the will in question was not properly witnessed. The claim is that the bank, as executor and trustee of the decedent's estate, had a beneficial and financial interest therein which disqualified its employees from witnessing the will. This contention is based on the assertion that a person named therein as executor may not witness the execution of a will and that if the executor may not act in that capacity the employees of the executor may not so act. It has been held that a person named as executor may properly serve as a subscribing witness. Baker v. Bancroft, 79 Ga. 672, 5 S. E. 46; Jones v. Larrabee, 47 Me. 474; Sears v. Dillingham, 12 Mass. 358; Stewart v. Harriman, 56 N. H. 25, 22 Am. Rep. 408. Page on Wills, § 199, states that:

> "The reasons given by the older cases for holding an executor to be incompetent [as a subscribing witness] have been entirely abandoned by the courts. His commissions are looked upon as merely a compensation for services rendered, and as giving him no financial interest in the probating of the will. * * * Accordingly, it is now held by the great weight of modern authority that an executor has, at the time of the execution of the will, no such beneficial interest thereunder as renders him incompetent."

This view found early expression in this state. Panaud v. Jones, 1 Cal. 488, 506; Estate of Egan, 6 Coff. Prob. Dec. 28, 30.

The respondent bank was also appointed by the will to act as trustee after final distribution. The superior court retains jurisdiction over the trust estate after distribution for the purpose of the settlement of the accounts of the trustee (section 1699, Code Civ. Proc.) and on such accounting the trustee is allowed only such compensation as the court may deem just and reasonable (section 1700, Code Civ. Proc.). Compensation which the respondent may receive as executor is also provided for by statute (section 1618, Code Civ. Proc.) and it will receive the same as compensation for services rendered and not as an interest in the estate by will or by succession (Estate of Simonton, 183 Cal. 53, 190 P. 442). In an early case it was held that a subscribing witness is not rendered incompetent as a witness by holding lands in trust for a devisee. Peralta v. Castro, 6 Cal. 354.

It was shown that the subscribing witnesses herein were employees of the respondent bank. They were known to the decedent and were requested to act at her suggestion. When the executor and trustee has no further interest than the compensation for acting as such, he is not thereby rendered incompetent to act as a subscribing witness, and it would follow that the employees of such executor and trustee would not be incompetent. Assuming that an executor or trustee had a disqualifying interest by reason of some discretionary powers exercisable under the terms of the will, still, when, as here, it does not appear that the subscribing witnesses were stockholders or officers of the respondent, their interest as employees would seem to be in no sense proprietary and would be too indefinite, uncertain, remote, and contingent to affect their competency as witnesses. Peralta v. Castro, supra.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; SULLIVAN, J.; PRESTON, J.

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200 Cal. 204

CHESTER R. PYLE CO. v. FOSSLER et al. (L. A. 7551.)

(Supreme Court of California. Dec. 31, 1926. Rehearing Denied Jan. 27, 1927.)

1. Appeal and error 🔑1071(6)—Omission to find on issue not necessitating change in judgment does not warrant reversal or new trial.

Omission to find on issue when finding would not necessitate any change in judgment does not warrant reversal or new trial.

2. Appeal and error 🔑1071(6)—Failure to find on certain issues does not constitute prejudicial error if findings are made on issues determining case.

If findings are made on issues which determine case, other issues become immaterial, and failure to find thereon does not constitute prejudicial error.

3. Trial 🔑397(5)—Court's failure to find on immaterial issues held not error.

In action to foreclose contract on building because of failure to pay purchase price claimed due, failure of trial court to find total cost of building and improvements or cost of various changes in construction, or to allow compensation as provided in construction, or to allow reasonable attorney's fees for prosecution of action, *held* not error; findings of trial court having completely disposed of all material issues of case.

4. Estoppel 🔑53, 54—Waiver always rests on intent and knowledge.

Waiver of rights always rests on intent and knowledge of parties.

5. Contracts 🔑322(4)—Evidence held insufficient to show waiver by defendants of any rights under contract to construct building for defendant.

In action to foreclose contract for construction of building because of failure to pay purchase price, evidence *held* insufficient to show either express agreement or conduct by defendants to warrant inference of waiver of rights under contract.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Chester R. Pyle Company against Mrs. Kate Fossler and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Roy V. Rhodes and Wilbur Bassett, both of Los Angeles, for respondents.

WASTE, C. J. Plaintiff brought an action to foreclose a written contract in the nature of a mortgage for the construction of a building for the defendants and respondents. Prior to the commencement of the action, defendants made an offer in writing to pay plaintiff the sum of $1,000, in addition to the sum of $2,500 theretofore paid, in satisfaction of any and all claims under the contract. The offer, accompanied by a sufficient tender, was refused, and the defendants subsequently paid the money into court. The trial court, by its judgment, decreed that plaintiff take nothing by the action, save and except the sum of $1,000, and that the defendants recover their costs. From this judgment the plaintiff appealed, citing insufficiency of the evidence, lack of proper findings, and errors of law occurring at the trial.

The appellant is a corporation carrying on a general contracting and building business. During the year 1918 the defendants, a mother and four daughters, sold their home in Nebraska and came to California; the mother, Mrs. Kate Fossler, about 75 years of age, and ill and weak, and two daughters, planning to live here. They had received $5,000 from the sale of the Nebraska property, which was all the money they had. With this modest amount to invest, they sought to buy a home in Pasadena. While in search of such an investment, and looking at houses already built, they came in contact with the appellant. One of its agents suggested to defendants that, instead of buying a home already constructed, they purchase a lot for $2,000, and erect thereon a house and garage similar to one already constructed with which they were familiar. He assured them that the desired structure could be built for a sum not to exceed $3,000. Acting on the advice of plaintiff, through its agent, the defendants purchased the lot, and agreed with the plaintiff that it should erect thereon a dwelling house, garage, and other improvements "at a cost of approximately $3,000."

A contract was thereupon prepared by the plaintiff and submitted to the defendants. It provided that whereas the defendants had agreed to hire, and contract with the plaintiff to erect a dwelling house, garage, and other improvements, the defendants would furnish the money therefor, in specified payments, the plaintiff to furnish all things required to complete a "one-story dwelling including an attic, a garage, and such other improvements" as might be ordered by the defendants, "according to plans and specifications and drawings" to be prepared by the plaintiff, "and agreed upon, and when agreed upon to be signed and approved by at least three of the" defendants. The contract further provided that the defendants might, during the progress of the work, request alterations, additions to, or omissions from the contract and plans and specifications, and also that, should the superintendent of construction order necessary changes or deviations, the same should in no way make void the contract, but any increased cost thereof should be added to the amount specified as the cost on which the compensation of the builder should be computed. By another stipulation, it was understood and agreed that the cost of the building and improvements ordered or contemplated in the contract and plans and specifications, or incurred by any changes made by the defendants, might be more than the amount specified in the contract, and, if so, the defendants should furnish the necessary money to complete the building, but the plaintiff should have the right to furnish any money at its option to construct and complete the improvements, all such amounts, so advanced, to be deemed secured by the contract, "as a lien on said premises in the nature of a mortgage." In consideration for any advancements and for its services, plaintiff was to be paid a sum equal to 10 per cent. of the cost of the building and improvements.

When the contract was presented for signing, the defendants called attention to the fact that it contained no provision as to the total maximum amount which the improvements would cost them, and did not provide that changes and alterations should be ordered in writing. The contract was thereupon taken away by plaintiff, and when again presented contained the provision for the erection of "a dwelling house and garage and other improvements at a cost of approximately $3,000.00," and that all changes and alterations should be ordered in writing. Not "knowing anything about contracts," and desirous of being properly advised, the defendants requested the name of a lawyer, and were sent by plaintiff to its own attorney. The defendants did not know of the relation of the attorney to the plaintiff, and one of them went to him for advice. He advised that the contract "was all right," but does not appear to have had any other connection with the transaction in its inception.

In apparent performance of the contract executed by the parties, the plaintiff erected a dwelling house and garage on the lot of the defendants but departed widely from the plans and specifications first presented to the defendants, and demanded payment for the completed improvements in the sum of $12,118.39. The defendants claim that then, for the first time, they learned that they were not getting a house and garage at a cost of approximately $3,000. On this point the evidence is contradictory. Appellant's superintendent of construction, who drew the plans and specifications, and who appears to have conducted most of the negotiations with the defendants, testified that he showed the defendants plans for a six-room frame house, and told them that it could be built for approximately $3,000; that prior to the signing of the written agreement no plans had been perfected, and no specifications had been drawn; that plaintiff a week later submitted a pencil sketch of plans for a frame building, and he was told to prepare plans along the lines shown on it; that certain changes in the sketch were suggested by the defendants; plans and specifications were subsequently prepared by him; that he frequently talked with defendants during the construction, and told them "that changes would cost more money than what the contract called for." In this connection, however, it must be borne in mind that the defendants were at all times planning and thinking in terms of improvements to cost approximately $3,000, all the money they had. They had been shown such a house by appellant's superintendent. He prepared a pencil sketch, apparently of a house that could be erected for that sum. On the witness stand he admitted that he gave defendants no figures regarding the cost of the house finally settled upon, and shown on the blue prints furnished by him. There is evidence on the part of the defendants that when the changes from the pencil sketch were talked over, appellant's superintendent assured the defendants that appellant had on hand some old or "left over material," by the use of which the house finally decided upon could be built within the original estimate. The evidence is in sharp conflict as to what was said and done by the parties in relation to changes made after the plans were signed, and during the progress of the work.

The findings appear to have been made largely in response to the issues raised by the third and special defense interposed by the defendants. The court found that the officers and agents of the plaintiff were skilled and experienced in the building business, and were accustomed to drawing and entering into contracts similar to that entered into by the defendants; but, on the other hand, the defendants were without business experience or skill, and were without knowledge regarding the erection of buildings and improvements or the cost thereof, or the matter of contracts similar to that entered into by them. As shown by the testimony of defendants' experts, the improvements, as originally planned, would probably have cost $6,000, and, as finally completed, should have cost approximately $8,000. The evidence clearly shows that had these facts been known to the defendants they would not have entered into the contract. During all the preliminary negotiations they made it plain that they would not do so if the cost to them should exceed the sum of approximately $3,000. It is equally clear that they would not have contemplated costly additions to and changes in the work. The court also found that, in entering into the contract, the defendants believed and relied on the representations of plaintiff that the improvements contemplated by them would be built for the sum of approximately $3,000, and that prior to the time at which the improvements were substantially completed plaintiff did not inform or disclose to defendants, nor did defendants have any knowledge that the total cost of construction, according to the plans and specifications made and first approved by them, or as subsequently modified, would exceed the agreed sum of approximately $3,000. The court also found the defendants did not order in writing any changes or alterations in the plans previously agreed upon, and did not agree to any deviation from the plans and specifications as originally submitted to them, which they knew or believed would increase the cost of the improvements above the maximum price fixed by the contract. There is another finding that, before making the many changes in the character of the improvements, the plaintiff never made or furnished to the defendants any estimate of the increased cost thereof, nor informed them that such changes from the plans and specifications would increase the total cost of construction, and the defendants understood and believed that the changes would not increase the cost of construction beyond the amount specified in the contract.

The trial court found, as the ultimate fact, that an additional sum of $500 over and above the sum of $3,000 was "in contemplation of the provision in said contract that the dwelling house, garage and improvements should be constructed at a cost of approximately $3,000, * * * adequate, just and full compensation from defendants to plaintiff for all changes, alterations, additions to, and deviations from said plans and specifications made by or with the consent of the defendants, or any of them, after said plans and specifications were approved"; and "that the total sum of $3,500 is adequate, just, and full compensation for all sums due from defendants to plaintiff." The offer and tender of the defendants, and the subsequent deposit in court, being of the exact amount found due, the plaintiff was not entitled to its costs.

[1-5] The appellant advances a number of reasons why the judgment should be reversed. They are that the trial court failed to find the total cost of the building and improvements, or the cost of the various changes in construction, and did not find and allow it compensation at the rate of 10 per cent. of the cost, as provided in the contract, and did not find and allow it a reasonable attorney's fee for the prosecution of the action. It also argues that the trial court attempted to find the reasonable value of the improvements constructed, which, it contends, is not an issue presented by the pleadings. In answer, it need only be said that an omission to find upon an issue, when a finding would not necessitate any change in the judgment, does not warrant a reversal or a new trial. If findings are made upon issues which determine the case, other issues became immaterial, and a failure to find thereon does not constitute prejudicial error. 24 Cal. Jur. pp. 943–944. The probative and the ultimate facts here found properly and completely dispose of the material issues of this case. The contention that the court did not find on an issue, raised by an amendment to the complaint, that the defendants waived the condition of the contract requiring deviations and changes to be ordered in writing, and consented that they be made, and accepted the benefits thereof, is answered by the findings taken as a whole. Waiver always rests upon intent and knowledge. There was, in this case, neither an express agreement nor such conduct on the part of the defendants, under the facts found, as would warrant an inference of any relinquishment on their part.

We have considered the various contentions of the appellant as to the sufficiency of the evidence, and the lack of appropriate findings, as well as the specifications of error in law occurring at the trial, and do not find that they warrant a new trial of the case.

The judgment is affirmed.

We concur: RICHARDS, J.; SHENK, J.; CURTIS, J.; SULLIVAN, J.; SEAWELL, J.

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200 Cal. 192

LANGFORD et al. v. THOMAS et al.

(L. A. 8498.)

(Supreme Court of California. Dec. 30, 1926.)

1. Brokers 🔑31—Broker, who concealed his ownership of interest in property and agency for another having an interest therein, held liable for secret profits (Civ. Code, §§ 2228, 2230, 2231, 2322).

Broker selling chicken ranch *held* liable for secret profits to same extent as unfaithful trustee, under Civ. Code, §§ 2228, 2230, 2231, 2322, where he concealed his interest in the ranch and also his agency for another having an interest in the ranch.

2. Brokers 🔑38(4) — In purchasers' action against their real estate broker, who concealed ownership of property, to recover secret profits, value of property is immaterial.

In action by purchasers against their real estate broker, who concealed his ownership of property sold, to recover secret profits, evidence of value of property purchased is immaterial since recovery is difference between price paid by real estate broker and price paid by purchaser from him.

3. Brokers 🔑38(4)—Testimony as to plaintiffs' real estate broker acting also for one having contract to purchase property held not admissible on ground that parties knew situation.

In purchasers' action against real estate broker to recover secret profits, testimony as to broker's agency for parties having contract to purchase property sold plaintiffs *held* not admissible on ground that dual agency is unobjectionable if both parties know of situation, there being no evidence of fact assumed.

4. Trial 🔑397(5)—Acreage sold plaintiffs, suing for secret profits by their broker, and personal property thereon held immaterial and findings thereon unnecessary.

In action for secret profits by real estate broker, failure to find on issues of acreage of property sold and amount of personal property thereon *held* not error, such issues being immaterial.

5. Brokers 🔑38(4)—In suit for secret profits against real estate broker, his letters suggesting meeting to adjust grievances held properly excluded.

In action to recover secret profits from real estate broker, court properly excluded letters by broker to plaintiff, written after completion of transaction and merely requesting meeting of parties to adjust grievances.

6. Appeal and error 🔑931(1)—Conflict in evidence must be resolved in favor of court's findings.

Conflict in evidence on issues in action to recover secret profits from real estate broker must be resolved in favor of court's findings.

In Bank. Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by Ada C. Langford and husband against J. F. Thomas and another for damages for violation of duty as real estate agents. Judgment for plaintiffs, and defendants appeal. Affirmed.

George H. Strong, of San Francisco, and Glen H. Munkelt, of San Diego, for appellants.

Hamilton & Lindley, of San Diego, for respondents.

SULLIVAN, J. This is an appeal from a judgment in favor of plaintiffs for $2,136.99 and costs against the defendants for damages for violation of their duty as real estate agents during the period of their employment as such by plaintiffs.

The case was tried by the court without a jury and findings were filed covering all material issues by the trial judge on November 25, 1924, the date of the entry of judgment in the superior court of San Diego county.

The facts, as stated in the complaint on which the cause was tried, as found by the trial court and as thoroughly established by evidence at the trial, may be summarized as follows:

(1) On March 1, 1923, Ada C. Langford and Norton Langford, husband and wife, were the owners of a lot situated at 1505 Lewis street, in the city of San Diego, referred to throughout the record as the "Lewis street property." The value of the property at the time, as found by the court, was $8,000. It was subject to a mortgage for $3,250, making the net value of the property of the Langfords at that time $4,750. The negotiations on the Langfords' part were conducted mainly by the wife.

(2) J. F. Thomas at the time was conducting business as a real estate agent in the city of San Diego under the name of "The Crescent Realty Company," a defunct corporation.

(3) On March 1, 1923, the Langfords, desiring to secure a chicken ranch and to make use of the Lewis street property, in whole or in part, in securing the new property, employed Thomas as a real estate agent to conduct negotiations for them, Thomas accepting the employment and undertaking to effect a desirable exchange. Neither then nor at any time during the negotiations re-

sulting in the exchange of properties did Thomas suggest any disqualifying or adversary interest on his part which might prevent his undivided service and loyalty as agent for the Langfords. At no time did Thomas inform the Langfords, or either of them, that "he or any one for whom he" was acting as agent had "an interest, present or contingent, adverse to that of his beneficiary," the Langfords. See sections 2230 and 2322, Civ. Code.

As a matter of fact, at the time of making the engagement to act as agent for the Langfords, Thomas was disqualified to assume such agency, both by his own personal interest and his interest as agent for the Malletts in the Chula Vista chicken ranch.

(4) As a result of the activities of Thomas assuming to act for all concerned, the Langfords parted with their equity in the Lewis street property, worth $4,750, gave their note for $4,500 and secured by mortgage on the chicken ranch, and paid off a street assessment lien of $121.99, due from Thomas or the Malletts, or both, on the chicken ranch. The aggregate cost to the Langfords to secure the Chula Vista chicken ranch was $9,371.99. The aggregate cost to Thomas of the chicken ranch deeded by him to the Langfords at the price of $9,371.99 was $7.235, made up of items which we shall presently state.

The difference between this latter amount and the price obtained from the Langfords was $2,136.99, for which amount the trial court gave judgment to the plaintiffs.

(5) The Chula Vista chicken ranch, on March 1, 1923, when Thomas, as agent for the Langfords, engaged to negotiate an exchange of the Lewis street property for a chicken ranch, was the property of Thomas subject to a contract of sale made by him on September 14, 1920, with Mildred Mallett and W. H. Mallett, under which he was to convey the same for a price of $6,250. On March 1, 1923, the balance due on the sale contract from Mallett and wife to Thomas was $3,500. To secure a release of the contract right of the Malletts in the Chula Vista chicken ranch, Thomas canceled his claim for the $3,500 unpaid balance and paid to the Malletts an additional sum of $3,735—making a total cost to Thomas of the ranch, $7,235.

Without burdening this opinion with all the details of the one transaction set out in the third amended complaint, we may say that Thomas, as trustee for the Langfords, violated his duty (a) by nondisclosure of his disqualification owing to his antecedent and continued ownership of the Chula Vista chicken ranch, (b) by his agency for the Malletts, (c) by concealment and suppression of essential facts likely to affect the action of the Langfords, (d) by misrepresentation and such other fraudulent device as would aid him in securing for himself the Lewis street property in San Diego and getting rid of the chicken ranch with its lien of $121.99.

[1] The law of California imposed on Thomas, the real estate agent, the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary. Violation of his trust is subject to the same punitory consequences that are provided for a disloyal or recreant trustee. King v. Wise, 43 Cal. 628. The case cited was one of secret profits realized by an agent out of a transaction handled by him for the benefit of two associates and himself in a common enterprise.

Justice Niles in 1872, speaking for an undivided court, declared that:

> "By the terms of the original agreement between the defendant and the plaintiffs, Crosett and King, the defendant was to purchase the land for the least price for which it could be purchased, and for the benefit of the three parties concerned.
>
> "By this agreement the defendant assumed a position of trust, and in that relation was bound to exercise the utmost good faith towards his associates in the transaction. It is one of the plainest principles of equity that an agent cannot make a profit out of his principal in the business of his agency. The defendant, as associate of the plaintiffs in the proposed purchase, and entrusted by them with its management, was held to the same good faith, and could make no bargain, the benefits of which his coassociates would not be entitled to share."

The Civil Code, enacted at the legislative session of the same year 1872, crystallized the adjudicated law of earlier days into statutory form as Civil Code sections declaring the rules for the government of agents and trustees in their dealings with principals and beneficiaries. Section 2322 of the Civil Code, as then enacted and still in force, provided that:

> "An authority expressed in general terms, however broad, does not authorize an agent * * * (3) to do any act which a trustee is forbidden to do by article 2, chapter 1, of the last title."

In the article and chapter thus referred to, we find section 2230, Civil Code, which contains the following inhibition upon the activities of trustees:

> "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows: 1. When the beneficiary, having capacity to contract, with a *full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his decision*, and without the use of any influence on the part of the trustee, *permits* him to do so. * * *" (Italics ours.)

Under the statutory rule thus laid down for Thomas in his proposed employment as a real estate agent by the Langfords, he was barred from acceptance of the employment, unless he disclosed all the facts to the Langfords and after such disclosure was permitted by them to act as their agent.

The law as laid down in these Code sections has been frequently interpreted and applied. The case of Calmon v. Sarraille, 142 Cal. 638, 76 P. 486, decided in 1904, is instructive. It was held in that case, as shown in subdivision 1 of the syllabus, as follows:

> "*Principal and Agent—Fiduciary Relation—Duty of Agent—Advantage Over Principal.*—The relation of an agent to his principal is of a fiduciary nature, and not only imposes upon the agent the highest good faith toward the principal, but precludes him from obtaining any advantage over him in any transaction had by virtue of his agency."

In the opinion in the same case at page 641 (76 P. 487), we find the following:

> "The relation between Garnier and the plaintiffs was of a fiduciary nature, and not only imposed upon Garnier the duty of acting in the highest good faith towards the plaintiffs, but precluded him from obtaining any advantage over them in any transaction had by virtue of his agency. Subdivision 3 of section 2322 of the Civil Code forbids an agent from doing 'any act which a trustee is forbidden to do' under sections 2228, 2239 of the Civil Code. Section 2228 declares that 'In all matters connected with his trust, a trustee is bound to act in the highest good faith towards his beneficiary, and may not obtain any advantage therein over the latter by * * * concealment;' and section 2231 declares that 'A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary.' See, also, Story on Agency, § 211; Mechem on Agency, § 470; Bunker v. Miles, 30 Me. 431 [50 Am. Dec. 632]; King v. Wise, 43 Cal. 628; Rubidoex v. Parks, 48 Cal. 215; Burke v. Bours, 92 Cal. 108 [28 P. 57]; Sterling v. Smith, 97 Cal. [343] 393 [32 P. 320]."

Cases to like effect covering the intervening years might be multiplied indefinitely, but it would be a work of supererogation. Thomas by his own showing, under the circumstances attending his conduct, became answerable as an unfaithful trustee for any benefits, profits, or advantages realized by him.

A brief reference to the 11 specific grounds for reversal urged by the appellants may be proper.

I. The trial court overruled a demurrer to the third amended complaint and denied a motion to strike out certain portions thereof. Appellants insist that the third amended complaint did not state a cause of action. As we read the complaint in the light of the law applicable as above stated, the ground is not tenable. Neither do we find reversible error in the ruling of the court on the same demurrer on the grounds of uncertainty or misjoinder of causes of action.

II. Appellants here contend that their motion to strike certain portions of the complaint was improperly denied. As stated in appellants' brief, the motion was made so as "to eliminate all allegations which tend to present two causes of action." The complaint detailed but one transaction and stated but one cause of action. The motion to strike was properly denied.

[2] III. For a third contention, the appellants urged that the court below erred in excluding testimony touching the value of the Mallett chicken ranch. In an action against an agent for breach of trust and to recover a secret profit obtained by said agent as a result of the agency relationship the authorities are to the effect that the value of the land is immaterial on the ground that:

> "The plaintiffs should have, from the defendant, the difference between the price of the land purchased by him for the plaintiffs and the amount paid by the plaintiffs." King v. Wise, 43 Cal. 628, 635; Calmon v. Sarraille, 142 Cal. 638, 642, 76 P. 486.

[3] IV. As their fourth point the appellants contend that the trial court erred in excluding certain offered testimony of the agency of Thomas for the Malletts, insisting that:

> "There is no objection to a dual agency if both parties are advised of the situation."

What we have said in the earlier part of this opinion disposes of the contention. The record herein fails to establish that the Langfords were informed of and consented to Thomas acting as the agent of the Malletts.

[4] V. Alleged failure of the trial court to find on material issues. We cannot say that the trial court failed "to find upon the material issues as framed by the pleadings." As we read the complaint, it alleges a cause of action arising from the false and fraudulent representations and concealments of Thomas by which the respondents were led to believe that they were dealing with the Malletts, when, in fact, they were dealing with Thomas. The record reveals that the court below found upon all the material issues presented by said cause of action. The issues raised by the further allegations of the complaint touching appellants' representations as to the acreage of the chicken ranch and the amount of personal property thereon were immaterial and findings thereon unnecessary. The judgment entered would not in any way be affected by findings on said immaterial issues. Sharp v. Pitman, 166 Cal. 501, 505, 137 P. 234.

[5] VI. It is here urged that the lower court erred in excluding two letters addressed by the appellant Thomas to one of the respondents requesting that the latter visit

the former in order to adjust any grievance that might exist.

We cannot see the materiality of the evidence and conclude that it was properly excluded. The letters involved were written long after the consummation of the transaction out of which this action arose and merely requested a meeting of the parties to adjust grievances. In addition, the letters contain many laudatory and self-serving declarations.

[6] VII., VIII., XI., X. We are of the opinion that the several findings complained of under the above headings are amply supported by the evidence. As already indicated, the evidence tends to show that the appellant Thomas by his conduct and activity, in effect, succeeded in substituting himself as principal in the place and stead of the Malletts. Any conflict in the evidence upon the issues covered by the findings complained of must be resolved in favor of said findings.

XI. The final ground urged by the appellants for reversal is that the court erred in the measure of damages awarded to the respondents. This matter has been fully covered by us in the preceding pages of this opinion. In our opinion, the trial court properly held Thomas answerable to his employers for the full amount of his secret profits realized on the one transaction which he, as their agent and trustee, conducted for them as principals and beneficiaries of the trust.

For the foregoing reasons, the judgment appealed from is hereby affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.

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200 Cal. 210

MORRIS v. STANDARD OIL CO.

(L. A. 8612.)

(Supreme Court of California. Dec. 31, 1926.)

1. Master and servant ⚷389—Compensation insurer, paying benefits for injuries to workman, held to have cause of action against wrongdoer (Workmen's Compensation Act, § 30, subd. [f]).

Where, upon insurer being allowed lien for compensation paid against judgment giving employee certain compensation to be paid by defendant, such insurer assigned claim to employee, at time of assignment insurer *held* to have cause of action against defendant, in view of Workmen's Compensation Act (St. 1917, p. 860) § 30, subd. (f), providing that if insurance carrier has paid any compensation for which employer is liable it shall be subrogated to all rights of such employer, which rights may be enforced in its own name.

2. Master and servant ⚷389—Insurer's cause of action, arising from subrogation to employer's rights by payment of compensation, held assignable (Workmen's Compensation Act, § 30, subd. [f]; Civ. Code, § 954).

Cause of action, arising through subrogation, under Workmen's Compensation Act (St. 1917, p. 860) § 30, subd. (f), of insurer to rights of employer because of such insurer having paid compensation for which employer was liable, *held* assignable, in view of Civ. Code, § 954, governing transfer.

3. Assignments ⚷22—Cause of action, arising either out of violation of property right, or out of obligation or contract, is transferable (Civ. Code, § 954).

Under Civ. Code, § 954, cause of action, arising either out of violation of right of property, or out of obligation or contract, may be transferred.

4. Master and servant ⚷389—Cause of action for compensation paid by insurer held to arise in favor of subrogated insurer and not in favor of employee (Workmen's Compensation Act, § 30, subd. [f]).

Cause of action of insurer for compensation paid by it for which employer was liable *held* to arise not in favor of employee because of injuries, but in favor of insurer, subrogated to employer's rights under Workmen's Compensation Act (St. 1917, p. 860) § 30, subd. (f) for reimbursement for amount of disability indemnity paid employee.

5. Assignments ⚷24(2)—Cause of action, arising from injuries to body or feelings of person injured, is not assignable.

Personal causes of action, arising out of injuries to body or feelings of person injured, are not assignable.

6. Limitation of actions ⚷34(1)—Action on assigned claim for compensation, paid by insurer to employee, held required brought within three years from time insurer paid employee (Workmen's Compensation Act, § 30, subd. [f]).

In action upon assigned claim for compensation, paid by plaintiff's assignor as insurer to plaintiff's ward, employee, such action, being based on liability created by statute (Workmen's Compensation Act [St. 1917, p. 860] § 30, subd. [f]), *held* subject to three-year limitation statute running from time insurer paid disability indemnity to injured employee.

In Bank.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by J. M. Morris, guardian of the person and estate of Milton Morris, a minor, against the Standard Oil Company, on an assigned claim for compensation paid by plaintiff's assignor as insurance carrier to plaintiff's ward. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 247 P. 583.

Dorsey Whitelaw, of El Centro, and Geo. H. Moore, of Hollister, for appellant.

A. L. Hubbell, of Calexico, for respondent.

WASTE, C. J. The main question to be determined on this appeal is whether or not a lien for the amount of the compensation paid an injured employee, by the insurance carrier of the employer, and allowed under the provision of section 26 of the Workmen's Compensation Act (St. 1917, p. 854), against a judgment for personal injuries recovered by the employee against the person causing the injuries, is assignable.

Milton Morris, a minor, the plaintiff, was run over by a truck operated by the defendant, Standard Oil Company, and seriously injured while in the course of his employment by the Chronicle Publishing Company of Calexico. He brought an action against the oil company for damages for personal injuries, and, after two appeals to this court, he was awarded the sum of $12,000. Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Ibid., 192 Cal. 343, 219 P. 998, 30 A. L. R. 1103. The action was defended by the Ocean Accident & Guaranty Corporation, Limited, of London, England, which company was the insurance carrier of both the oil company and the minor's employer, the Chronicle Publishing Company. As compensation carrier for the employer, it supplied the injured boy with medical and hospital care, and paid to him disability indemnity during the existence of the disability arising from the injury, but refused to inform the employee of the items or the amounts expended for medical and hospital care. Consequently those expenditures were not given consideration in the action brought by the minor against the oil company. During the pendency of the second appeal in that action, the Industrial Accident Commission made an award to the injured employee, fixing the amount of compensation to be paid by the insurance carrier of the employer at the sum of $800.64, which amount the insurance company paid.

Neither the employer of the boy nor its insurance carrier joined, or was joined, in the action for damages brought by him against the oil company, and neither instituted an independent action against that company because of the injury. The Ocean Accident & Guaranty Corporation, as such insurance carrier, having paid the employee compensation for which his employer was liable, was subrogated to all rights of the employer and was entitled to enforce such rights in its own name. Workmen's Compensation Act, § 30, subd. (f). It therefore petitioned for a lien against the judgment obtained by the employee against the oil company for the amount paid by it as compensation and the additional sum paid for medical and hospital treatment. The application was denied as to the latter items, but the insurance carrier was allowed a lien against the judgment for the sum of $800.64, paid as compensation, upon the condition that it assign to the employee any and all claims, demands, or causes of action it might have against the oil company for the amounts paid by it to the employee. No appeal was taken from this order allowing a conditional lien. The oil company, not having reimbursed the insurance company for the disability indemnity paid the employee, it complied with the order of the court and duly assigned its claim to him.

Thereafter, and while the second appeal in the action for damages hereinabove noted (192 Cal. 343, 219 P. 998) was pending, the parties entered into negotiations for settlement of the judgment there in question. As a result, a settlement was had whereby the oil company paid the injured minor the sum of $10,290.21, and agreed to and did, secure from the insurance company and deliver to the employee a satisfaction and release of the lien, and also caused the company to assign to the employee, with full power to enforce the same, any cause of action it might have against the Standard Oil Company by reason of the indemnity payment. The court approved the terms of the settlement, and the judgment against the oil company was thereupon satisfied and discharged. The oil company retained, and presumably paid to the insurance company, the sum of $800.64 from the amount agreed to be paid by the oil company to the employee in satisfaction of the judgment. The oil company refusing to acknowledge the legality of the assignment or to pay the amount assigned, the employee, as assignee, instituted this suit, setting up the assignment and basing his cause of action thereon. Judgment was entered in his favor for the amount, interests, costs, and attorney's fees, and the Standard Oil Company has appealed.

[1, 2] Appellant's first contention is that at the time its insurance carrier made the purported assignment to the employee it had no cause of action against the oil company. This contention is answered by the provision of the Workmen's Compensation Act (section 30, subd. [f]) that, when an employer is insured against liability for compensation with an insurance carrier, and such carrier shall have paid any compensation for which the employer is liable, or furnished or provided any medical services required by the act, such insurance carrier shall be subrogated to all the rights of the employer and may enforce such rights in its own name. The ocean Accident & Guaranty Corporation therefore had a cause of action arising by way of subrogation or equitable assignment. Dibble v. San Joaquin L. & P. Corp., 47 Cal. App. 112, 117, 190 P. 198. The cause of action was assignable.

[3-5] Section 954 of the Civil Code has effected a change in the common-law rule of nonassignability of choses in action. One arising either out of violation of a right of property, or out of an obligation or contract, may now be transferred. Dibble v. San Joaquin L. & P. Corp., supra; Stapp v. Madera Canal, etc., Co., 34 Cal. App. 41, 46, 166 P.

823. The cause of action here assigned is not one arising in favor of the employee by reason of his injuries, but out of the obligation imposed by the Workmen's Compensation Act on the oil company, which caused a property injury to the employer, to reimburse the employer or its subrogated insurance carrier for the amount of disability indemnity paid the employee. It must not be confused with those peculiarly personal causes of action arising out of injuries to the body or feelings of the person injured, which are not assignable.

[6] The action on the assignment was not barred by the statute of limitations. Being one based upon a liability created by statute, it was properly commenced within three years from the time the insurance company paid the disability indemnity to the injured employee.

The judgment is affirmed.

We concur: RICHARDS, J.; SULLIVAN, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

200 Cal. 81

HERMINGHAUS et al. v. SOUTHERN CALIFORNIA EDISON CO. et al.

(S. F. 11630.)

(Supreme Court of California. Dec. 24, 1926. Rehearing Denied Jan. 21, 1927.)

1. Waters and water courses 🔑51—Accretions to San Joaquin river from snows and rainfall held "usual and ordinary flow" and not "storm" or "flood" or "vagrant" waters; "enemy" waters.

Waters of San Joaquin river, annually flowing therein before, during, and after regularly occurring accretions in volume by reason of melting of snows in mountains, *held* to constitute usual and ordinary flow of such river, and are not "storm" or "flood" or "vagrant" or "enemy" waters.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Flood Water.]

2. Waters and water courses 🔑51—Riparian owners held entitled to entire flow of San Joaquin river, including accretions from snows.

Riparian owners on San Joaquin river *held* invested with riparian rights in entire flow of waters in such river, including seasonable accretions resulting from melting of snow in mountains.

3. Waters and water courses 🔑39—Lands to which water is conveyed by minor channels cut by river on leaving mountains held "riparian."

Where river on entering plains from mountains has cut numerous minor channels, all land to which water is carried by such minor channels is "riparian" to river, authorizing reasonable use of flow of water.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Riparian.]

4. Waters and water courses 🔑38 — Sloughs with definite beginnings, channels, and definite ending held "water courses," and lands bordering thereon riparian.

Sloughs conducting water during excessive rainfall periods having definite beginnings, definite channels and banks, and definite endings, are water courses, and lands bordering thereon are riparian lands, with right to flow of water thereon.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Water Course.]

5. Waters and water courses 🔑40—Riparian owners are abstractly entitled to reasonable use of waters of river at all seasons.

Riparian owners are abstractly entitled to reasonable use of waters of river at all seasons of year as having a vested right to usufruct of flowing stream in usual and ordinary course of its flow.

6. Waters and water courses 🔑44—Riparian owners' utilization of river water for growing grasses and reclaiming alkali land by use of overflow held reasonable.

Riparian owners' utilization of waters of river and flow and underflow and overflow thereof for growing of natural grasses and reclaiming alkali land by overflow *held* to constitute reasonable use thereof.

7. Waters and water courses 🔑42—Riparian owners' failure to regulate natural flow by artificial devices held not to limit right to usufruct of waters in natural course.

Failure of riparian owners to regulate natural flow of river by artificial contrivances involving large expenditure of money *held* not to operate to limit riparian right to usufruct of such waters in their natural course.

8. Waters and water courses 🔑44—Riparian owners' use of whole flow to carry waters used held not waste, though smaller quantity would be necessary with modern methods; "waste water."

Underflow of streams carrying water actually used to riparian lands benefited therein is not waste water, though with modern irrigation methods much less water would be necessary, since without uplift of former the outflow and beneficial use of latter could not exist.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Waste Water.]

9. Waters and water courses 🔑42—Riparian owners as against appropriators need not limit natural use of waters by artificial appliances.

Riparian owners are not obliged, as against appropriators, to limit their natural use and enjoyment of waters of river by artificial appliances.

10. Waters and water courses 🔑40—Upper riparian proprietor has same usufruct in waters as all other riparian owners.

Generally, upper riparian proprietor has same usufruct in waters of river as all other riparian owners along the course thereof.

11. Waters and water courses 🔑42—Upper riparian owner is entitled to benefit of reasonable waste occurring in course of reasonable exercise of rights.

Upper riparian owner along river and tributaries thereof is entitled to benefit of whatever reasonable waste or diminution of waters of river occurs during course of reasonable exercise of its riparian rights therein.

12. Waters and water courses 🔑46—Upper riparian owner may use waters for development of power.

Upper riparian proprietor is entitled to make appropriate use of waters of river for development of power and electric energy.

13. Waters and water courses 🔑78—Upper riparian owner as such may not reservoir and indefinitely divert and detain waters of stream.

Upper riparian owner as such has no right to reservoir and indefinitely divert and detain waters of river to such an extent as would practically effectuate a withdrawal of waters from large portion of riparian owners during certain periods in each season.

14. Waters and water courses 🔑142—Appropriation under statute divests no private rights, but merely gives preference over subsequent appropriator (Civ. Code, §§ 1410–1422).

Appropriation of water by riparian owner, under Civ. Code, §§ 1410–1422, divests no existing private right and merely gives preference over subsequent appropriator or diverter, who takes under no other right or title.

15. Waters and water courses 🔑130—Water Commission Act. declaring waters public waters, held inapplicable to waters beneficially used by riparian owner (Water Commission Act, § 11).

Water Commission Act (St. 1913, p. 1012) § 11, relative to declaring waters which may not be needed for useful and beneficial purposes on riparian lands to be public waters, *held* to have no application in case where waters are being applied to useful and beneficial purposes on riparian lands.

16. Waters and water courses 🔑130—Water Commission Act, construing term "useful or beneficial purposes," held not to include all waters not used for irrigating cultivated land (Water Commission Act, § 42).

Water Commission Act (St. 1913, p. 1012) § 42, construing term "useful or beneficial purposes," as used in act, *held* not to confine such term as used in section 11, making subject to appropriation all waters not used for useful and beneficial purposes, to waters used for irrigation of cultivated lands.

17. Waters and water courses 🔑128—Water Commission Act, construing term "useful and beneficial purposes," held not within police power (Water Commission Act, §§ 11, 42).

Water Commission Act (St. 1913, p. 1012) § 42, construing the term "useful and beneficial purposes" in section 11, making waters "not used for useful or beneficial purposes" subject to appropriation as public waters, to limit the use of water in irrigation of uncultivated land to not more than 2½ acre feet of water per acre, *held* not within police power of the state.

18. Waters and water courses 🔑78—Upper riparian owners, contemplating sequestration and diversion of water, cannot justify right as lessee of government to superior use in aid of navigation.

Upper riparian owner cannot predicate asserted right as lessee and licensee of federal government to superior use of river waters in aid of navigation, where record shows that contemplated use required sequestration, storage, and diversion of very large quantity of waters from river.

Shenk, J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Amelia Herminghaus and others against the Southern California Edison Company and others. Judgment for plaintiffs, and the defendant named appeals. Affirmed.

Rehearing denied; SHENK and LANGDON, JJ., and FINCH, Justice pro tem., voting for rehearing.

Edward F. Treadwell, Roy V. Reppy, George E. Trowbridge, and Gail C. Larkin, all of Los Angeles, and Lindsay & Conley, of Fresno, for appellant.

John W. Preston, James F. Peck, and Preston & Duncan, all of San Francisco (Annette Abbott Adams and Robert E. Hatch, both of San Francisco, of counsel), for respondents.

Amici curiæ in support of appellants—McCutchen, Olney, Mannon & Greene and Warren Olney, Jr., all of San Francisco, Lucien Shaw, of Los Angeles, John G. Sargent, U. S. Atty. Gen., and Harold Baxter and James F. Lawson, Sp. Asst. U. S. Attys. Gen., for the United States.

Amici curiæ in support of respondents—George J. Hatfield, of San Francisco (Fred B. Wood, of San Francisco, of counsel), for James J. Stevinson, a corporation.

Amici curiæ in support of appellants in part and in support of respondents in part—U. S. Webb, Atty. Gen., and Spencer Burroughs, of Sacramento, for the State, the Department of Public Works, the Division of Engineering and Irrigation, the Division of Water Rights, W. F. McClure, Director of Public Works, and Edward Hyatt, Jr., Chief of Division of Water Rights; Richard J. Coffey, of San Francisco, for the United States Bureau of Reclamation; A. E. Chandler, of San Francisco, A. L. Cowell, of Stockton, P. H. Griffin, of Modesto, H. J. Hankins, of San Francisco, and M. B. Harris, of Fresno, for Irrigation District Association of California; Power & McFadzean, of Visalia, for Alto Irrigation District; Harris, Johnson, Willey & Griffith, of Fresno, for

Consolidated Irrigation District, Madera Irrigation District, and Stratford Irrigation District; Harris & Hayhurst and Harris, Johnson, Willey & Griffith, all of Fresno, for Fresno Irrigation District; A. E. Chandler, of San Francisco, for Corcoran Irrigation District; Hankins & Hankins, of San Francisco, for Glenn-Colusa Irrigation District; Guy Knupp, of Porterville, for Foothills Irrigation District; H. C. Bell, of Willows, for Jacinto Irrigation District and Princeton-Codora-Glenn Irrigation District; J. E. Rodgers and A. F. Bray, both of Martinez, for Knightsen Irrigation District; A. L. Cowell, of Stockton, for Merced Irrigation District; C. F. Metteer, of Sacramento, for Nevada Irrigation District; P. H. Griffin, of Modesto, for Oakdale Irrigation District and Turlock Irrigation District; Griffin, Boone & Boone, of Modesto, for Owens Valley Irrigation District; Edw. T. Houghton, of San Francisco, for Lemoore Irrigation District; George R. Freeman, of Willows, for Provident Irrigation District; Nutter, Hancock & Rutherford, of Stockton, for South San Joaquin Irrigation District; Sidney J. W. Sharp, of Hanford, for Laguna Irrigation District, Riverdale Irrigation District, Liberty Mill Race Company, Reed Ditch Company, and Liberty Canal Company; Charles L. Childers, of Ellentro, for Imperial Irrigation District; H. Scott Jacobs, of Hanford, for Last Chance Water Ditch Company, People's Ditch Company, and Lucerne Irrigation District; F. E. Burton, of Bakersfield, for Kern River Water Storage District; L. J. Maddux, of Modesto, for Modesto Irrigation District; D. E. Perkins, of Visalia, for Alpaugh Irrigation District; Raymond A. Leonard, of Oroville, for Oroville-Wyandotte Irrigation District, Thermalito Irrigation District, Paradise Irrigation District, and Table Mountain Irrigation District; Warren Lee Pierson, of Los Angeles, for La Canada Irrigation District; W. D. Tillotson, of Redding, for Fall River Valley Irrigation District; W. R. Bailey, of Visalia, for Tulare Irrigation District and various mutual water companies.

Amicus curiæ concerning section 11 of Water Commission Act—Samuel C. Wiel, of San Francisco.

RICHARDS, J. This appeal is from a judgment in the plaintiffs' favor in an action brought by them to obtain an injunction preventing the defendants from an alleged actual and proposed diversion of the waters of the upper San Joaquin river and its tributaries to the irreparable injury of the plaintiffs, through the interference thereby with riparian rights of the latter in and to the flow and use of the waters of said river upon, along, and across their lower lying lands contiguous to the banks and course of said river. The plaintiffs in their original complaint herein allege that they are the owners and tenants in possession of a certain large tract of land containing about 18,000 acres in the counties of Fresno and Madera, state of California, and extending along the bank of the main channel of the San Joaquin river for a distance of about 20 miles; the said land being as to the whole thereof riparian to said river, and the said plaintiffs having, for many past years, in the exercise of their riparian rights therein, made appropriate use of the waters of said river for the irrigation, overflow, and enrichment of their said lands and of the whole thereof. The plaintiffs proceed to allege that the defendants, being the occupants of lands lying along the reaches of the San Joaquin river and its tributaries above to the location of the plaintiffs' lands, claim some right in and to the waters of said river and to the use thereof adversely to the rights of the plaintiffs therein, and by virtue of such claims are threatening by dams, reservoirs, and other works to stop the flow of said river and to impound the waters thereof in and thereby to divert the waters of said river impounded and to convey the same away from said river at points above the plaintiffs' said lands so as to prevent the waters of said river from flowing through the courses and channels thereof down to and along, across, and over the said lands of plaintiffs, and to thus deprive the latter of the use and enjoyment thereof to their great and irreparable injury. The fuller particulars of the plaintiffs' utilization of the waters of said river and of the nature of the defendants' actual and threatened interference with such uses as alleged in said complaint will be set forth at a later point in this opinion. To the plaintiffs' complaint the defendants presented their answer, wherein and in certain amendments thereto they proceeded by denials and by affirmative averments to set forth twelve separate defenses to the plaintiffs' alleged cause of action. The particulars of these will also be adverted to in their proper order in the course of this decision. It is sufficient here to state that the said defendants by their said answer and defenses put in issue the averments of the plaintiffs' complaint respecting the nature of the rise and flow of the waters of said river as related to the plaintiffs' asserted right to the use thereof as lower riparian owners along the banks and courses thereof, and also put in issue the question as to the fullness and extent to which the plaintiffs' said lands, or certain portions thereof, are riparian to said stream. To these two primary considerations the trial court addressed itself in its findings of fact and in its conclusions of law based thereon; and it would seem that these should be the first to receive our consideration before passing to the other questions discussed upon this appeal and which must necessarily be to a greater or less degree predicated thereon.

[1] The trial court found upon sufficient evidence, which was not materially conflicting, that the San Joaquin river was a natural stream of water with well-defined channels and banks which, with its tributaries, took its rise in the Sierra Nevada mountains and descended thence in a generally westerly course to the plains of the San Joaquin valley, and thence in a generally northwesterly direction through the counties of Madera, Fresno, Merced, Stanislaus, and San Joaquin to the San Francisco bay; that the said river in its usual, ordinary, and natural flow passed along and over the lands of the plaintiffs herein; that the natural flow of water in the said San Joaquin river is, and has always been and always will be, if unobstructed, variable in quantity in the course of each and every year; that is to say, the same is, has been, and will be largest and most abundant at times of heavy rainfall over its watershed in said mountains in each winter season, and will also have a larger accretion in the spring and summer seasons by reason of the melting of the snows in said mountains; that these annually occurring accretions in the amount and flow of the waters of said river are natural and regular, and occur in their usual, expected, and accustomed seasons, and result in an increased amount and flow of the waters of said river as they proceed by, along, and across the lands of said plaintiffs, lasting through several months in the annual change of seasons of every year. From these findings of fact, based upon evidence which is indisputable, the conclusion is inevitable that the waters of the San Joaquin river annually flowing therein before and during and after these regularly occurring accretions in the volume thereof constitute the usual and ordinary flow of said river, and are in no sense "storm" or "flood" or "vagrant" or "enemy" waters as these terms are understood in law. This has in fact been so definitely determined by the decisions of this and other courts having precise reference to the waters of this and of other similar streams taking their sources in the same range of mountains and owing their periodical accretions to the same general causes, as to be no longer a matter susceptible of serious dispute.

In the case of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, this court was called upon to determine the nature of the annual flow of the waters of the Fresno and also of the San Joaquin rivers, which streams take their rise in the same general region and are subject to the same periodic and climatic conditions. It was in that case contended by the defendant that the waters it proposed to divert did not constitute any part of the ordinary or usual flow of these rivers, but were waters occurring during periods of heavy rains and were storm, freshet, and flood waters as distinguished from the ordinary and usual flow of said rivers, and that as such the defendant was entitled to impound, divert, and use the same. On the other hand, it was claimed by the plaintiff that the rise in the flow of the waters in said rivers was not extraordinary, occurring upon rare occasions, but that such flow and overflow occurred in all years of ordinary rain and snowfall and constituted the regular annual and usual flow of said rivers. The trial court found in that case, as in this case, that the claim of the plaintiff relative to such waters was correct, and this court in sustaining such finding and conclusion used the following language:

> "Upon this showing it cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are practically of annual occurrence and last for several months. They are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, do occur, and only fail to do so when ordinary climatic conditions are extraordinary—when a season of drouth prevails."

Again, the court says:

> "This is the character of the waters of the Fresno river, the flow of which it is shown the defendant intends to divert. These overflow waters, occasioned through such usually recurring floods and freshets, are not waters which flow beyond the natural channel boundaries of the stream which nature has designed to confine their flow; they are not waters which depart from the stream or are lost or wasted; they flow in a well-defined channel in a continuous body and in a definite course to the San Joaquin river, and while they spread over the bottom lands, or low places bordering on the main channel of the Fresno river as it carries its stream during the dry season, still this is the usual, ordinary, and natural channel in which they flow at all periods of overflow, the waters receding to the main channel as the overflow ceases."

And finally the court concluded:

> "In the present case the storm and freshet waters are not something distinct and separate from the ordinary waters of the Fresno river. As a fact, and under the authorities, being annually recurring floods and freshets, flowing in a clearly defined channel, they constitute a part of the ordinary flow of the waters of such river."

In the case of Piper v. Hawley, 179 Cal. 10, 17, 175 P. 417, this court expressly approved the doctrne laid down in the foregoing case to the effect that annually recurring floods, even though the flow of their waters made the stream wider during the period thereof so as to include adjoining lands, are yet to be deemed a part of the ordinary flow of the stream. In the case of California Pastoral, etc., Co. v. Enterprise C. & C. Co., 127 F. 741, the Circuit Court of the United States, sitting in and for the Southern District of California, and having under consideration a case wherein the particular lands affected by the present controversy and the riparian rights of the owners and occupants thereof in relation to the San Joaquin river were involved, decided that the waters of the San Joaquin river which the defendant in that case was proposing by means of a canal and dam to divert from their accustomed flow in said river along and over the Herminghaus lands were not storm or freshet waters which any person who can may impound and use, but that such waters constituted the usual and ordinary flow of said river in which the full riparian rights of the owners of said lands inhered. In the case of Lindblom v. Round Valley Water Co., 178 Cal. 450, 173 P. 994, this court said, with relation to the facts of said case:

> "The evidence is clear to the effect that the water running into Round Valley (and, except as intercepted by the defendant, down North Canyon) consisted of the runoff from the usual, and annually recurring, fall of rain and snow. Such water, when running in a defined stream, constitutes a watercourse to which the riparian proprietor's rights attach"—citing Miller & Lux v. Madera, etc., Co., supra.

[2] In the presence of the foregoing consistent rulings of this court and of the federal court, having reference to the precise or similar conditions relative to the annual, usual, ordinary, and regularly recurring outflow of the San Joaquin river during the varying seasons of each and every year, we are constrained to hold that, in so far as the lands of said plaintiffs shall be found to be riparian to said river, they are entitled to the exercise and enjoyment of whatever riparian rights they shall be determined to be invested with, in the entire flow of the waters of said river, considering the same with its seasonal accretions as the usual and ordinary flow of said stream during each and every year.

[3, 4] The next question to which our consideration should logically be directed is as to what are the riparian rights of the plaintiffs in respect to said river and the waters thereof. This question is divisible into several parts, the first of whch involves the inquiry as to how much of the plaintiffs' said tract of land is riparian to the San Joaquin river. The findings of the trial court germane to this inquiry show that the plaintiffs' large tract of land lies in a position of peculiar and unique vantage in its relation to the San Joaquin river, since said tract of land not only extends for a goodly number of miles along the bank of the main channel of said river, but also lies just at the base of the lower reaches of the Sierra Nevada Mountains, from which the river makes its immediate debouchment into the plain, and in the apparent stress of which it has cut numerous minor channels or sloughs, so-called, 22 in number, which parallel or intersect each other, and which extend into and in some instances across the plantiffs' tract of land and which convey the waters of said river which enter the same at differen seasons of the year out, upon, or over said lands, and finally conduct the residue of such waters back into the main channel of the river. Upon this subject the findings of the trial court are we think fully sustained by the evidence, and are quite lengthy and detailed, but are also very instructive. The opinion of the trial court, rendered in deciding this cause, makes the following summary of these detailed findings, which will suffice for the purposes of this decision:

> "The evidence in this case shows that some of the sloughs that traverse the Herminghaus property, such as sloughs 19, 20, and 22, take from the river at all stages and carry their water in well-defined channels, with banks and bottoms, to Fresno slough. Others of the sloughs, such as No. 1 and No. 9, take directly from the river at higher stages, and likewise conduct their water in similar channels across the Herminghaus property to Fresno slough, a distance of some miles. Others of the main sloughs have no mouths entering the river's banks, but take water either by seepage from the main river or at times when the river overflows its adjoining banks. After the water has entered these sloughs, they conduct the same in well-defined channels across the Herminghaus property to Fresno slough. The testimony showed that the water in these sloughs was not stationary but was moving in a current. The evidence also showed that these sloughs, or at least the ones the descriptions of which have heretofore been set forth, carry water as above set forth each year during the late spring and summer months, when the San Joaquin river has been raised by waters from the melting snow. The testimony also showed that these sloughs for many years have been conducting water in this manner. It appears to me, therefore, that there is every element here that goes to make up a legal water course. These sloughs have definite beginnings, definite channels with banks and bottoms, and a definite ending in Fresno slough. Likewise, there is a permanent source from which they take water during certain seasons of the year. I am forced to the conclusion, therefore, that these sloughs are in fact and in law water courses, and that the lands bordering on them are riparian lands, and have a right to the flow of the water as it was, by nature, wont to flow, subject only to a reasonable use by riparian owners on the San Joaquin river, at points above said lands."

With the foregoing conclusions of the trial court with reference to the nature of these 22 channels or sloughs as water courses conveying the waters of the said river to practically all of the lands of these plaintiffs, thus rendering the same and the whole thereof riparian to the San Joaquin river, we entirely agree. The fact that some of these sloughs make their more or less definite connection with the main channel of said river at elevations which permit the waters thereof to enter said sloughs only when the increment in the quantum of such waters reaches a height and volume which makes possible their passage into the same in no way militates against their quality or utility to the plaintiffs as water courses, since the plaintiffs are, as we have seen, entitled to the beneficial use of said waters, in some degree at least, at all times and under all conditions attending the usual and ordinary flow of said stream.

This conclusion leads us to our next consideration, which involves the nature, extent, and limitations of the plaintiffs' riparian rights in and to the use of the waters of the San Joaquin river in connection with their ownership and uses of their said tract of land. We shall first consider this subject abstractly and without reference to the bearing upon it of those rights which the defendants possess as upper proprietors upon the San Joaquin river. The plaintiffs in their complaint aver that for more than 10 years prior to the commencement of this action they were and have since been the owners in fee of the 18,000 acres of land described in their said complaint, located in the San Joaquin valley, and bordering on the San Joaquin river; that the climate of that portion of the San Joaquin valley is arid, and as a result thereof their said land, unless irrigated, is unfit for cultivation or the growing of profitable crops thereon; that the soil is naturally fertile and very productive if water is supplied thereto; that the natural flow of the waters of the San Joaquin river is variable in quantity, being more abundant during the period of rainfall in the winter season and also during the late spring and summer when the snows upon its watershed in the high Sierras melt and contribute their accretion to said river; that during these periods in the augmented natural flow of said river the waters thereof flowed naturally out and over the plaintiffs' said lands and saturated the same, and deposited thereon a very fertile silt, which enriched said land and caused an abundant growth of grasses thereon as the same would not have grown except for said natural irrigation by the overflow of said waters and the deposit of said silt; that said waters reached said land as to the lower portions thereof, which are described as swamp and overflow land lying immediately adjacent to the lower reaches of said river, by direct overflow therefrom, but that said waters reached the upper portions of said tract of land during said periods of abundant flow by means of the numerous sloughs or channels which have been hereinbefore referred to; that, as the quantity of water flowing in said river diminishes, the area of said lands covered by the flow of said river in its higher stages would diminish until such waters would be confined to the said channels which traverse said lands, and would then seep into and moisten the same while such waters continued to flow in said restricted channels; that any artificial change in the natural flow of the waters of said river which would cause a further diminution in the quantum of the flow thereof would result, to the extent of such diminution, in the cessation of the accustomed overflow of the river directly and through the aforesaid numerous channels thereof, and would, if sufficiently extended, cause the waters of said river to proportionately cease to enter said sloughs or channels or to continue to flow therein, and would thereby diminish the area of said lands thus irrigated and enriched, and render the same, to the extent of such deprivation, arid and unsuitable for the growth of grasses or other products thereon, and thus destroy the value and profitable use of the same.

The answer of said defendants put in issue the aforesaid averments of the plaintiffs' complaint in those portions of its several defenses wherein they controvert the plaintiffs' claim that those parts of the plaintiffs' said lands which are traversed by the aforesaid channels and sloughs other than the main channel of said river, or are affected by the overflow from the former, are areas of said lands which are riparian to said river. or that the waters of said river, which enter the same during periods of its most abundant flow, constitute the usual and ordinary flow of said river, or that plaintiffs are entitled thereto as riparian proprietors along the course of said river, or, if so, to the extent and nature of the uses and benefits to which the said plaintiffs claim the right as such riparian proprietors to put and continue to utilize said waters.

The trial court, upon the particular issues thus joined, found the aforesaid averments of the plaintiffs' complaint to be true. We are satisfied, from a careful review of the evidence in this case, that it sufficiently sustains the findings of the trial court in the foregoing regard, and, this being so, it becomes necessary for us at this point to review the history and development of the law of riparian rights in this state. We are saved the necessity of an extended elaboration of the earlier stages of that development by the decision of this court in the leading case of Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674, wherein, in the longest opinion in the judicial history of this court, the growth and development of the doctrine of riparian rights under the common law, in other jurisdictions, and finally in California, since its adoption of the common law in the year 1850, through a course of judicial decision down to the date of the determination of that cause upon appeal, is exhaustively reviewed. While it is true that the decision in the case of Lux v. Haggin was that of a divided court, we think it is also true, as stated by Mr. Chief Justice Shaw in his most able review of the "Development of the Law of Waters in the West," to be found in the appendix to 189 Cal. at page 779 et seq., that:

> "It declared that the rights of the riparian owners to the use of the waters of the abutting stream were paramount to the rights of any other persons thereto; that such rights were parcel of the land and that any diminution of the stream against the will of the riparian owner by other persons was an actionable injury. The question was settled by that case and the riparian right has never since been disputed."

When we turn to that notable decision to determine just what was thus settled in the way of a definition of the riparian right, we find that it is embraced in the following conclusions by Chief Justice Shaw of Massachusetts in the case of Johnson v. Jordan, 2 Metc. 239, 37 Am. Dec. 85, which this court therein adopted and approved in the following language (69 Cal. at page 391 [10 P. 754]):

> "The right to the flow of the water is inseparably annexed to the soil, and passes with it, not as an easement or appurtenant, but as a parcel. Use does not create, and disuse cannot destroy or suspend it. Each person through whose land a watercourse flows has (in common with those in like situation) an equal right to the benefit of it as it passes through his land, for all useful purposes to which it may be applied; and no proprietor of land on the same watercourse has a right unreasonably to divert it from flowing into his premises, or to obstruct it in passing from them, or to corrupt or destroy it."

In a later portion of the opinion this court said (69 Cal. at page 394 [10 P. 755]):

> "By our law the riparian proprietors are entitled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case."

The doctrine of riparian rights thus abstractly stated has been clarified, though not materially changed, by this court in its application to the particular cases which have come before it since the decision of the case of Lux v. Haggin, supra. The case of Heilbron v. Last Chance Water Ditch Co., 75 Cal. 117, 17 P. 65, was one wherein the tenant in possession of a large tract of land riparian to Kings river brought suit to restrain a diversion of the waters of said river by an upper appropriator who had diverted a large body of the waters of such river and conveyed the same by a ditch to land not riparian to said river. In setting forth the original right of the plaintiff to have said stream continue to flow as by nature it was wont to flow over, through, or along his land, this court said:

> "It seems clear, upon principle and authority, that the diversion of natural water from land is 'an injury done to the inheritance.' The flow of natural water over land is a continuous source of fertility and benefit; and its withdrawal is followed by consequences which are perpetually injurious to the freehold. This is strikingly illustrated by the averments in the complaint in this case, 'that the waters of said Kings river have hitherto been accustomed to overflow, seep through, and moisten the lands of said rancho, whereby the fertility of said lands was greatly increased, and a large and valuable quantity of natural grass was produced upon said lands'; and that, by reason of the diversion of the water by defendant, 'said lands have failed to produce their accustomed crops of natural grass.' The flow of the water of a stream, whether it overflow the banks or not, naturally irrigates and moistens the ground to a great and unknown extent, and thus stimulates vegetation; and the growth and decay of vegetation add, not only to the fertility, but to the very substance and quantity of the soil. It is not true, therefore, as claimed by appellants, that the water of a natural stream may be taken away from land for a great number of years, and then turned back, without any permanent injury to the land."

In the case of Southern California Investment Co. v. Wilshire, 144 Cal. 68, 77 P. 767, wherein the controversy was between the plaintiff as a lower and the defendant as an upper riparian proprietor along a certain stream, this court said:

> "The plaintiff has riparian rights in the stream, and this right extends to all the water flowing in the stream through its lands. * * * As such riparian owner, it has the right to have the stream continue to flow through its lands in the accustomed manner, and to use the same to irrigate an additional area thereof, undiminished by any additional or more injurious use or diversion of the water upon the stream above. This right is a part of the estate of the plaintiff—parcel of its land—and whether it is or is not as valuable in a monetary point of view, or as beneficial to the community in general, as would be the use of a like quantity of water in some other place, it cannot be taken by the defendants without right, or, in case of a public use elsewhere, without compensation. It is not necessary in such cases for the plaintiff to show damages, in order that it may be entitled to a judgment. It is enough if it appears that the continuance of the acts of the defendants will deprive it of a right of property, a valuable part of its estate" (citing cases).

In the case of Anaheim Water Co. v. Fuller, 150 Cal. 327, 88 P. 978, 11 L. R. A. (N. S.) 1062, wherein the plaintiffs, who were lower riparian owners along the Santa Ana river, sought to enjoin the defendants, who were upper riparian owners upon said river, from diverting water from the stream by means of a ditch through which said defendants proposed to convey such water to other lands not riparian to the stream, the defendants, among other contentions, urged that the plaintiffs were actually using but 400 inches of water for their land, and that there would remain in the stream after the defendants' proposed diversion more than 2,000 inches flowing down to and beyond the plaintiffs' lands, and which was more than the latter could possibly use thereon, and that therefore no damage could ever ensue, even conceding the defendants' diversion to be unlawful, and hence that their said diversion ought not to be enjoined. Mr. Justice Shaw, in dealing with this contention, said (150 Cal. at page 335 [88 P. 982]):

> "The theory of the law of riparian rights in this state is that the water of a stream belongs by a sort of common right to the several riparian owners along the stream, each being entitled to sever his share for use on his riparian land. The fact that a large quantity of water flows down the stream by and beyond the plaintiffs' land does not prove that it goes to waste, nor that the plaintiffs are entitled to take a part of it, as against other riparian owners or users below. Nor can it be said that plaintiffs, on account of the present abundance, could safely permit defendants to acquire, as against them, a right to a part of the water. The riparian right is not lost by disuse, and other riparian owners above may take, or others below may be entitled to take, and may insist upon being allowed to take, all of the stream, excepting only sufficient for the plaintiffs' land. In either alternative, the taking of a part of the water by the defendants would not leave enough for the plaintiffs' use. There is nothing in this case to show how much water is required above and below by those having rights in the stream. In view of the well-known aridity of the climate and the high state of cultivation in the vicinity, the court could almost take judicial notice that in years of ordinary rainfall there is no surplus of water in the stream over that used by the various owners under claim of right. But, however this may be, it is settled by the decisions above cited that a party, situated as the plaintiffs are, can enjoin an unlawful diversion, in order to protect and preserve his riparian right."

In the case of Modoc L. & L. S. Co. v. Booth, 102 Cal. 151, 36 P. 431, the plaintiffs, who were the owners of swamp and overflowed land riparian to the Pitt river, sought an injunction to prevent the defendants, who were upper but nonriparian owners of land, from appropriating 200 inches of water from said river for irrigation, stock, and domestic uses upon their nonriparian lands. The evidence in the case showed that the plaintiffs were engaged in reclaiming their said swamp and overflowed lands by ditching and diverting the waters of the Pitt river away from the same at times of the high flow of said river during the months of June, July, August, and September when the defendants used the comparatively small amount of the water of the river appropriated by them. The trial court denied the injunction sought, and this court affirmed its order to that effect, saying:

> "The only point made for a reversal is that the court erred in not granting an injunction against the respondent, because appellants were riparian owners and as such 'entitled to have the stream flow in its natural channel, undiminished and unobstructed.' In a state like this, where irrigation is greatly needed, and where large areas of land are comparatively worthless unless artificially irrigated, it is difficult to lay down a rule as to riparian rights which will be applicable to and cover all cases. It seems clear, however, that in no case should a riparian owner be permitted to demand, as of right, the intervention of a court of equity to restrain all persons who are not riparian owners from diverting any water from the stream at points above him, simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner, when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it. If this be not so, it would follow, for example, that an owner of land bordering on the Sacramento river in Yolo county could demand an injunction restraining the diversion of any water from that river for use in irrigating nonriparian lands in Glenn or Colusa county. And yet no one, probably, would expect such an injunction, if asked for, to be granted, or, if granted, to be sustained."

In the case of Fifield v. Spring Valley Water Works, 130 Cal. 552, 62 P. 1054, this court applied the rule above quoted from the last-cited case to a situation wherein the defendant, a nonriparian appropriator, was seeking to divert the storm or flood waters of a stream but none of the ordinary flow. In the case of Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, which has already been adverted to as to its facts, it was urged upon this court upon petition for rehearing that it had not given due consideration to its rulings in the cases of Modoc Land Co. v. Booth, and Fifield v. Spring Valley Water Works, last above referred to, but this court differentiated between the two cases last above referred to and the case of Anaheim Water Co. v. Fuller, supra, and also between those former cases and the instant case before it, by showing that the instant controversy was not one relating merely to storm or flood waters, but that the pending cause involved the usual and customary flow of the Fresno river and the right of a lower riparian owner thereto as against an upper appropriator of the waters of said stream. In the course of this differentiation, Mr. Justice Sloss, after approving the language of the main opinion to the effect that the owners of land bordering upon such a flow of water are riparian proprietors entitled to all the rights pertaining to riparian ownership, went on to say:

"It is suggested that a different rule should apply in a semiarid climate like that of California, where the fall of rain and snow occurs during only a limited period of the year, and, consequently, streams carry in some months a flow of water greatly exceeding that flowing during the dry season, with the result that such increased flow is not, at all points, confined within the banks which mark the limits of the stream at low water. But no authority has been cited, and we see no sufficient ground in principle, for holding that the rights of riparian proprietors should be limited to the body of water which flows in the stream at the period of greatest scarcity. What the riparian proprietor is entitled to as against nonriparian takers is the ordinary and usual flow of the stream. There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off. Perhaps other considerations should apply where a river, in times of heavy flow, runs over its banks in such manner that large volumes of water leave the stream and spread over adjoining lands to an indefinite extent, there to stagnate until they evaporate or are absorbed by the soil. But the evidence of respondent, and this was the evidence on which the court below acted, fails to show that the water which defendant seeks to divert was such 'vagrant water.' The evidence of respondent was to the effect that at all seasons the water of the Fresno river, even though overflowing the banks of the channel in which it flowed during the dry season, formed a single and continuously flowing stream. The argument that the method of irrigation adopted by plaintiff, i. e., that of having the annual increased flow of the river spread over its lands, was not a reasonable use of the water can have no weight in this case. The doctrine that a riparian owner is limited to a reasonable use of the water applies only as between different riparian proprietors. As against an appropriator who seeks to divert water to nonriparian lands, the riparian owner is entitled to restrain any diversion which will deprive him of the customary flow of water which is or may be beneficial to his land. He is not limited by any measure of reasonableness. If any doubt ever existed on this point, none can remain since the recent decision of this court in Anaheim Union Water Co. v. Fuller, 150 Cal. 327 [88 P. 978, 11 L. R. A. (N. S.) 1062]. The cases relied on to show that the riparian owner is entitled to only a reasonable use of the water were all cases of controversies between owners of different parcels of land riparian to the same stream. Virtually the same point is presented by the argument that plaintiff is not limiting itself to the most economical manner of using the water. This is not an objection which may be raised by an appropriator who seeks to divert water of the stream to non-riparian lands. It is argued that unless appropriators are permitted to divert and store for future use water which would otherwise run into the sea and be wasted, there will be a failure to make the most beneficial use of the natural resources of the state and that riparian owners should not be permitted to obstruct the development of these resources. It may be that, if nonriparian owners are permitted to intercept the winter flow of streams, in order to irrigate nonriparian lands or to develop power, the water so taken will permit the cultivation of more land and benefit a greater number of people than will be served if the flow continues in its accustomed course. But the riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."

The case of Arroyo Ditch & Water Co. v. Baldwin, 155 Cal. 280, 100 P. 874, cannot be said to be at variance with the foregoing principles or cases, since the questions discussed therein arose in an action wherein a lower riparian proprietor was claiming the right gained by prescription as against the upper riparian owner to have a certain quantum of the waters of the common stream flow down to him for purposes of diversion. The court in such a case was not called upon to discuss the principles enunciated in the case of Miller & Lux v. Madera Canal, etc., Co., supra, but doubtless had that case in mind, since it is reported upon earlier pages of the same volume of our reports; and whatever the court may have said in developing the later case cannot be held to be in any wise hostile to its utterances in the earlier one. Neither do we find anything in the case of Gray v. Reclamation Dist., 174 Cal. 622, 163 P. 1024, or in the earlier case of Lamb v. Reclamation Dist., 73 Cal. 125, 14 P. 625, 2 Am. St. Rep. 775, each dealing with the particular situation therein considered, which is in conflict with the case of Miller & Lux v. Madera Canal, etc., Co., supra, and its companion line of cases which seem to deal with the identical situation as to the state and flow of the streams in question presented by the case at bar. We are unable to draw the differentiations which the appellant and certain of the amici curiæ herein would have us see between the case of Miller & Lux v. Madera Canal, etc., Co., and this one in the foregoing regard; nor are we referred either by appellant or the amici curiæ to any later decision of this court which has materially modified the decision in the last above-cited case in its application abstractly to the rights of riparian owners to the usufruct of streams identical in their origin and outflow to that of the San Joaquin river.

[5] As a result of the foregoing review of the cases which have succeeded and have generally followed the doctrine declared in the early case of Lux v. Haggin, supra, we arrive at the following conclusions: The waters of the San Joaquin river, as they approach and pass along, through, and over the lands of the plaintiffs herein at all seasons of the year constitute the ordinary, usual, periodical, and natural flow of said river. They are not "flood" waters, or "storm" waters, or "vagrant" waters, or "enemy" waters, which are the result of occasional or unusual freshets and which any one having the ability so to do may impound or divert, and who in most cases confer a blessing upon lower riparian landowners by so doing. The plaintiffs herein are riparian owners along the course or courses of the San Joaquin river, and their tract of land is practically all riparian to said river, either directly along and beside the main channel thereof or through the contiguity of the upper portions thereof to the numerous sloughs putting off from said river and interpenetrating these higher areas of their said tract of land. As such riparian owners said plaintiffs are abstractly entitled to the reasonable use of the said waters of said river at all seasons of the year. Their right thereto is to the usufruct of said flowing stream in the usual and ordinary course of its flow, and this right is a vested right inherent in the soil of their said lands and not a mere incident or appurtenant thereto. It is a right which is neither gained nor lost by use or disuse abstractly and in the absence of adverse rights gained by others by prescription or of their loss by laches creating an estoppel under certain conditions hereinafter to be noted. It is a right which they partake of in common with other riparian proprietors along said stream entitled to a similar usufruct in its waters. It is a right which appropriators of water from said stream do not, as we shall see, share with the riparian owners thereon, in the absence of rights to the use of said waters gained by such appropriators by grant or by prescription.

[6] Having thus defined and limited the right of the plaintiffs as riparian owners along the San Joaquin river to the use and enjoyment of the waters thereof, we pass next to the question as to what the trial court has found to be the extent of the plaintiffs' right to the reasonable use and enjoyment of the waters of said stream under the particular circumstances as shown by the evidence in the case. The trial court found, as we have seen, that practically all of the plaintiffs' tract of land is riparian to said river. The trial court has further found specifically what particular benefit the various areas of the plaintiffs' said tract of land of different elevations derive from the intake, flow, and overflow of the waters of said river, through and by means of the several sloughs which take off from said river at such respective elevations in the land, and which carry a varying content according to their location, and also to the amount of accretion in the flow of the river at certain seasons of the year. Having so found, the trial court proceeds to find as follows:

> "That the climate of that portion of the San Joaquin valley in which the said land described in said schedule A is located is naturally arid, and the annual rainfall is very slight, and, as a result thereof, the said land, unless irrigated otherwise than by annual rainfall, is unfit for cultivation or the growing of profitable crops, but the soil, 10,000 acres or more thereof, is very fertile and by the use of said waters of the San Joaquin river and its branches, is rendered very productive, and abundant crops of natural grasses can be and are produced thereon, as herein specifically stated, and with water to irrigate the same the said land is adapted to the growing of cereals, viticultural, and horticultural crops, vineyards, garden truck, grain, and berries. The balance of said soil blends with different degrees of alkali from the quality of said 10,000 acres of land to land impregnated with alkali in such quantities that the land must be reclaimed from it in order that anything other than natural grasses will grow thereon, and the process of this reclamation of the land from alkali is being accomplished by the overflow aforesaid."

The trial court further found:

> "That all the water which will flow in the San Joaquin river and its branches, as it and they were wont to flow by nature would be beneficial to the land of plaintiffs which is overflowed thereby as aforesaid, for the entire period and in the entire quantity that it is accustomed to so overflow said land."

The foregoing findings of the trial court are, in our opinion, sufficiently supported by the evidence in the case. We are further entirely satisfied that the foregoing utilization by the said plaintiffs of the waters of said river and the flow and underflow and overflow thereof constitutes a reasonable use thereof within the intent and meaning of the foregoing definitions of the riparian right of land owners along such or similar streams. It is to be noted that, apart from certain general similarities of location, topography, adaptability, and quality the plaintiffs' tract of land as to its position, adaptability, and soil qualities, when taken in its relation to the San Joaquin river and the aforesaid natural distribution of the waters thereof, is peculiar, and in fact unique. From the evidence in the case as reflected by the findings of the trial court, it would seem to be a tract of land especially designed and equipped by nature for pastoral uses; but, even if it were not thus peculiarly adaptable to the irrigation and growth of wild grasses for the pasture of stock, even if it were equally or even more advantageously susceptible of adaptation to more intensive and even more profitable agricultural, horticultural, or viticultural uses, we are unable to perceive under what showing or claim of right any other landowner along said river, or any would-be appropriator of the waters thereof, or any aggregation of individuals, or any court or even the state itself, would have the right to dictate to these plaintiffs, choosing to devote their said lands and the water which, in its ordinary and usual flow, as an integral part and parcel thereof, to its present beneficial uses, that they should devote their said lands and the water flowing thereon to other and more intensive uses which such individuals or such aggregation or such court or such state might deem to be more in keeping, and, so to speak, more up to date with modern development in the productive uses of property. To admit the right to such interference to the extent of taking away from the individual his initiative in deciding to which of several adaptable uses he shall devote his property would be to divest him to that extent of his most precious right of ownership therein. In so stating we are not to be understood as dealing with or denying the right of the state in the proper exercise of its police power to regulate the uses, within certain well-defined limitations, of private property. We shall revert to this subject at a later point in this opinion.

[7-9] It is, however, contended by the defendants herein that the trial court placed a vital limitation upon its foregoing findings as to the extent of the right of the plaintiffs to the use and flow of the entire body of the waters of said river entering upon and flowing through and over their said lands by appending thereto and to the last above-quoted portion of finding 30 an additional sentence which would make said finding 30 read in full as follows:

> "That all the water which will flow in the San Joaquin river and its branches, as it and they were wont to flow by nature would be beneficial to the land of plaintiffs which is overflowed thereby as aforesaid, for the entire period and in the entire quantity that it is accustomed to so overflow said land, *but a constant flow of 180 cubic feet of water per second from April 1st to October 1st of each year would irrigate the lands of plaintiff, if the same were prepared for intensive cultivation, which preparation would entail a large expenditure of money*, but in the present condition of the land all the water flowing in said main and branch channels is necessary for the irrigation of said land."

We are unable to perceive that the emphasized sentence of said finding 30, as above quoted in full, amounts to a limitation in any degree upon the foregoing findings of the trial court to which the same is appended. The fact that these plaintiffs might by artificial contrivances through dams and ditches and reservoirs, involving large expenditures of money, so interrupt or so regulate the present natural flow of said river as to render a smaller quantum of its waters sufficient to satisfy the beneficial uses which they are now making of such waters in their entirety, could not possibly operate to limit or lessen their riparian right to the usufruct of said waters in their natural course and under plaintiffs' unique relation thereto. Were it otherwise, the clause in our foregoing definition of the riparian right to the effect that such right is neither gained by use nor lost by disuse would be meaningless. But more than that—to require of these plaintiffs that they install expensive improvements upon nature's method for the purpose of lessening the quantum of the said water to be used by them below that full amount thereof to which they are in the natural exercise of their riparian right entitled would be to impose a like duty upon all the other riparian owners along the lower reaches, not only of this particular stream, but of all other streams of like origin and outflow, in order that some upper riparian proprietor or nonriparian appropriator might have, gain, and exercise rights to the use and diversion of said waters thus conserved, to which they would not otherwise be entitled. To so declare would be to impose a radical, and, in its outworking, an utterly impracticable, limitation upon the doctrine of riparian rights. The impracticability of such a proposition might, if time and space would permit, be made the subject of almost endless illustration. The rights which the plaintiffs assert herein inhere not only in the upper flow of said waters which actually enters upon and permeates and fructifies the soil of riparian lands, but also in the underflow of said river which lifts the upper flow thereof to the levels of entry upon such lands, and which, having done so, passes by to uplift its peak, in turn, to the levels of lower riparian lands along the course of said river through the plain. The underflow of streams is, with respect to riparian rights therein, no more waste waters than is the upper flow thereof which the riparian owner uses, since, without the uplift of the former, the outflow and beneficial use of the latter could not exist. Such waters are therefore serving a useful and beneficial purpose in relation to said lands.

The foregoing findings of the trial court dispose, we think, of the question as to the reasonableness of the plaintiffs' use of the waters of said river in view of the unique advantages which nature has bestowed upon them in respect to their said lands. Had nature not been thus kind, had the plaintiffs originally been obliged, at large expense and by artificial means, to dig the water courses, create the channels, and make the connections at various levels for the intake of the waters of the river to which as riparian owners they were entitled, it could not, we think, be reasonably contended that their conduct in so doing was so unreasonable as to justify upper appropriators upon said stream in taking away their riparian rights in the waters of the stream which they had thus artificially and at great expense applied to their lands. Neither could it be said that the amount of water of said river, which is thus lifted to the varying levels of plaintiffs' lands and enters upon and flows over the same by means of the channels which nature has provided, is to be held unreasonable merely because it exceeds the volume which the trial court suggested would be sufficient, if conserved and distributed through expensive artificial methods and appliances. As against appropriators the plaintiffs were not obliged by artificial appliances or otherwise to limit their natural use and enjoyment of the waters of said river, nor can it be said, as supported by either reason or authority, that a lower riparian owner, as against an upper riparian owner attempting to impound a greater amount of the waters of the stream than that to which he would be entitled under his well-defined riparian right, should have cast upon him the burden of limiting by artificial contrivances his natural use and enjoyment of said waters in order that the upper riparian owner may make other and greater uses thereof than those to which he is lawfully and naturally entitled. There is nothing in the record herein tending in any degree to show that the defendants herein ever offered, or would be willing to offer, to reimburse the plaintiffs for any portion of the cost, expense, and outlay which would be required in order to limit the amount of water entering upon plaintiffs' land to the amount thereof indicated by the trial court as susceptible of being made reasonably adequate through such artificial means.

[10-12] We have now reached the point in this discussion where the rights and claims of right of the appellant in and to the use of the waters of the San Joaquin river and its tributaries come into view. The appellant is a riparian owner of considerable lands along the upper reaches of said river and its tributaries. It is also a lessee or licensee from the United States government of certain other lands in the same region and riparian to the same river, and as such lessee or licensee thereof is admittedly entitled to the use and exercise of whatever riparian rights the federal government has in respect to said river by virtue of its ownership of said lands. It is in its aforesaid capacity as an upper riparian proprietor along said river that its rights as such therein are first to be considered. Generally speaking, it has the same usufruct in the waters of said river as all other riparian owners along the course thereof possess. It is entitled to the reasonable use of said waters and of the ordinary and usual flow thereof for such customary and domestic uses as inhere in riparian owners along similar streams, and for irrigation of their said riparian lands. Being an upper riparian owner along said stream and the tributaries thereof, it is entitled to the benefit of whatever reasonable waste or diminution in the volume of said waters occurs during and in the course of the reasonable exercise of its riparian rights therein. In addition to the foregoing usual and customary uses of said waters, the appellant is entitled to make appropriate use of the same for the development of power and electric energy. Mentone Irr. Co. v. Redlands Elec. L. & P. Co., 155 Cal. 323, 100 P. 1082, 22 L. R. A. (N. S.) 382, 17 Ann. Cas. 1222. In so holding, this court further held that the production of power upon riparian land was a proper riparian use of the waters flowing thereon, even though the power and energy so developed was to be conveyed away and used at distant points not riparian to such lands. The uses made by the defendants herein as upper riparian proprietors of the waters of said river for purposes of irrigation and for domestic uses are negligible and are not in dispute in this proceeding; and, as to the use of said waters for the production of power and electric energy, the plaintiffs herein concede to the defendants the right to such use as being within the defendants' riparian right, subject, of course, to the duty imposed upon all riparian owners and users of water to make a present return of such waters to the course of the stream without undue waste or diminution. This concession does not satisfy the claims of the defendants herein or of the various amici curiæ who have come forward to support the defendants' contentions as to the extent of their rights as upper riparian proprietors to the use, for the aforesaid purpose, of the waters of said river. These claims of the defendants are set forth in their answer herein, where they appear in the form of several separate defenses, which we shall deal with in turn.

The first of these affirmative defenses consists in the claim of the defendants that, in the course and exercise of their conceded right to a reasonable use of the waters of said stream for the development of power and electric energy, they have the right to build reservoirs at various points along the upper reaches of said river and the tributaries thereof for the storage of the waters of said river to the extent set forth with much of detail in their said answer. With reference to the averments therein, and to the past, present, and prospective work of said development in the planning and building of such reservoirs, a vast amount of evidence was presented at the trial of the cause. The trial court found that the said defendants did claim and assert their right to construct such reservoirs to the extent and capacity shown by the evidence in the case and set forth with much of detail in the findings therein; and the trial court further found from such evidence that the proposed sequestration of the waters of said river, in the system of reservoirs shown to be partially in course of construction and wholly within the contemplation and plans of the defendants, would, if permitted to be completed and carried into operation according to their aforesaid claims and plans and purposes, have the effect of causing a diversion of the waters which constitute the usual and ordinary flow of said river for periods, and to an extent which would practically effectuate a withdrawal of said waters from a large portion of the lands of said plaintiffs during the period in each season when they are benefited by its flow and overflow, especially in and through those sloughs and channels which are wont to convey such waters to the plaintiffs' higher lands. The conclusion of law of the trial court, based upon its foregoing findings of fact, was that the claim of right asserted by said defendants, in so far as the same was sought to be grounded in the alleged rights of the defendants as upper riparian proprietors along the course of said river, was not sustainable as a matter of law. We are asked upon this appeal to review and reverse that conclusion. We are not urged so to do upon the ground that the evidence presented at the trial does not fully sustain the findings of fact of the trial court upon which its aforesaid conclusion of law was predicated. On the other hand, the defendants frankly admit that their proposed plans for the storage of the waters of said river in its vast system of reservoirs hold in contemplation the retirement of said waters for long and indefinite periods of time, in fact, admit that as to certain of said reservoirs, the sequestration of the portion of the said waters stored therein will be cyclic, and as to said waters as a whole and to the extent of their retention in said reservoirs, their ultimate return to the river would depend, not at all upon the claims and asserted rights of lower riparian owners to the usual, natural, and ordinary flow of said waters, but altogether upon the will and convenience of the defendants in their proposed utilization of said waters for power production.

The defendants do not, in support of their aforesaid claim of right, in so far as the same is based solely upon riparian ownership, direct our attention to any decision by the courts of this state which does more than vaguely hint at any possible merit in such a claim. We are, however, referred to a line of decisions by the courts of certain of the older states wherein a qualified right of an upper riparian proprietor to impound the waters of a stream has been recognized. We have examined these cases only to find that they have reference in the main to a mere temporary detention of water by dams during periods of scant flow in order to the uninterrupted operation of mills or water wheels which would otherwise be insufficiently supplied with their usual and expected quantum of water required for their continued activities; the water being presently returned to the stream. Such cases have no bearing upon such an extensive, prolonged, and indefinite storage, withdrawal, and sequestration of the waters which form the usual and ordinary flow of such a stream as the San Joaquin river to the inevitable detriment of not one but all of the lower riparian owners and users of such waters. The asserted right of the defendants herein as riparian owners along said river and incidentally the asserted rights and claims of all those who have appeared herein as amici curiæ claiming similar rights in similar rivers in this state, would, if permitted, put an end to the whole doctrine of riparian rights, not only as to these plaintiffs and all other lower riparian owners similarly situated, but also as to the defendants themselves, since any person or aggregation of persons having the financial ability and acquiring a riparian ownership in lands above those of the defendants along the yet higher reaches of said river would thus become entitled to exercise all the rights which the defendants are here claiming, even against them, with the resultant drying up of the defendants' own reservoirs. Two answers might well be suggested to the claims of the defendants and of their supporting amici curiæ of a present right to thus break down and destroy the long-established doctrine of riparian rights upon the ground of public policy. One of these is to be found in the apt expression of our Chief Justice Shaw in his admirable review of the "Development of the Law of Waters in the West" above referred to, wherein he says:

> "The obvious answer on the question of policy is that the objection comes too late, that it should have been made to the Legislature in 1850, prior to the enactment of the statute adopting the common law. When that was done, the riparian rights became vested, and thereupon the much more important public policy of protecting the right of private property, became paramount and controlling. This policy is declared in our constitutions, has been adhered to throughout our national history, and it is through it that the remarkable progress and development of the country has been made possible."

And the other equally apt answer is to be found in the opinion of Mr. Justice Sloss in the case of Miller & Lux v. Madera Canal, etc., Co., supra, wherein that learned jurist said:

> "The riparian owners have a right to have the stream flow past their land in its usual course, and this right, so far as it is of regular occurrence and beneficial to their land is, as we have frequently said, a right of property, 'a parcel of the land itself.' Neither a court nor the Legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will not be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not without compensation, be taken from the owners of these lands and transferred to others."

The defendants herein, however, make the contention that the foregoing disastrous consequences to the plaintiffs particularly and to the law of riparian rights generally will not occur, for the reason, as they expressly plead and show, the said defendants have entered into a certain original contract and certain supplementary contracts thereto with Miller & Lux, a riparian owner of large tracts of land in the same immediate region as are the lands of these plaintiffs, and that the defendants' obligations under said contracts compel them to a certain limited reservoiring of the waters of said river, dependent upon the consent of their cocontractor and to the making of certain releases and restorations of the said impounded waters to and also at the will of the other party to said agreement. It would be illuminating to quote these contracts in full for the purpose of showing the admissions which this appellant made therein as to the particular lower riparian owner with which it was dealing as to the right of the latter to the full ordinary flow of the waters of said stream; but we deem it sufficient to say at this point in the opinion, with relation to said contracts, that these plaintiffs were not parties thereto or otherwise bound or other than indirectly benefited thereby, and that said contracts between the parties thereto were of course subject to change or even abrogation by the parties thereto at any time, and that without the plaintiffs' concurrence or consent. They cannot, therefore, be held to have their individual rights to require that the waters of said river be permitted to continue to unobstructedly flow as by nature they are wont to do, affected by the existence of private agreements between other riparian owners along said stream to which they were not parties. A further consideration of these contracts may become appropriate at a later point in this opinion.

[13, 14] We have thus disposed, we think, of the assertion by the appellant of a right to reservoir and indefinitely divert and detain the waters of this stream to the extent claimed by it merely as an upper riparian owner to the detriment of the plaintiffs as shown by the evidence in the case and the findings of the trial court sufficiently based thereon. The appellant makes the further claim of right to reservoir, sequester, and eventually use the waters of said river to the full extent of its disclosed plans, in that regard based upon its asserted right so to do as an appropriator of the waters of said stream. Primarily it may be said that, in so far as the rights and claims of the appellant as an appropriator rest upon the contention that the waters in and to the use or diversion of which such rights and claims are asserted are flood or waste waters of said stream, that contention has been fully disposed of by what has been decided in an earlier part of this opinion. In so far as the appellant claims any right arising out of its previous appropriation of the water of said river made under and in conformity with sections 1410 to 1422, inclusive, of the Civil Code relating to the acquisition of waters in this state by appropriation in accordance with the method therein provided, such claim of right is sufficiently disposed of by the numerous decisions of this court which are collated and commented upon in the case of Duckworth v. Watsonville Water Co., 170 Cal. 425, 150 P. 58, wherein Mr. Justice Shaw made the following significant statement:

> "The argument on this point is partly, if not entirely, based on the theory that an appropriation of water, under the Code, constitutes a grant by the state of a right to take the water appropriated, a grant which confers upon the appropriator a title or right to the water superior to private rights, riparian or otherwise, existing at the time of the appropriation. This theory seems to persist in the minds of members of the bar. It finds no support in the decisions of this court. It has long been settled in this state that an appropriation under the Code divests no existing private right, that its effect is merely to give a preference over a subsequent appropriator or diverter who takes under no other right or title, and to fix the date of the posting of the notice as the inception of the claim under it. De Necochea v. Curtis, 80 Cal. 402, 405, 20 P. 563, 22 P. 198; Wells v. Mantes, 99 Cal. 584, 34 P. 324; Alta Land Co. v. Hancock, 85 Cal. 223, 24 P. 645, 20 Am. St. Rep. 217; Cave v. Tyler, 133 Cal. 566, 65 P. 1089; Santa Cruz v. Enright, 95 Cal. 113, 30 P. 197; Frederick v. Dickey, 91 Cal. 358, 27 P. 742; Coonradt v. Hill, 79 Cal. 593, 21 P. 1099; Watterson v. Saldunbehere, 101 Cal. 112, 35 P. 432; Lux v. Haggin, 69 Cal. 390, 4 P. 919,

10 P. 674; Palmer v. Railroad Commission, 167 Cal. 163, 138 P. 997."

In the petition for rehearing in the above last-cited case it was particularly insisted that a significant change had been made in section 1410 of the Civil Code by the amendment thereof in 1911, whereby it was claimed the rights of appropriators of waters were greatly enlarged. In disposing of that contention, this court said:

> "It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it cannot operate to divest rights already vested at the time it was enacted. The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land. It could not affect the riparian rights of the other owners, nor the rights of any person or corporation claiming under them, nor rights previously acquired from riparian owners by prescription, nor rights acquired from the state prior to that time by appropriation under the Code, in reliance upon the implied offer of the state to allow its riparian rights to be acquired in that manner, as indicated in the opinion."

In the yet more recent case of San Bernardino v. Riverside, 186 Cal. 7, 198 P. 784, the foregoing views of this court upon this subject were restated and approved.

[15-17] The appellant herein, however, contends that it has gained certain definite additional rights as an appropriator of the waters of said river by virtue of the provisions of the so-called Water Commission Act of 1913 (Stats. 1913, p. 1012), and of the various later acts of the Legislature supplementary to or amendatory thereof. In this claim the appellant is quite ardently supported by certain amici curiæ asserting similar enlarged rights to the use of the waters of the various streams of this state having their sources in the high Sierras. Sections 11 and 42 of said act are the portions thereof whereupon the appellant and the amici curiæ who agree with it rely for the asserted right to reservoir and store practically unlimited amounts of the waters of this and other rivers of this state. The portion of section 11 thereof, thus relied upon, reads as follows:

> "All waters flowing in any river, stream, canyon, ravine or other natural channel, excepting so far as such waters have been or are being applied to useful and beneficial purpose upon, or in so far as such waters are or may be reasonably needed for useful, and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is and are hereby declared to be public waters of the state of California and subject to appropriation in accordance with the provisions of this act. If any portion of the waters of any stream shall not be put to a useful or beneficial purpose to or upon lands riparian to such stream for any continuous period of ten consecutive years after the passage of this act, such non-application shall be deemed to be conclusive presumption that the use of such portions of the waters of such stream is not needed upon said riparian lands for any useful or beneficial purpose; and such portion of the waters of any stream so non-applied, unless otherwise appropriated for a useful and beneficial purpose is hereby declared to be in the use of the state and subject to appropriation in accordance with the provisions of this act."

In so far as the foregoing portion of said section of said act is concerned it would seem to have no application to the facts of the instant case, since, as we have seen, the trial court has found upon what we deem sufficient evidence that all of the waters flowing in the San Joaquin river down to and upon and over the lands of the plaintiffs herein have been and are being applied to useful and beneficial purposes upon the plaintiffs' said lands riparian thereto, and have been so applied by them for more than ten consecutive years last past. It follows that such waters are not the proper subject of appropriation under the express terms of said section of said act. Section 42 of said act reads as follows:

> "The word 'water' in this act shall be construed as embracing the term 'or use of water'; and the term 'or use of water' in this act shall be construed as embracing the word 'water.' Whenever the terms stream, stream system, lake or other body of water or water occurs in this act, such term shall be interpreted to refer only to surface water, and to subterranean streams flowing through known and definite channels. But nothing in this act shall be construed as giving or confirming any right, or title, or interest to or in the corpus of any water; provided, that the term 'useful or beneficial purposes' as used in this act shall not be construed to mean the use in any one year of more than two and one-half acre feet of water per acre in the irrigation of uncultivated areas of land not devoted to cultivated crops."

It is the contention of appellant herein and its supporting amici curiæ that the concluding clause in the section above quoted expressly so limits the language of section 11 thereof above referred to in respect to the term "useful or beneficial purposes," used therein, as to confine riparian owners using the waters of the rivers and streams of this state for the irrigation of uncultivated areas of their said lands "not devoted to cultivated crops" to the use in any one year of not to exceed 2½ acre feet of water per acre of their said riparian lands. The only possible theory upon which the Legislature of this state could be conceded to be empowered to arrogate to itself the right to determine what are the "useful and beneficial purposes" to which lands held in private ownership shall be devoted or to which those riparian rights, which are an integral part and parcel of such lands and which are already vested rights, shall be limited in their use and enjoyment to the extent declared in the above-quoted concluding clauses of section 42 of said Water Commission Act, is that put forward by certain of the amici curiæ herein to the effect that such an arrogated act of legislation is justifiable as a proper exercise of the police power of the state. It may be conceded that the phrase "police power of the state" has, as to its scope and meaning, been subjected to a quite severe strain of recent years in the endeavor to so expand it as to cover all sorts of legislation sought to be enacted in the asserted interest of modern progress, but we have yet to be referred to a case wherein it has been judicially so far expanded as to invest the legislative department of this state with arbitrary power to destroy vested rights in private property when such rights are being exercised and such property is being employed in the useful and in nowise harmful production of wealth, and when such use and the product thereof cannot be said or shown to be inimical to public health or morals or to the general welfare, but, on the contrary, must be conceded to be beneficial to each and all of these. The use to which the owners of lands contiguous to a river devote its soil by the aid of the waters of such river in the annual production of crops or cattle is such a use. The extent to which such riparian landowners need and use and are entitled to have the benefit of the flow and overflow of such waters under their vested riparian rights therein is a matter which depends upon the circumstances of each particular case; upon location, aridity, rainfall, soil porosity, responsiveness, adaptability to particular forms of production, and many other elements, which render the question essentially one for judicial inquiry and determination in all cases involving the proper use of water upon both cultivated and uncultivated areas. To concede that the state Legislature has the right arbitrarily to fix as to the latter the amount of water which the riparian proprietor may take and use thereon would be to concede an equal power to make a like arbitrary fixation in respect to cultivated areas also, entirely regardless of the foregoing elements which are necessarily the determining factors in such fixation. To concede this would be to concede to the legislative department of the state government the arbitrary power to destroy vested rights in private property of every kind and character.

In the case of Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874, this court had under consideration the extent to which the state had attempted to invest the said commission under the Water Commission Act above referred to with judicial power to determine what is and what is not water subject to appropriation under the terms of said act. In the main opinion, holding that such a question would be a judicial question which said commission could be invested with no power to decide, Mr. Justice Sloane said:

> "What is unappropriated water is a constantly fluctuating question, depending upon the seasonal flow of the stream, the annual rainfall, the forfeiture of prior appropriations and default in the use of riparian rights. To conclude the rights of would-be appropriators by the extrajudicial and perhaps arbitrary action of a board of water commissioners would be to deprive such applicant of a valuable property right without due process of law."

In a concurring opinion, Mr. Chief Justice Shaw, approving this conclusion, states in apt and terse sentences, enforced by ample citation of authority, that the effect of section 1 of article 6 of the Constitution is to vest in the courts the entire judicial power of the state, and that it is not within the power of the Legislature to vest in any other state body any general judicial power to establish and declare the right and title to private property. If this be true, it must be equally and obviously true that, whatever of judicial power the Legislature cannot confer upon agencies of its own creation, other than courts, it cannot arrogate to itself the right to exercise. It is to be noted as highly significant in this immediate connection that the numerous amici curiæ who have presented briefs upon this appeal are in quite radical and vigorous disagreement as to the proper basis of the appellant's asserted rights in the premises. The appellant claims the right to invoke public policy and the police powers of the state in aid of its project for the sequestration of the waters of the San Joaquin river to the full extent of such proposed sequestration, and lays claim to this right both as a riparian owner and as an appropriator of the waters of said stream. The Attorney General of this state appears as amicus curiæ herein to assert that the public interest is directly opposed to the extension of the riparian right so as to include the storage of waters, and that to accord the appellant that right to anything like the extent of its asserted claim would destroy the basis of rights on which much present development in this state depends, and render insecure the basis of rights for much future development. In this insistence the Attorney General is joined by the United States Bureau of Reclamation and by the Irrigation District Association of California, embracing a score or more of the districts of this state. The latter, however, while insisting that the right of storage of these waters should be denied to the appellant as a riparian owner, argues that such right should be allowed to it as an appropriator where such diversion will not result in injury to lower riparian owners. The James J. Stevinson Company, a corporation, and an extensive owner of lower riparian lands upon said river, appears as amicus curiæ to protest against the exercise of the asserted rights of the appellant to the diversion and storage of the waters of said stream either as a riparian owner or as an appropriator, and to urge that the state possesses no power to enact legislation such as that attempted by the Water Commission Act, which would have the effect of destroying already vested rights of riparian owners as established by this court in Lux v. Haggin, supra, and since repeatedly reaffirmed in the cases already cited in this opinion. Certain other public utility power companies appear by eminent counsel to uphold in its entirety the claim of the appellant. "When doctors disagree, who shall decide" as to where the public interest and public welfare lie? Or who shall venture to say that these lie altogether on the side of those quasi public corporations or associations, which, while fulfilling certain public utility functions, are nevertheless organized primarily for private gain, as against the lesser material interests. but not less vitally important vested rights, in private property, in the other scale of the balance? If the state were here essaying to uphold an effort on its part to work out impartially, unselfishly and in the interests of the whole people some general plan or system for the equitable adjustment of rights and uses in its flowing streams with a view to the conservation, development, and distribution of the dynamic forces and generative and fertilizing fructibilities of their waters, it might well be argued that public policy, public interest, and a most liberal interpretation of the police powers of the state might rightfully be invoked in support of such an effort. But can the same be properly said or claimed in a case wherein one or many privately owned and operated institutions, organized primarily for personal and private gain, and only incidentally and secondarily assuming to act in the public interest and welfare, are engaged in controversies in the courts with other private individuals or associations over the asserted and disputed property rights and interests of each of the respective parties to such controversies? We do not feel called upon in this case to so declare.

[18] It is further urged by the appellant herein. and also by certain amici curiæ having identical aims and interests to those of the said appellant, that, because of the fact that this appellant is a lessee and licensee of the United States government, which is the owner of certain of the lands through which the San Joaquin river and its tributaries flow, and on which are or will be located certain of the reservoirs and storage systems now in course of construction or contemplated by it, and because of the fact that the San Joaquin river is a navigable stream, and because the United States government in aid of commerce is in control of all navigable rivers, and because of the fact that the United States government has not only in the past expended large sums of money in the improvement of navigation along the lower reaches of said river but has in more recent years adopted the act of Congress known as the Federal Water Power Act (41 U. S. Stats. at Large, 1063 [U. S. Comp. St. § 9992¼ et seq.]), which said act was intended, among its other purposes, to promote the improvement of navigation upon and along navigable rivers, and because under the provisions of said act and in aid of the administration thereof the appellant has been granted leases and licenses to enter upon, occupy, and use the said lands of the United States and to construct, operate, and maintain thereon a large portion of its contemplated system of reservoirs and storage plants for the purpose of conserving and storing the waters of said river and of thereby developing and transmitting electric power, that said appellant in so doing will be exercising and carrying forward the plans and purposes of the United States government in aid of the navigation of said river, and that in so doing it is in the rightful possession of rights and powers superior to those possessed and claimed by the plaintiffs as lower riparian owners along said stream. In aid of the foregoing assertion of the appellant herein, it may be stated that the Attorney General of the United States has authorized the presentation by oral argument and by briefs as amicus curiæ of the views of that department of the federal government in support of the appellant's aforesaid claims.

We do not deem it necessary in this case to consider or attempt to determine what the full powers and rights of the United States government may be by virtue of the fact that it continues to be the owner of public lands along the upper reaches of navigable rivers and their tributaries beyond the point of their possible or practical navigability. It will suffice for the purposes of the present case to state that the findings of the trial court disclose that the United States government has neither expressly nor by any fair or reasonable implication undertaken to transfer to the appellant herein any right or authority to exercise whatever rights or powers the federal government may possess or be entitled to exercise in aid of navigation upon said river; nor does it appear therefrom, nor was it made to appear by any evidence in the case, that the proposed plans and projects of the appellant for the sequestration, storage and use of the waters of said stream would be in any degree in aid of navigation. On the contrary, the evidence in the case disclosed that the appellant's proposed sequestration and storage of said waters contemplated the diversion from said river of a very large quantum of its waters, that such sequestration thereof was to continue for long and indefinite periods of time, regardless of the seasonal flow of said river, and that certain large and important units of its said proposed reservoir and storage systems were to be cyclic. It further appeared by both the pleadings and evidence offered by the appellant itself that it was under certain contracts with Miller & Lux Corporation, a very large lower riparian owner of said stream and user of the waters thereof for irrigation and other uses, not to return the said waters when finally released by it to said river in aid of navigation, but to deliver the same to the other party to said contracts in furtherance of its private and particular uses thereof as such riparian proprietor along said stream. Under such a state of the record we utterly fail to perceive upon what possible theory the appellant herein can predicate its asserted right as the lessee and licensee of the federal government to a superior use of the waters of said river as in aid of navigation.

Finally, the appellant herein has pleaded and attempted to prove an estoppel on the part of the plaintiffs to interfere with the appellant's alleged project and plans for the construction of its proposed system of reservoirs and storage plants upon the upper reaches of said river and its tributaries arising out of their laches in the assertion of their right to the injunctive processes of the courts if such right they ever had. We do not deem it necessary in this already much extended opinion to go into the details of the appellant's averments and proofs in support of its said plea of estoppel further than to say that the findings and conclusions of the trial court sufficiently dealt with said matter, and that such findings and conclusions were fully supported by the evidence in the case. The trial court found that, as to the appellant's constructive work upon the Huntington Lake reservoir and also upon the Shaver Lake reservoir, and as to the amount of water inpounded in each of these, the plaintiffs had estopped themselves by laches from asserting the present right to enjoin the maintenance and use of these two reservoirs to the extent of the appellant's past and present utilization of the same and of the waters stored or to be stored therein; but that, as to the other and as yet uncompleted and unused units of its reservoir and storage system, no such estoppel had been shown. As to the former two reservoirs, the trial court exempted them and the appellant's use thereof from the terms of its judgment, and from its action in so doing the plaintiffs have taken no appeal. With respect to the appellant's contention and attempted showing that the plaintiffs had not come into the court of equity with clean hands, we entirely agree with the trial court that there was and is no merit in said contention; nor do we deem it necessary to further elaborate upon other points urged by the appellant and by certain of the amici curiæ in support of this appeal.

The main propositions advanced herein have been given full consideration, and, for the reasons educed in the course of such consideration, it is ordered that the judgment herein be and the same is hereby affirmed.

We concur: WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SULLIVAN, J.

SHENK, J. I dissent. The decision in this case is important because of its effect generally upon the conservation of the waters of the state. The main opinion, it seems to me, will result in checking the progress of the state of California in conserving this most important natural resource. It unnecessarily pulls the teeth of the Water Commission Act. In order to have the beneficial use of less than 1 per cent. of the maximum flow of the San Joaquin river on their riparian lands, the plaintiffs are contending for the right to use the balance in such a way that, so far as they are concerned, over 99 per cent. of that flow is wasted. This is a highly unreasonable use or method of the use of water. The opinion not only supports the plaintiffs in that contention, but invalidates sections 11 and 42 of the Water Commission Act, which constitute an endeavor on the part of the state to gather unto itself the waters of the state not used for a reasonably beneficial purpose and make them available for appropriation and use by the state and its inhabitants. It also supports the riparian proprietor in what may be called a vested right to an unreasonable use of water as against an appropriator. It perpetuates the doctrine to that effect announced before the adoption of the Water Commission Act, one of the purposes of which unquestionably was to abrogate the former rule. It affirms the rule laid down in Miller & Lux v. Madera Canal, etc., Co., 155 Cal. 59, 99 P. 502, 22 L. R. A. (N. S.) 391, where it was said that, as between a riparian owner and an appropriator, the riparian owner is not limited in his use of the water by any measure of reasonableness. That case was decided in 1909 before the adoption of the Water Commission Act in 1913. In section 11 of that act the Legislature has provided that all waters flowing in any river, except in so far as the same are or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto or otherwise appropriated, are declared to be public waters of the state and subject to appropriation in accordance with the provisions of the act. In section 42 it is provided that the term "useful or beneficial purpose," as used in the act, shall not be construed to mean the use in any one year of more than 2½ acre feet of water per acre in the irrigation of uncultivated areas of land not devoted to cultivated crops. These statutory provisions are in line with the declared policy of the state. In Pabst v. Finmand, 190 Cal. 124, 135, 211 P. 11, 15, it was said that "the declared policy of this state

[is] to require the highest and greatest duty of water because of the immense importance to the state of the economical use of water," and, as stated in Antioch v. Williams Irr. Dist., 188 Cal. 451, at page 461, 205 P. 688, 693:

> "It may without exaggeration be said that the full use of the waters of the rivers and mountain streams for irrigation, power and like beneficial purposes, is absolutely necessary to the continued growth and prosperity of the state."

The rule that limits the right to the use of water to that which is reasonably necessary for beneficial purposes is now general throughout the Western states, and prevails in this state except as between a riparian owner and an appropriator. The rule of reason in the conservation and use of water has been applied as between appropriators California, etc., Co. v. Madera, etc., Co., 167 Cal. 78, 138 P. 718. It has been applied to the owners of underground water or percolating waters. Katz v. Walkinshaw, 141 Cal. 116, 138, 70 P. 663, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. It has been applied to riparian owners as between themselves. Harris v. Harrison, 93 Cal. 676, 681, 29 P. 325; So. Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 77 P. 767; Turner v. James Canal Co., 155 Cal. 82, 95, 99 P. 520, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823. Since the declaration of this court that the measure of reasonableness in the use of water did not apply as between a riparian proprietor and an appropriator, the state, through the Water Commission Act, has in my judgment, brought the riparian owner within the rule of reasonable use. The Legislature has the right in the first instance to prescribe the standards of beneficial use and reasonable necessity that may be applied to the use of water. If those standards be unreasonable in their entirety or in any given case they may be tested in a judicial proceeding by any party aggrieved, just as police regulations with reference to the ownership of other kinds of property may be tested. Village of Euclid, Ohio, v. Ambler Realty Co., 47 S. Ct. 114, 71 L. Ed. ——. The main opinion brushes aside sections 11 and 42 as an arbitrary usurpation of power by the state resulting in interference with and destruction of vested rights. The state of Oregon, by a similar legislative enactment, has limited the right of the riparian owner to the use of that quantity of water which is actually applied to a beneficial use, in the adoption of its "Water Code" in 1909. In upholding the validity of that provision of the act, the Supreme Court of Oregon said:

> "No one has any property in the water itself but a simple usufruct. It was within the province of the Legislature, by the act of 1909, to define a vested right of a riparian owner, or to establish a rule as to when and under what condition and to what extent a vested right should be deemed to be created in a riparian proprietor." In re Hood River, 114 Or. 112, 181, 227 P. 1065, 1087.

The state of Washington also has restricted the riparian owner to reasonable use when in conflict with an appropriator. In the case of Brown v. Chase, 125 Wash. 542, 217 P. 23, the court said that, where the supply of water in a stream is more than ample for all possible riparian uses, the presumption is that the diversion by a nonriparian user will not injure any riparian right.

In 1850 the Legislature provided that the common law of England should be the rule of decision in all of the courts of this state in so far as it was not inconsistent with or repugnant to the state and federal constitutions and laws of this state. Stats. 1850, p. 219. This provision was codified in 1872. Pol. Code, § 4468. One of the characteristics of the common law is that it contains within itself its own repealer; that is to say, it changes as conditions change and adapts itself to new conditions, ex proprio vigore. It should be applied to our conditions when our conditions are similar to those out of which the common law arose, but, when the common law is not applicable, because of different conditions, it should not be applied. 1 Kinney on Irrigation, §§ 509, 510; Motl v. Boyd (Tex. Sup.) 286 S. W. 458. In Lux v. Haggin, 69 Cal. 255, 4 P. 919, 10 P. 674, the common-law doctrine of riparian rights was applied to water rights in this state. But the conditions prevailing over 40 years ago when that case was decided were far different from the conditions existing at the present time when the growth and prosperity of the state are so dependent upon the proper conservation of the excess waters of its rivers by storage for irrigation and power uses. That the common law, by its own principle, adapts itself to varying conditions and modifies its rules so as to subserve the ends of present requirements was recognized and decided in 1903 in the case of Katz v. Walkinshaw, supra. Rights to the use of real property, heretofore deemed vested, have been curtailed in the interest of the public welfare. It is axiomatic that all property is owned and possessed subject to reasonable regulations under the police power. There is nothing peculiar to a riparian right, which is part of the parcel of land itself, that should exclude it from proper limitations in the interest of the people of the state. It is difficult to conceive of a question more intimately connected with the present and future industrial and economic development of the state than the conservation of the excess waters of its great rivers. The immediate question involved in this case is: How may the waters in excess of the reasonable requirements of the riparian owners be taken and put to a beneficial use? This question the state has endeavored to solve, at least in its initiatory stage, by the adoption of the Water Commission Act.

Citation of authority would seem to be unnecessary to support the proposition that no one may acquire a vested right to waste water in any form. That precise statement was made in the case of Eden Irrigation Co. v. District Court, 61 Utah, 103, 211 P. 957, in the following language:

> "Let it be remembered that no one can acquire a vested right to waste water in any form. In this arid country water is life and may not be wasted. In this connection it is of the utmost importance to remember that no one can acquire an absolute title to water as he can to other property. A person having absolute title to property generally may ordinarily waste it, destroy it, or permit it to go to decay and become utterly useless at his pleasure. This he may not do with water."

Abundant authority to the same effect could be cited. The asserted right of a riparian owner in this state to have the waters of a river flow over or past his land, regardless of the reasonableness of the use or the benefit that such use may be to him, should therefore not be confirmed, especially when such use results in a needless waste and the deprivation of the rights of the state and of those who would use such waters for beneficial purposes under the authority of the state. The case of Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874, cited in the main opinion in support of the holding that sections 11 and 42 are void, did not purport to decide that the Legislature was without power to safeguard the waters of the state from wastefulness and dissipation by the adoption of proper regulations. What that case did decide was that it was not competent for the Legislature to confer upon the state water commission arbitrary power to refuse applications to appropriate waters in conformity with the provisions of the act. The power there sought to be exercised by the comsion, as pointed out in the concurring opinion, was the exercise of a judicial function which it was not competent for the Legislature to confer upon the commission. The sections of the act nullified by the main opinion do not attempt to confer judicial power on the commission. They merely declare the standards of beneficial use to be adhered to unless set aside when subjected to proper judicial test, and there is nothing in this case to indicate that those standards are unreasonable.

As to the particular facts in this case: The appellant is both a riparian owner and an appropriator on the upper reaches of the San Joaquin river. The plaintiffs are the owners of some 18,000 acres of land bordering on the river below. This tract is an uncultivated area of grazing land, not devoted to cultivated crops. In the spring and early summer it is inundated by the waters of the river to such an extent that as such waters flow down the valley they resemble a moving lake. During that season of the year the flow amounts to from 10,000 to 20,000 cubic feet of water per second. The court found that a constant flow of 180 cubic feet per second from April 1 to October 1 of each year would irrigate the lands of the plaintiffs if the same were prepared for intensive cultivation.

> "The amount of water sufficient to cover the ground 2½ feet deep is generally considered plenty if beneficially used; therefore, one second foot should, it has been said, be sufficient to irrigate one hundred to two hundred acres." Weil on Water Rights (3d Ed.) p. 522, citing Hough v. Porter, 51 Or. 318, 95 P. 732, 98 P. 1083, 102 P. 728.

The amount found by the court to be sufficient was therefore no more, and, in fact, was less, than the statute declares may be used for beneficial purposes. In the face of that finding and notwithstanding its admitted support in the evidence, the opinion proceeds to declare said sections of the statute nugatory.

The plaintiffs do not pretend to use or to be able to use the great volume of water that flows by their land on to San Francisco bay in the sense that the term "use of water" is ordinarily employed, namely, for the purpose of sinking into or moistening the soil of their lands. The use they demand is to employ this tremendous flow as a booster or a means of conveyance or of transportation to lift the very small percentage of the flow so useful to them to and over their pasture lands. A more extavagant or wasteful use of water could not be well imagined. Two and one-half acre feet of water is more than annually sinks into their lands. The balance is excess as to them, and, so far as they are concerned, passes on to the sea and is utterly wasted. This waste is not only contrary to the statutory regulation, but it works an injustice to the state which is endeavoring to conserve such waters for useful and beneficial uses by appropriators under the laws of the state.

The main opinion stresses the fact that the court found that the proposed use of the waters of the river by the appellant was and is unreasonable as against the plaintiffs, and that the use by the plaintiffs of the entire flow of the river was necessary to the enjoyment of their riparian right, and that therefore this court is bound by those findings. It may be conceded that the question of reasonableness is usually one of fact for the determination of the trial court, but it is also true that, when the facts found in the light of the evidence disclose a use or a method of use of water that is so excessive and wasteful as to be palpably unreasonable, a question of law is then presented. 40 Cyc. 563. The conclusion of the trial court that the storage plans and enterprise of the appellant will result in an unreasonable use of the waters of the river, and the further conclusion that the natural flow of the river is necessary for the plaintiffs' purposes, are predicated upon the continuance of the present status. Claim for the continuance of that status on the part of the plaintiffs is so unreasonable as to render their position inequitable and to justify the denial of the absolute injunction granted in this case. It would seem that the impounding of the waters by the appellant as proposed could only result in an equalization of the flow of the river with a constant release of sufficient water to develop the contiguous valley to a high state of cultivation and to the ultimate benefit of plaintiffs' lands. In fact it has been said, as to the overflow waters in this locality in the spring and early summer season, that "at such times the San Joaquin river itself is carrying an abundance of water, the excess waters are not needed and are not used, and are rather a detriment than a benefit to the landowners." Miller & Lux v. Enterprise, etc., Co., 169 Cal. 415, 420, 147 P. 567, 569.

If it be assumed that the plaintiffs would suffer detriment in being deprived of the use of such excess waters, wasteful though it be, and if it be assumed that it would not be necessary to reduce that detriment to damnum absque injuria, still the absolute injunction should not be granted. Such detriment would seem to be no more than the cost to the plaintiffs of conforming to a same program of conservation by the construction of necessary diversion works. The court found that such preparation would entail a large expenditure of money, but it did not find the amount that would be required. The cause should at least be remanded for the purpose of ascertaining the amount of that expenditure. In other words, whatever present detriment might accrue to the plaintiffs by reason of being deprived of the lifting facilities afforded by the flow in excess of what they reasonably need should be ascertained. The fact that the appellant possesses the power of eminent domain is not a justification for the injunction as ordered. That the appellant has that right supports the view that the trial court in this proceeding and in the injunction order itself could adequately provide for compensation to the plaintiffs for the damage suffered, if any. In such a case, when—

> "the court can arrive in terms of money at the loss which plaintiff has sustained, an absolute injunction should not be granted, but an injunction conditional merely upon the failure of the defendant to make good the damage which results from its work. * * * The defendant in effect would be held to be damaging private property without just compensation first made to the owner, and, failing to make such compensation, should be enjoined from further damage. For, as was said by this court in Montecito Valley v. Santa Barbara, 144 Cal. 578, 177 P. 1113, in a case similar to this, 'a prohibitory injunction should only be granted if any and all other forms of relief should be found inadequate.'" Newport v. Temescal Water Co., 149 Cal. 531, 87 P. 372, 6 L. R. A. (N. S.) 1098.

In a condemnation proceeding, the court could arrive in terms of money at the loss which the plaintiffs would sustain, and no good reason appears why it may not do so in this proceeding.

I am of the opinion that sections 11 and 42 of the Water Commission Act constitute valid regulations in the interest of the conservation of the waters of the state; that, as between a riparian owner and an appropriator of water, the rule of reasonable use should apply to the one the same as to the other; that the Water Commission Act has properly established that rule, and that this court should hold in harmony with the legislative declaration when such declaration, as here, appears to be just and reasonable in recognition of the vested riparian right; that the appellant, as an appropriator of water, has the right of storage, and should have its reasonable exercise of that right, balanced only against the reasonable exercise by the plaintiffs of their riparian right; that the plaintiffs should not be upheld in their insistence that the present wasteful use or method of use of waters of the river shall continue; and that, in any event, the method of procedure suggested in Newport v. Temescal Water Co., supra, at page 538, should be adopted, viz. that of requiring the trial court in the exercise of the equity power its possesses to find the damage, if any, suffered by the plaintiffs and under the prayer of the appellant for general relief make the "injunction conditional merely upon the failure of the defendant to make good the damage." In that way the extensive project undertaken by the appellant need not be stopped, the preference and other lawful rights of the plaintiffs would be protected, and the state be not impeded in working out its highly important task of conserving the waters of the state for this and coming generations. That such is the duty of the state can admit of no doubt. Its purpose to that end is commended and urged by the Attorney General of the United States, the Attorney General of California, the attorney for the state division of water rights, and counsel for numerous irrigation districts appearing as amici curiæ herein. It seems to me that the appropriate opportunity to interpret the laws of the state in harmony with present day requirements as contemplated by the statute is presented in the case at bar.

80 Cal. App. 641

PHILLIPS v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 3126.)★

(District Court of Appeal, Third District, California. Jan. 12, 1927. Hearing Denied by Supreme Court March 10, 1927.)

1. Street railroads ⟹90(2)—Speed of street car which could not be stopped within 250 feet after collision held negligent.

Evidence that street car could not be stopped within 250 feet after accident in residence section of city *held* to show negligence, in action against street railway company by automobile driver who collided with street car while attempting to pass another automobile at night.

2. Street railroads ⟹112(3)—Street railway has burden of proving contributory negligence.

In action against street railway for injuries in collision between street car and automobile, burden of proving contributory negligence was on defendants.

3. Street railroads ⟹117(26)—Contributory negligence of automobile driver colliding with street car at night in attempt to pass another automobile held for jury.

In action against street railway for injuries in collision between street car and plaintiff's automobile, occurring at night, as plaintiff attempted to pass another automobile, contributory negligence *held* for jury.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Frank Phillips against the Pacific Electric Railway Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Frank Karr, R. C. Gortner, and E. E. Morris, all of Los Angeles, for appellants.
Ford, Bodkin, Watt & Herlihy, and H. L. Watt, all of Los Angeles, for respondent.

FINCH, P. J. Plaintiff recovered judgment against defendant for damages sustained by him in a collision between his automobile and a street car operated by defendants. The defendants have appealed from the judgment.

The collision occurred on Holt avenue in the city of Pomona. Holt avenue runs east and west. There is a single street car line along the street in the south half thereof. It was stipulated by the parties "that from the south rail of the street car track to the south curb of Holt avenue was 25 feet 6 inches, and that the distance from the north rail of said track to the north curb line of Holt avenue is 37 feet, and that it is 5 feet between the rails." On either said of the street, between the curb and the sidewalk there is a row of large pepper trees. Street cars are run along the track in both directions. The collision occurred about 9 o'clock in the evening, May 5, 1923. Four automobiles were going east long the south side of the avenue, plaintiff being in the rear, driving a Ford touring car. Ahead of them, coming from the east, was the defendants' street car. Plaintiff attempted to pass to the left of the automobile ahead of him, and in doing so came into collision with the street car. His automobile was wrecked, and he was seriously injured. The plaintiff testified:

"I had not driven along Holt avenue prior to the collision, but I had crossed Holt avenue. * * * I was traveling between 15 and 18 miles per hour. * * * At that time I did not notice that there was only a single railroad track on Holt avenue. I saw one automobile ahead of me. * * * I was driving directly behind the car that was in front of me. This car was about 6 feet south of the railroad track. Another automobile came along and passed me. * * * It came out onto the street car track, and it then passed the car that was in front of me. At this time I gradually came up on the car that was in front, and I followed the other car around the car that was in front of me. I was approximately 40 feet behind the car that passed me. It was a Buick. * * * touring car, and had a top on it. * * * The first time I saw the street car this Buick dodged off the track, and there was a light coming rapidly towards me, and I tried to get off the street car track, but the street car struck me. * * * I attempted to dodge it. * * * I did not know then what it was. * * * The lights on my automobile were burning at the time of the accident. * * * I had been driving several blocks on Holt avenue before the accident, at least three or four blocks. I drove right along by the street car track. I saw the street car track. When I drove out onto the track to pass the car ahead of me I saw the track then, and I supposed it was a railroad or street car track. * * * After I got on the track, I drove along the track, and I traveled about 75 feet before the collision occurred. * * * I hadn't yet passed the other car that I had been following. I was right up to it. Probably the front end of my car was even with the back end of his (Mitchell's car) at the time of the accident, or probably a little bit further than that. A man named Mitchell was driving the car I was passing. * * * As I traveled on the railroad track I was astride the south rail. * * * The street car was lighted. I saw a light. I suppose it was the headlight I saw. * * * I didn't know cars run on those tracks. * * * I did not see any lights at the top of the street car. I didn't have time to look very much. * * * I did not see the street car before I drove on the track. I did not make any effort to ascertain whether or not a street car was coming before I drove on the track. I didn't expect a street car on that side. I don't remember that I saw the tracks before I drove on. * * * I looked straight ahead, and there was an automobile ahead of me. * * * The reason I could not see the street car was because the automobile was immediately ahead of me. The large Buick automobile was ahead of me on the street car tracks at that time. * * * I did not know it was a single track."

★Hearing denied by Supreme Court.

G. V. Moser testified that "the street car was going over 30 anyway, not less;" that the plaintiff's automobile was thrown or carried to a point about 80 feet west of the place of the collision; that he measured the distance from the point of collision tc the place where the street car stopped after the collision, and that it is 250 feet; that plaintiff "was traveling directly straddle of the south rail"; that the street car had one headlight, and the lights were on inside of the car. "They were very dim. They are never very bright. * * * The street car had just one headlight. It was rather dim. The headlight was approximately as high from the street as an automobile light would be." Other witnesses for plaintiff corroborated the testimony given by plaintiff and Moser. One of them gave the distance from the point of the accident to the place where the street car stopped as 265 to 275 feet. Another witness testified that he was driving west on Holt avenue at the time of the accident, traveling at the rate of 23 to 25 miles an hour, when the street car passed him, and that thereafter he "traveled * * * about 100 feet when the accident happened, and the car had traveled 500 or 600 feet while I was traveling 100 feet." While the estimate of this witness is doubtless erroneous, from his testimony together with that of other witnesses including the distance the car traveled befor coming to a stop, the jury was justified in finding that the street car was running at an excessive speed.

The motorman, who is one of the defendants, testified:

> "I was at that time operating a one-man car that was going westerly on Holt avenue at the time of the accident. * * * We had on this car straight air brakes with emergency features. * * * An emergency application of air on the wheels will slide. * * * I realized that an accident was about to take place just as it took place. I was then about 20 feet from the automobile. Prior to that I had been sitting down. I was coasting; the power was off. * * * When I realized there was going to be a collision, the first thing I did was to apply the emergency application of the air. * * * I have traveled over the street a good deal. * * * If the automobile turned out at all off the track before the collision it was right at the time of the collision. I noticed automobiles on the street at that time, and * * * I think there was about four. There was no automobile between me and Mr. Phillips. He turned right out behind the rear car. I did not see any large touring car in front of him. I was looking straight ahead down the track. * * * I didn't see any automobile turn off from in front of Mr. Phillips. * * * I saw some automobiles driving in an easterly direction. * * * They were south of the track. They were following each other. * * * I am positive they were all off the track when I first saw them. I only saw one automobile on the track, and that was the plaintiff's. * * * When the car came to a stop the brakes were set. * * * I would say from my experience as a motorman that a street car of that type, going at the rate of 15 miles an hour, under the conditions that existed there at that time, after the emergency brakes were applied, would go 80 feet. There were pepper leaves on the track that night. They kept blowing on the track there all the time. I knew that. I had experience prior to that as to what effect they would have on the brakes of the car. I knew it made it more difficult to stop with the pepper leaves on the track. * * * There was no fog that night. * * * The street is rather dark along there on account of the pepper trees. The pepper trees are so large that they reach clear out into the streets so the leaves drop on the track. They extend about half way into the street. * * * I operate along there daily and when there are pepper leaves on the track. * * * The automobiles were going at a moderate rate of speed. * * * I don't know how fast the automobile was going that was in the collision. * * * It was going a little bit faster to be able to try to get around, but it didn't get around. * * * My headlight was burning, and the car was lighted inside. There are also two red lights just below the roof, directly in front of and just below the roof. * * * The two red lights on the front of the street car were lighted that night. * * * After the accident, I walked back over where the automobile was, and saw where I had slid on the rail. * * * I could feel the brakes take hold. They took hold right at the place. Approximately right at the time."

[1] Appellants ask for a reversal of the judgment on two grounds: First, that the evidence does not show that the defendants were guilty of any negligence; second, that the evidence conclusively shows that the plaintiff was guilty of contributory negligence. It is clear from the evidence herein set out that it is sufficient to warrant the inference that, under the circumstances shown, the street car was running at an excessive rate of speed. It is certainly negligence to run a street car through a residence section of a city at such a rate of speed that it cannot be brought to a standstill, under known conditions, within a distance short of 250 feet, and the jury may have reasonably inferred from the evidence that but for such excessive speed the plaintiff would have safely passed the automobile ahead of him.

[2, 3] The burden of proving contributory negligence was on the defendants. "It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown." Seller v. Market-Street Ry. Co., 139 Cal. 268, 271, 72 P. 1006; Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125; Rosenbloom v. Southern Pacific Co., 59 Cal. App. 102, 111, 210 P. 53; Wing v. Western Pacific R. R. Co., 41 Cal. App. 251, 257, 182 P. 969. In attempting to pass the automobile ahead of him, plaintiff was at all times on the south half of the street. It is unusual for a single street car track to be placed so far to one side of the center line of the street as that in question here was placed. The plaintiff did not know that it was a single track line, and, therefore, did not expect to meet a street car traveling west upon it. By reason of that assumption, he did not look for an approaching car. The Buick automobile in front of him hid the street car from his view. Had there been a double line of tracks in the street, plaintiff's acts would not have been negligent. Under the circumstances disclosed by the evidence it cannot be said, as a matter of law, that the plaintiff was negligent, but the question was one of fact for the jury. The case is somewhat analogous to that of Wing v. Western Pacific R. R. Co., supra. That was an action to recover damages for personal injuries received while crossing a spur track which was under construction, after having safely crossed the main tracks of the defendant. The court said:

> "The reasonable construction of plaintiff's entire testimony is that, while he looked for danger when crossing the main tracks and saw the car standing on the main tracks about six hundred feet from the crossing, he, nevertheless, considered all danger was passed when the main tracks had been crossed, and took no more notice. 'I take care of myself, not for the track, because I see I pass through the two tracks. I didn't take no more notice.' In other words, he neither regarded the spur-track in its then condition as a sign of danger nor took the precautions which the law would have required of him if it had been such. Did his failure to do so constitute contributory negligence as a matter of law, or was that a question of fact to be determined by the jury? In our opinion, it was the latter."

The judgment is affirmed.

We concur: PLUMMER, J.; PRESTON, Justice pro tem.

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80 Cal. App. 513

FANTA v. MADDEX. (Civ. 5329.)★

(District Court of Appeal, First District, Division 1, California. Dec. 29, 1926. Rehearing Denied Jan. 27, 1927. Hearing Denied by Supreme Court Feb. 24, 1927.)

1. Landlord and tenant 🔑79(2)—By lessor's acceptance of assignment of lease, privity of contract and of estate was created between lessor and assignee, and latter acquired leasehold estate for remainder of term.

Where lessor accepted assignee as tenant under terms of lease, subject to all terms of lease, privity of contract and privity of estate were created between lessor and assignee, and assignee acquired leasehold estate for remainder of term provided for in lease.

2. Landlord and tenant 🔑79(2)—Receipt given lessee by lessor, stating balance due under lease, at time of assignment, could not operate to shorten term of lease assigned, as against assignee not party to settlement.

Receipt given lessee by lessor, adjusting difference between parties, on which was stated balance due under lease, at time of assignment, to be paid by assignee, could not operate to shorten term of lease assigned, as against assignee not a party to it.

3. Landlord and tenant 🔑79(2)—Written assignment of lease superseded prior oral negotiations, so that term stated in lease controlled (Civ. Code, § 1625).

Written assignment of lease superseded previous oral negotiations, in which assignee was shown receipt given lessee, in which balance still due under lease was stated, in view of Civ. Code, § 1625, so that term stated in written lease was controlling.

4. Landlord and tenant 🔑71—Time of completion of building was controlling under lease to commence on completion, even though construction was delayed.

Under lease providing for term commencing on day building should be completed, time of completion was controlling as to commencement of term, even though building was not completed until two months after it was expected to be at time of making lease.

5. Landlord and tenant 🔑235—Judgment entered on inconsistent findings on material issue, in suit for rent, could not stand.

In action for rent due under lease providing for term of ten years after completion of building, where trial court found that leased building was completed February 1, 1913, and also found that term of lease expired November 30, 1922, judgment based on such inconsistent findings on material issue could not stand.

6. Trial 🔑404(1)—Finding that building was completed "by" February 1st meant as soon as, not later than, February 1st.

In action for rent under lease providing for ten-year term after completion of building, finding that building was completed and ready for occupancy "by" February 1st meant as soon as, not later than, February 1st.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, By.]

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action for money by Julia Fanta, executrix of the last will and testament of B. Fanta, deceased, substituted for B. Fanta, against W. T. Maddex. From a judgment for plaintiff, defendant appeals. Reversed.

Harry Lyons, of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment rendered in favor of

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★Hearing denied by Supreme Court.

respondent and against appellant, in the sum of $5,000, with interest thereon from February 1, 1923.

In the month of September, 1912, B. Fanta, now deceased, was constructing an apartment house on the corner of Union and Tenth streets, in the city of Los Angeles. On September 20, 1912, he entered into a lease of the apartment house then under construction and known as the "Fanta Apartments," leasing the same to Louettie A. Zuber for a term of ten years, "commencing on the day said building shall be completed and ready for occupancy for the purpose of an apartment house," and providing that the first month which the lessee should occupy the premises should be free, and that the lessee should not be required to pay any rental for such month. The rental provided to be paid by the lease was $47,600 for the ten-year term in installments as follows: $400 on the execution of the lease, for which the lessor was to give a receipt for the rental for the month of January, 1913, and $400 on the first of each and every month thereafter during the term of the lease, until the whole sum of $47,600 was paid to the lessor by the lessee. The lease further provided that should the lessee hold over after the expiration of the term with the consent of the lessor, expressed or implied, said tenancy should be deemed a tenancy from month to month at the rental of $400 per month.

At the time the lease was entered into, it was expected that the building would be completed and ready for occupancy by the 1st day of December, 1912, and that the lessee should have the use of the building, rent free, during that month, and that her rent should commence on January 1, 1913. The contractor of the building abandoned his contract, and plaintiff completed it on force account. The building, as found by the court, "was completed and ready for occupancy, for all purposes for which the same was leased, namely, an apartment house, by the 1st day of February, 1913."

During the year 1913 Louettie A. Zuber was making claim against the lessor for damages because she did not get into the premises in the month of December, 1912. She paid rent at the rate of $400 per month for the 12 months of the year 1913. In December of that year she desired to assign the lease to appellant. This assignment the lessor, B. Fanta, declined to consent to unless Louettie A. Zuber would waive her claim for damages. On December 30, 1913, Louettie A. Zuber and B. Fanta adjusted their controversy, and Fanta delivered to Mrs. Zuber, appellant's assignor, a receipt acknowledging one year's rent from January, 1913, to January, 1914. In consideration thereof appellant's assignor released B. Fanta from all claims and demands growing out of the latter's failure to complete the building on time, and at the same time appellant's assignor delivered to appellant the following instrument:

"For valuable consideration, I hereby assign, set over, and transfer all my right, title, and interest to the within lease to W. T. Maddex, subject to the same terms of said lease and all the conditions therein set out, which the said assignee hereby assumes, and subject to the mortgage of B. Fanta, now of record, covering the furniture in said building in accordance with the terms of said lease and said mortgage.

"Dated December 30, 1913.

"Mrs. L. A. Zuber.
"W. T. Maddex.

"I hereby accept the above assignee as tenant under the terms of said lease subject to all the terms of said lease and said mortgage.

"B. Fanta.

"Dated December 30, 1913."

The receipt given to Mrs. Zuber by B. Fanta is as follows:

"Received of Mrs. L. A. Zuber $4,800 in full for rent on lease September 20, 1912, on apt. building, Union avenue and Tenth street from Jan. 1, 1913, to Jan. 1, 1914. Balance of $42,800 to be paid by W. T. Maddex, her assignee. B. Fanta."

Upon the execution of the assignment of the lease, appellant entered into the possession of the premises, occupying them until the last day of February, 1923, when he surrendered the possession and moved out. On February 1, 1923, he tendered the lessor $400 as rent for such month of February, which the lessor refused.

[1, 2] By said assignment and assent respondent accepted appellant as tenant under the terms of said lease and subject to all provisions thereof. A privity of contract, in addition to a privity of estate, was created thereby between the lessor and appellant (Realty Co. v. Rea, 184 Cal. 565, 194 P. 1024), and appellant acquired a leasehold estate for the remainder of the term; that is to say, for the time remaining from the date of the completion of the building as provided in said lease. The receipt given by respondent to appellant's assignor could not operate to shorten the term of the lease, but was a mere acknowledgment by way of compromise of the receipt of rent for the premises up to January 1, 1914.

It was an adjustment of a difference between B. Fanta and Louettie A. Zuber and not binding on appellant, who was not a party to it, and could not operate to change the terms of the written assignment executed by Louettie A. Zuber and appellant, and which was accepted in writing by B. Fanta, now deceased, but formerly the plaintiff in the action and for whom respondent, as executrix of his will, has been substituted.

[3] Respondent urges that, while there is a conflict in the evidence as to whether appellant knew of the receipt given by B. Fanta to his assignor, Julia Fanta testified that all the papers were executed at the same time and as one transaction, and that appellant was shown the receipt and agreed thereto.

His agreement thereto is, at best, but an oral agreement which preceded or accompanied the written assignment of the lease executed by Louettie A. Zuber and himself, and which written assignment superseded such oral negotiations. Civ. Code, § 1625. This principle is so well established that it does not require the citation of authorities.

[4] The intention of the parties to retain all the terms of the lease is evidenced beyond any doubt by this assignment to appellant, executed at the same time, wherein it was expressly stipulated that the terms of the lease remained in force, and that the assignment was made subject to all of its terms. The contention of respondent, accepted by the trial court in its findings, that by means of a mathematical calculation of the total rental to be paid under the lease and the recitals of the receipt, the amount of rent was fully paid up by November 30, 1922, is irreconcilable with the fact that the building was not completed or ready for occupancy on the 30th of November, 1912, and the court found that the building was not completed for some two months later. The time of the completion of the building is controlling under the lease as to the commencement of the term thereof. As has been said, it is obvious from the lease that the parties understood that the building would be completed by the 1st of December, and it is equally evident therefrom that the term of the lease was fixed for the period of ten years from the date of such completion.

In the case of Lang v. Pacific Brewing, etc., Co., 44 Cal. App. 618, 187 P. 81, it was provided in the lease that the term should commence on the 1st day of August, 1907, and continue for ten years thereafter, provided that the building would be erected by that time, and it was stipulated that, in the event of the failure of the lessor to erect said building by said time, no rental should be payable by the lessee. The building was not completed by the 1st day of August, 1907, but was completed only in January, 1908, and the lessee entered into possession at that time. On the 1st day of August, 1917, the lessee surrendered possession, claiming that the term of the lease expired on that day. The lessor refused to agree to such termination and contended that the term of the lease began only when the building was completed and ready for occupancy and did not expire until ten years from that day, that is to say, on February 1, 1918. He brought an action to recover the rent for the period of six months, and the court held that, under the terms of the lease expressing the evident intent of the parties, the term of the lease did not begin until the building was ready for occupancy.

From that case we quote the following:

"They had in mind, and the lease provided for, the erection of a building on the demised premises. They also contemplated, and the lease specifies, a ten-year term. As the lease was executed May 1, 1907, and as the term did not, by its express provision, begin until the 1st day of the succeeding August, it is only reasonable to suppose that the parties likewise considered that three months was an adequate period of time within which to erect a building. * * * Viewed in the light of the circumstances under which the lease was made, and the matter to which it relates (Civ. Code, § 1647), it is not hard to conclude that the parties understood, and fully intended, that the period granted defendant to occupy, and have possession of the premises, began when the building was completed and occupied, and that the term of the lease was for the ten years thence next ensuing."

[5] The trial court in the instant case found that the leased building was completed by the 1st of February, 1913. The lease provided for a ten-year term after such completion. Hence the term of the lease, under such finding, expired by the 1st of February, 1923. The court, however, also found, in complete contradiction to the foregoing finding, that the term of the lease expired on the 30th day of November, 1922. The last-mentioned finding, in view of the fact that the leased building was not completed and ready for occupancy as an apartment house, as found by the court, until the 1st of February, 1913, involves the incongruity that the lessee is made liable to pay rent for two months prior to the occupation of the building and before the same was ready for occupancy. These two findings cannot be reconciled. The determination of the main issue in the case depends upon whether or not the term of the lease expired the 1st of February, 1923, as follows from one of such findings, or two months before that time, as it is implied by the other finding. This conflict in the findings of the trial court leaves the judgment without support.

"It is apparent, we think, that the findings above quoted are inconsistent and contradictory; and that the contradiction thus presented is not merely formal and about things not essential—such as frequently creeps into findings inadvertently. The contradiction is, in our opinion, important, material, and fatal to the judgment, * * * and how can we take one of these findings as true, and disregard others which are directly contradictory of it? The rule on this subject may safely be said to go this far, at least, that where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way or the other, is essential to the correctness of the judgment, there the judgment cannot stand." Learned v. Castle, 78 Cal. 459, 21 P. 12.

No judgment can properly be entered when the court finds both for the plaintiff and the defendant on a material issue. Reese v. Corcoran, 52 Cal. 495; Carman v. Ross, 64 Cal. 249, 29 P. 510; Richards v. Dower, 64 Cal. 62, 28 P. 113; Sloss v. Allman, 64 Cal. 47, 30 P. 574; Gilman v. Curtis, 66 Cal. 116, 4

P. 1094; Randall v. Hunter, 66 Cal. 512, 6 P. 331; Kerns v. McKean, 65 Cal. 411, 4 P. 404.

[6] Respondent urges that, even though a strict reading of the findings might indicate a conflict, it would be an immaterial one—that by the use of the word "by" the court did not find that the building was completed "on" the 1st day of February, 1913. The word "by," as used in the connection in which the court used it in finding that the building was completed and ready for occupancy by February 1st means as soon as, not later than, February 1st—that that was the time the lessee was charged with occupancy, but could not possibly mean that it was completed and ready for occupancy two months earlier.

If the finding that the building was completed by February 1, 1913, be deemed correct—and there is no evidence to the effect that it was completed prior to that time—the lessor himself admitting that the building was not completed prior to that time, the term of the lease expired on February 1, 1923. On the other hand, if the finding that the total rental was fully paid up on November 30, 1922, be considered correct and be understood to mean that the term of the lease expired on that day, such finding is in conflict with the terms of the lease, as well as in conflict with the other finding that the building was completed and ready for occupancy for all purposes for which the same was leased by February 1st.

The point is made that, under the terms of the lease, the lessor could not invoke the right accorded a landlord, under section 827 of the Civil Code, to change the terms of a tenancy from month to month and increase the monthly rental from $400 to $5,000, but from the view we have taken, this point becomes immaterial, as the case must be reversed for the reasons given.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 464

PEOPLE v. FRAZER. (Cr. 1373.) ★

(District Court of Appeal, Second District, Division 2, California. Dec. 28, 1926. Hearing Denied by Supreme Court Feb. 24, 1927.)

1. Criminal law 🔑511(2)—If incriminating evidence, standing alone, connects defendant with offense, every fact testified to by accomplice need not be corroborated (Pen. Code, § 1111).

Under Pen. Code, § 1111, incriminating evidence need not be corroborative of every fact testified to by accomplice, but, standing alone, must tend to connect defendant with commission of offense.

2. Criminal law 🔑511(7)—Testimony of accomplice may be sufficiently corroborated by confession or admission of defendant.

Confession or admission by defendant, in criminal case, may be sufficient corroboration of testimony of an accomplice.

3. Criminal law 🔑517(4)—Testimony of accomplice may sufficiently prove corpus delicti to warrant introduction of admissions or confessions.

Corpus delicti may be sufficiently proved by testimony of accomplice to warrant introduction of admissions or confessions of defendant.

4. Criminal law 🔑511(7)—Testimony of accomplice, in prosecution for bribery, held sufficiently corroborated.

Testimony of accomplice, in prosecution for bribery of traffic officer, *held* sufficiently corroborated by evidence of defendant's admissions and manner of handling check.

5. Criminal law 🔑517(4)—Proof of corpus delicti by accomplice testimony, sufficiently corroborated, held not ground for complaint.

In bribery prosecution, proof of corpus delicti by accomplice testimony, sufficiently corroborated, *held* not ground for complaint by defendant.

6. Bribery 🔑1(2)—Traffic officer's fixing of bail, acceptance of check therefor, and release of prisoner held official acts, not the performance of unauthorized judicial functions.

Traffic officer, in fixing bail for reckless driving and drunkenness, and in accepting check therefor and releasing prisoner from jail, *held* to have been acting in his official capacity, and not performing unauthorized judicial functions affecting liability for bribery.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Thomas P. Frazer was convicted of bribery, and he appeals. Affirmed.

George H. Shreve and Arthur L. Dorn, both of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, J. This appeal is from a judgment convicting the defendant of the crime of bribery and from an order denying his motion for a new trial.

The facts were as follows: The defendant was a traffic officer of National City, Cal.; on September 17, 1925, the defendant, together with a fellow officer, John J. La Porte, arrested one C. C. Young, the chauffeur of Mrs. Arthur Jacobs, on a charge of reckless driving and also on a charge of drunkenness on the streets, in violation of a city ordinance. Waiting some little time after the arrest, according to her testimony, Mrs. Jacobs approached the defendant and asked how she might get her chauffeur out of jail. She was told that the bail was $100 and that

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★Hearing denied by Supreme Court.

the defendant could not take a check for bail. She then says she asked the defendant to drive her to the Grant Hotel in San Diego, where she might cash a check through the manager of the hotel; that upon arriving at the hotel they found the manager to be out, whereupon she asked the defendant if he would accept a check for $50 in addition to her check for $100 and was told that he would not, but he did agree to accept a check for $100 in addition to the check for the amount of the bail and release C. C. Young; that defendant then wrote out a check for $100, payable to the city recorder of National City, and Mrs. Jacobs drew another to cash for $100, both of which were signed and delivered to defendant. The defendant gives a different version of the transaction which this appeal does not require us to repeat. The check of the city recorder was delivered to him and subsequently paid; Young was released from jail. On September 25 the defendant cashed the check made out to cash and with the proceeds opened a new account in the First National Bank of San Diego. Mrs. Jacobs, however, stopped payment on this check through the bank upon which it was drawn, the Crocker National Bank of San Francisco.

It is the position of appellant that inasmuch as Mrs. Jacobs was an accomplice, in the eyes of the law, the testimony falls short of that required in this: That there was no corroborating testimony of the agreement on the part of the defendant to accept the check for $100, and, in return, accept bail in the form of a check, and release the chauffeur. He claims that it falls short in two particulars: First, that there is not sufficient corroborative testimony to connect the defendant with the crime; second, that the agreement is an essential element of the offense and is here made to rest entirely upon the testimony of an accomplice. He also contends that, in fixing the amount of bail, determining that a check was sufficient, and releasing the prisoner the defendant was performing judicial functions, and that, inasmuch as he was a police officer, he could not be bribed to perform an act outside of his own official duties.

With respect to the first objection, it is necessary to recite the corroborating testimony. It consisted of testimony by the assistant cashier of the Crocker National Bank to the effect that the check was presented in due course to the bank and refused payment on account of its payment having been stopped by Mrs. Jacobs, and the identification of a photostatic copy of the check and indorsements, including the signature of the defendant, and also testimony of the assistant cashier of the First National Bank of San Diego to the effect that on September 25 the defendant presented the check to the bank last mentioned, indorsed it, received the money, opened a new account with the proceeds, and told the witness he had received the check for driving Mrs. Jacobs from National City to San Diego while off duty, and asking him if he thought it advisable under those circumstances to use it. This statement made to and the question propounded to the witness by the defendant is of greater weight than might otherwise be the case, when considered in connection with his own testimony on the stand, in substance, that after he had released Young and alighted from Mrs. Jacobs' automobile she reached out of the window saying, "Here is a remembrance for you," which remembrance turned out to be the check in question. Also, the check made out to the city recorder was introduced.

From this recital we think it is evident that every essential of Mrs. Jacobs' testimony was corroborated, except possibly that portion which relates to the agreement between Mrs. Jacobs and the defendant. And here we are confronted by the statements made by the defendant to the assistant cashier of the First National Bank of San Diego, and the question propounded by him. There was a hesitancy as to whether the check should be used. Further, on cross-examination, the defendant stated that after he had told Mrs. Jacobs that he would accept a check as bail she made offers of "fifty or one hundred," saying "It was worth anything in the world to get her chauffeur out of jail."

[1] The rule of law, under section 1111 of the Penal Code, is stated very clearly in the case of People v. Kelly, 69 Cal. App. 558, 231 P. 767, where many of the authorities are gathered, to the effect that:

> "It is not necessary that such incriminating evidence be corroborative of each and every fact testified to by the accomplice; but all that is required is that, standing alone, it tends to connect the defendant with the commission of the offense. It may be slight (People v. Melvane, 39 Cal. 616) and of itself entitled to but little consideration (People v. McLean, 84 Cal. 482, 24 P. 32)."

[2] There are plenty of authorities to the effect that a confession or an admission is sufficient corroboration, and in the case of People v. Armstrong, 114 Cal. 574, 46 P. 612, it was held that flight, followed by an expression of astonishment by the fleeing person at being overtaken and by his statement that, had he not been surprised, he would have resisted arrest, although he attempted to explain his flight by the claim that "before the theft of the horse the defendant was, as he put it, 'taking precautions to avoid running into an officer,' being apprehensive of arrest for some breach of the peace," was sufficient coroboration of the testimony of an accomplice.

[3] It has been held in a number of cases that the corpus delicti may be sufficiently proved by the testimony of an accomplice to

warrant the introduction of admissions or confessions of the defendant. People v. Richardson, 161 Cal. 552, 563, 120 P. 20; People v. Leavens, 12 Cal. App. 178, 106 P. 1103; People v. Barnnovich, 16 Cal. App. 427, 117 P. 572; People v. Tobin, 39 Cal. App. 76, 179 P. 443; People v. Snyder (Cal. App.) 239 P. 705.

[4, 5] We are satisfied that, under the rules thus laid down, there was not only sufficient corroborative testimony tending to connect the defendant with the offense charged, but also that, having been sufficiently corroborated in this respect, the appellant may not complain that the corpus delicti was proved by the testimony of the accomplice. Furthermore, the hesitancy of the defendant in making use of the check and his dubious tale of its acquirement are certainly as potent in corroboration as was the admission made by the defendant in the Armstrong Case.

We have next to consider whether the defendant could be bribed with respect to the acts done by him, to wit, fixing the bail, determining that a check would be sufficient, and releasing the prisoner from jail. Appellant says that he was exercising a delegated judicial authority and that the reward was for guaranteeing Mrs. Jacobs' check for bail. There was, in fact, no guaranty, and the contention in this particular brings home most forcibly the fact that the influence exerted by the second check did corrupt the action of the defendant and cause him to accept a check which otherwise he would have refused. It was conceded by both counsel at the trial that the custom prevailed in National City by permission of the city recorder for the officer to determine the amount of bail in such cases, in accordance with a schedule adopted by the recorder for that purpose.

[6] It does not seem to be debatable that defendant's acts were in his official capacity. The authority conferred upon him by the recorder was by virtue of his office, and not by virtue of a personal confidence reposed in the individual. This last statement is not made with the idea of indicating that it would necessarily make any difference, but only to point out more clearly that appellant was acting in his official capacity. And we think that, being an act in his official capacity, there can be no doubt that the offense was made out. In Harris v. Superior Court, 51 Cal. App. 15, 196 P. 895, a somewhat similar contention was under consideration, and, after reviewing and citing from the authorities upon the question, the rule is laid that:

> "Where an officer of the law becomes *directly or indirectly* vested with power to take or not to take some official action, he is guilty of bribery if he corruptly offers for a reward to forego official action." (Italics ours.)

In that case, the officer did "offer to forego official action." In this action, the official action was corruptly influenced. There is no distinction. As was said in Barefield v. State, 14 Ala. 603, quoted with approval in People v. Markham, 64 Cal. 157, 30 P. 620, 49 Am. Rep. 700, Harris v. Superior Court, supra, and People v. Lips, 59 Cal. App. 381, 211 P. 22:

> "The offense consists, in contemplation of the statute, in poisoning and corrupting the source and fountain of justice, and although the particular deleterious consequence designed to be effected by the parties has not ensued, the state, nevertheless has an officer corrupted, and society has lost all protection for its rights, so far as the administration of the law by him is concerned."

The judgment and order are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

80 Cal. App. 623

PEOPLE v. ARNOLD. (Cr. 1393.)

(District Court of Appeal, Second District, Division 1, California. Jan. 11, 1927.)

1. Criminal law 🔑1170(1) — Excluding evidence of whereabouts of prosecutrix nine months before birth of child held not prejudicial, where defendant failed to show impossibility of access.

Where state sought to prove rape by birth of child in month of November, sustaining objection to question put to mother as to whether 13 year old prosecutrix stayed at particular place during month of February, if error, *held* not prejudicial, where unaccompanied by offer of proof that defendant had no opportunity for intercourse during that period; it being immaterial that during such time other men may have had access to prosecutrix.

2. Criminal law 🔑918(1)—Nonprejudicial error is not available as ground for new trial.

Error, in order to be available as ground for new trial, must be shown to have been prejudicial.

3. Criminal law 🔑1170½(2)—Sustaining objection to question whether prosecutrix would kiss any men present held not prejudicial, where answered in negative before objection.

Sustaining objection to question as to whether prosecutrix, 13 years of age, would kiss any men present, if error, *held* not prejudicial, where witness had answered question in negative before court sustained objection, and where no motion was made to strike out answer.

4. Criminal law 🔑1170(1)—Rejecting evidence of identity of handwriting on log containing name of prosecutrix and another man, and date, held no ground for reversal, where rape at another time was claimed.

Sustaining objection to question asked handwriting expert as to whether names of 13 year old prosecutrix in rape case and another man and date written on log were not all written by same individual, prosecutrix having admitted writing names, *held* no ground for reversal, where acts of intercourse at different times were claimed, and where proposed testimony would probably have had no more than cumulative effect in impeaching prosecutrix.

5. Criminal law 🔑1036(1)—Excluding evidence held no ground for reversal, in absence of offers of proof, where damage inconsequential.

In rape prosecution, sustaining objection to questions *held* no ground for reversal, where no offer of proof was made, questions were compound and impeaching in character, and no foundation was laid therefor, and damage, if any, resulting from sustaining objections, was very slight.

6. Rape 🔑52(2)—Though defendant was claimed to be father of prosecutrix's child, court's statement that proof thereof was unnecessary, if intercourse proved, held not error.

Where several acts of rape on 13 year old girl were charged, and birth of child was shown as part of state's proof, statement of court that it was not necessary to prove that defendant was father of child, if defendant and prosecutrix had intercourse on or about date alleged in information, *held* proper statement of law, and nonprejudicial.

7. Criminal law 🔑1166½(12)—Charge that testimony showing rape just before May was not inconsistent with statement that act occurred in March held cured by instructions.

Statement of court that prosecutrix's testimony as to commission of statutory rape just before May was not inconsistent with former statement that act occurred in March, if error, *held* not prejudicial, in view of charge that testimony of prosecutrix should be carefully scanned and acted on with great caution.

8. Criminal law 🔑1159(1)—Jury held final arbiter of facts in rape prosecution.

In prosecution for rape, jury *held* final arbiter of facts.

9. Rape 🔑52(1)—Evidence held sufficient to sustain conviction in prosecution for rape of 13 year old girl.

In prosecution for rape of 13 year old girl, evidence *held* sufficient to sustain verdict of guilty.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Carl Arnold was convicted of rape, and he appeals. Affirmed.

Thomas Scott, Jr., and Dorris & Henderson, all of Bakersfield, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted of the crime of rape on the person of a girl of the age of 13 years. He appeals from the judgment and the order denying his motion for a new trial.

From the testimony given by the prosecutrix, which was corroborated by her 10 year old sister, it appears that the act of which defendant was found guilty was committed on or about March 23, 1925. There was other evidence tending to establish the case against defendant, including the facts that one witness testified to having seen defendant and the prosecuting witness in a most compromising situation on one occasion, and another witness testified that on another occasion, in the presence of herself and several other persons, defendant "grabbed Marie (the prosecutrix), and put a big bite on her neck that was about that size around (indicating), monkey bite, I think they call them." It also appears in evidence that on November 24, 1925, which was 8 months and one day after the alleged criminal act of defendant toward the prosecutrix occurred, the prosecutrix gave birth to a fully developed child. The prosecutrix testified further that approximately ten separate acts of sexual intercourse had taken place between her and defendant, some of which occurred before the date of the particular act specified in the information.

[1] The first irregularity in the trial of which appellant complains is that the trial court sustained an objection interposed by the people to the following question which had been asked by counsel for defendant of the mother of the prosecutrix: "Q. Now, during the month of February, 1925, did Marie stay at Granite all the time?"

[2] As having a bearing upon the materiality of such question, appellant urges that, because the child born to the prosecutrix was fully developed at its birth on November 24, 1925, instead of its having been conceived on March 23, 1925, it "must have been begotten late in February or early in March," and that, in order to rebut the charge that defendant was the father of the child, defendant had a right to show, first, that, because of the possible absence of the prosecutrix from Granite during the month of February, 1925, men other than defendant had opportunity of intercourse with the prosecutrix during the particular period in which, as he contends, the child was conceived; and, secondly, that defendant had no such opportunity during such time. But, assuming (without deciding) the materiality of the question, no offer of proof was made that during the month of February, 1925, no opportunity was open to defendant to have sexual intercourse with the prosecutrix; and it was immaterial that during such time men other than defendant may have had access to the prosecutrix. It is a cardinal rule that error, in order to be available as a ground

for new trial, must be shown to have been prejudicial.

[3] Complaint is also made that further error was committed by the trial court in sustaining an objection to a question propounded by the attorney representing defendant to a witness as follows: "Q. Now, Marie would go up and kiss any of the men that were there, wouldn't she, and throw her arms around them?"

Appellant's argument is based upon the assumption that the answer of the witness would have been in the affirmative. However, it appears from the transcript of the proceedings had at the trial that the witness actually answered the question, "No, sir," and thereafter the court sustained an objection to the question. No motion was made to strike out the answer, and, so far as the record discloses, it was left for the consideration of the jury. It is therefore clear that no harm resulted to defendant by reason of the fact that the objection to the question was sustained by the court.

[4] The evidence shows that the prosecutrix testified that one of the acts of intercourse between her and defendant occurred on July 15, 1925. In rebuttal defendant produced a piece of log with some writing on it, which included the name of the prosecutrix, the name of a man other than defendant, and the date of July 15th—all of which, with the exception of the date, the prosecutrix admitted was in her handwriting. In connection therewith defendant asked of an expert on handwriting the following question:

> "Q. At the time you examined this Defendant's Exhibit A for the purpose of identification at the trial of the case of the people of the state of California against Carl Arnold in department 1 here about three or four months ago, I will ask you to state whether or not the names that appear there on the face of this exhibit and the date that appears on the face of it, was it written by one and the same person?"

The trial court sustained an objection to the question, and prejudicial error is predicated thereon.

The question is not clear; but, assuming that it was intended, and was understood by the witness, as an inquiry as to whether in his opinion all of the handwriting on the log was that of one individual, and that the offer of proof by defendant was sufficient to apprise the court and the opposing counsel of his intention in the premises, the materiality of the question, other than the possibility of drawing an inference from its answer that on the date in question the prosecutrix was in the company of some man other than defendant, and to reason therefrom that the prosecutrix was not telling the truth regarding the matter, is not apparent. The record discloses several conflicts in the testimony as between the prosecutrix and other witnesses; and the reception of the proposed testimony probably would have produced no result other than to act accumulatively with other similar evidence toward the impeachment of the prosecutrix, and concretely raise a question in the minds of the members of the jury as to which witness was correct with reference to the handwriting on the log, which, in itself, was of minor importance. From the evidence, including any statement which might have been made by the expert on handwriting, it is possible that the jury would have concluded either that the prosecutrix was mistaken as to the date of the alleged occurrence on July 15th, or even that she had deliberately misrepresented the facts concerning it, and yet, in view of strong corroborative evidence, have been fully convinced that she spoke the truth as to the happenings on March 23d, as charged in the information.

[5] A situation similar in many respects arises with reference to three other questions which were asked by defendant's counsel of three several witnesses, and to which questions objections were sustained by the trial court at the instance of the prosecution. In addition to the point that, as to each of such questions, there was nothing to indicate what the answer to it would have been, no offer of proof was made in connection therewith. Furthermore, one of the questions thus propounded was compound in its nature, besides being objectionable from several other standpoints, including the objection that it was impeaching in its character and that no foundation was laid therefor. Moreover, it clearly appears, considering the circumstances, that the damage, if any, which resulted to defendant by reason of the refusal of the trial court to permit any or all such or any other questions to be answered was so slight that this court would not be justified in ordering a reversal of the judgment on account thereof.

[6] Appellant presents the point that the defendant was prejudicially affected in his substantial rights by reason of the statement made by the judge of the trial court that "it isn't necessary to prove whether Mr. Arnold was the father of the child or not."

Appellant's point is that, inasmuch as the prosecution had seen fit to produce the child, and to claim that it was the result of the act of intercourse of date March 23, 1925, the prosecution was bound to stand or fall by reason of such position. It is clear that, even though it might have been satisfactorily shown that the defendant was not the father of the child, still if he and the prosecutrix indulged in the act of sexual intercourse on or about the date alleged in the information, he would be guilty of the offense charged, from which it would follow that the statement made by the judge was correct as a principle of law. We fail to see how any material harm could have resulted to defendant by reason thereof.

[7] Finally, defendant contends that, in connection with the attempt on the part of the defendant to impeach testimony given by the prosecutrix, the trial court erred by stating in the presence of the jury that the testimony given by the prosecutrix to the effect that she had sustained meretricious relations with defendant at a time fixed as "just before May" was not inconsistent with a former statement made by the witness that the act occurred on March 23d. In connection therewith the jury was instructed that it was not to infer from any remarks or rulings made by the court as indicating how the case should be decided; also that "the testimony of the prosecutrix should be carefully scanned, and be acted upon with great caution." Perhaps it was unnecessary for the trial judge to be so specific in his ruling, when the same result would have been accomplished by sustaining the objection without comment, but which latter course, to an intelligent juror, would have carried the identical meaning. But, if error was committed, which under the circumstances we are unprepared to concede, it was cured, or at least rendered innocuous, by the instructions given by the trial court to the jury to which reference has been had.

[8, 9] On the whole, while the evidence, especially as to several collateral details or incidents, was somewhat conflicting, the jury was the final arbiter of the facts. On the main issue the evidence, if not conclusive, was sufficient to support the verdict, in fact, no claim is made to the contrary. It cannot be said that, after an examination of the entire evidence, any one of the claimed errors, nor all of them combined, were so prejudicial that, had they not occurred, a different result would have been reached.

The judgment and the order denying the motion for a new trial are affirmed.

We concur: CONREY, P. J.; YORK, J.

80 Cal. App. 538

JOHNSON v. STUDLEY et ux.★

(Civ. 3142.)

(District Court of Appeal, Third District, California. Dec. 30, 1926. Hearing Denied by Supreme Court Feb. 28, 1927.)

1. Contracts 🔑99(3)—In action to cancel written contracts conveying property in exchange for life care, evidence held insufficient to show undue influence and fraud.

In action for cancellation of written contracts conveying entire property of aged and invalid man to defendants in exchange for life care, evidence *held* insufficient to show that defendants practiced deceit, or resorted to misrepresentations or other fraudulent conduct to induce conveyance.

2. Contracts 🔑99(3)—In action to cancel written contracts conveying property in exchange for life care, evidence held insufficient to show coercion.

In action for cancellation of written contracts conveying entire property of aged and invalid man to defendants in exchange for life care, evidence *held* insufficient to show that defendants used coercion to induce conveyance to them.

3. Contracts 🔑96—Where invalid agreed to give friends property in exchange for life care, rule affecting independent advice held not applicable; no confidential relationship existing.

Where aged and invalid man entered into agreement with friends to turn over his entire property in exchange for care and support for life, rule requiring independent advice in regard to such transaction *held* not applicable; there being no confidential relationship between parties.

4. Contracts 🔑96—Invalid giving friends property in exchange for life care held to have had sufficient independent advice, if necessary, to validity of transaction.

Where aged and invalid man entered into agreement with friends to turn over his entire property in exchange for care and support, rule requiring independent advice, if applicable, *held* satisfied; aged man having received advice from banker on whom he relied as to full significance of transaction.

5. Contracts 🔑99(3)—In action to cancel written contracts conveying property in exchange for life care, evidence held insufficient to show lack of mental capacity in grantor.

In action for cancellation of written contracts conveying entire property of aged and invalid man to defendants in exchange for life care, evidence *held* insufficient to show that grantor lacked mental capacity to transact business involved; there being showing that grantor conversed rationally with others as to transaction involved.

6. Evidence 🔑63—Age of 70 years does not create presumption that person is mentally incompetent to transact business affairs.

That person has reached or passed age of 70 years does not raise presumption that he has become mentally weak to extent that he is incapable of attending to his business affairs intelligently, or with full understanding of nature thereof.

7. Deeds 🔑211(1)—That grantor had serious ailment when he executed grant in consideration of care and support held not to show mental incompetency.

Fact that grantor was afflicted with serious physical malady at time of executing grant in consideration of care and support *held* not to warrant conclusion that he was mentally incompetent to transact business culminating in the grant.

8. Deeds 🔑17(2)—Adequacy of consideration must be determined as of time of conveyance attacked.

Sufficiency of claimed consideration for conveyance attacked must be determined from

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★Hearing denied by Supreme Court.

facts of transaction existing when contract was made rather than from subsequent developments.

9. Deeds 🔑17(4)—Invalid's grant of entire property in exchange for life care held supported by valid consideration.

Conveyance by aged and invalid man in return for care and support for remainder of his life, made at time when it was possible that he might live for years, and when grantee was required to give up employment as carpenter in order to care for grantor, *held* supported by sufficient consideration, though grantor died within short time.

Appeal from Superior Court, Riverside County; George R. Freeman, Judge.

Action by A. M. Johnson, as administratrix of the estate of Ola Bentson, deceased, against F. D. Studley and his wife to set aside and cancel a written contract. From judgment for plaintiff, defendants appeal. Reversed.

Best & Best and Richard J. Welch, Jr., all of Riverside, for appellants.

Richardson & Scherrer, of Riverside, for respondent.

HART, J. The administratrix of the estate of Ola Bentson, deceased, the plaintiff, brought this action to have set aside and canceled a certain written contract, by the terms of which the deceased executed and delivered to defendants a quitclaim deed conveying to them certain real property, and for like relief as to said deed, also as to an assignment of a certain mortgage in which the deceased was the mortgagee, and further as to a promissory note executed and delivered by the defendants to the deceased.

The cause was tried by the court, sitting without a jury, and judgment for the full relief prayed for was awarded plaintiff. The defendants appeal from the judgment upon a record prepared in accord with the so-called alternative method.

The following is the agreement:

"This agreement made and entered into this 20th day of February, 1923, by and between F. D. Studley and Ola Bentson, witnesseth that the said Ola Bentson, on his part and for valuable consideration herein as mentioned, does agree to give clear deed to the following described real estate:

"House and three lots, described as lots 17–18–19. Frames resubdivision of block 27 original townsite of Elsinore.

"He also agrees to make a proper assignment of a note and mortgage for three thousand dollars ($3,000) which said note and mortgage is dated April 1, 1919, and due in five years with interest at six per cent.; said note and mortgage are executed by Thomas O. and May R. Boothby; and one note of said F. D. Studley in favor of Ola Bentson for three hundred dollars ($300) and assignment of mortgage and deeds are hereby acknowledged by said F. D. Studley and for the above and other valuable considerations which partly consist of six bonds of the Nevada California Electric Company for one hundred dollars ($100) each, total six hundred dollars ($600), receipt of which is also acknowledged for the above considerations. The said F. D. Studley agrees on his part that he will care for and provide a good and comfortable home in the town of Elsinore for the said Ola Bentson, and that he will care for him in sickness and in health in a good and proper manner, paying all expenses of living, clothing, doctor's bills and any other expenses that might be necessary for the comfortable care and protection for the said Ola Bentson so long as he may live and give him a reasonably fair burial at the time of his death, at his own proper cost and expense, and these transfers assignments, etc., of the deeds and bonds and notes shall also pay the said F. D. Studley for all past services that he has already rendered to the said Ola Bentson. *It is understood that all interest and rent accruing from the above property is to belong to Mr. Bentson during his life for his own personal use.*

"Given under our hands and seals the day first above written. F. D. Studley.
"Ola Bentson.

"Witness to the signatures of the said F. D. Studley and Ola Bentson. R. J. Horton.
"G. R. Gough."

On the day of the execution of said agreement (February 20, 1923), the deceased executed and delivered a deed, duly acknowledged, quitclaiming to the defendants lots 17, 18, and 19 in "Frames resubdivision of the original townsite of Elsinore." This deed was filed for record and recorded in the office of the county recorder of Riverside county on the 2d day of April, 1923.

On the same day the deceased, in writing, assigned to the defendants a certain mortgage executed by Thomas O. Boothby and his wife on certain real property situated in Riverside county, and given to secure a promissory note for the sum of $4,000. This mortgage was executed on April 1, 1919, and the note to secure which it was given was made payable five years from date. At the same time the deceased canceled a promissory note for the sum of $300, executed and delivered by the defendants to deceased.

The complaint charges that the above-mentioned documents were procured from the deceased by the defendants through fraud and the exercise of undue influence. It is alleged, among other things, that at the time of the execution of said instruments the deceased was afflicted with Bright's disease of the kidneys, and "so weakened mentally and physically thereby that his death could be expected within a few weeks or months, and which did actually take effect shortly thereafter, and that under such conditions his will and mind were easily susceptible to the undue influence of the will and mind of said defendants"; that said deceased was under the exclusive care, charge, and control of said defendants, and that, by reason of his "extreme old age," his mental and physical weakness and infirmity, due to the disease mentioned, defendants did then and there exercise and practice upon said deceased undue influence, and thereby succeeded in inducing him to execute the instruments above mentioned. The details of the alleged fraud and undue influence are set forth in paragraph 13 of the complaint. The court adopted substantially said paragraph as part of its findings. These allegations will be set forth herein as they are adopted by the court in its findings.

The answer admits the execution of the agreement, the deed and the assignments, but specifically denies that the same were procured by fraud or undue influence on the part of the defendants. The finding just referred to reads as follows:

> "With respect to the allegations contained in paragraph No. 13 of plaintiff's complaint, the court finds: That at all the time immediately preceding the making and execution of said purported contract and said purported deed, the said Ola Bentson had a home and house of his own sufficiently furnished to keep him in the station and condition of life that he then had been previously enjoying, and sufficient money and financial means to pay these defendants herein for any services in taking care of and nursing him, and for any food and clothing furnished by them or necessary for his then immediate care and comfort, and to pay these defendants well for such services, and for the furnishing of any food and clothing necessary for the then immediate care and comfort of himself; that said Ola Bentson during all of such time was fully cognizant of his ability to so financially pay and otherwise provide himself with such care, comfort, and food and clothing as aforesaid, and, having knowledge of his financial ability to so pay for such services, care, food, and clothing as aforesaid, did then and there, and on many divers occasions previous thereto, offer and propose to said defendant F. D. Studley that if he, said F. D. Studley, and wife, would so take care of and nurse him, and provide him with the necessary food and clothing, he (Ola Bentson) would pay them, and pay them well for it, and for him (Studley) to name the price; but said F. D. Studley and wife, having as hereinbefore found in these findings conceived the plan of obtaining title and possession to the whole of the valuable real and personal property of said Ola Bentson, and knowing that to accept said Ola Bentson's offer and proposal as aforesaid would prevent the consummation of their said plan, did then and there, and on many diverse occasions previous thereto, refuse and decline said offer and proposal, and did then and there, with the intent and purpose of carrying out said consummation said preconceived plan is hereinbefore found in these findings, and having then the opportunity to take advantage of the fact that said Ola Bentson was under their exclusive care, charge, and control, and of his old age, fatal illness, mental weakness, distress, and necessities as hereinbefore in these findings found, and having then and there and theretofore sought and gained legal advice and counsel for themselves, and sought and gained the advice and counsel of the physician then in attendance upon said Ola Bentson as to the probable length and duration of his life, and having then and there, and on diverse occasions previous thereto, sought and had a notary public come to their home for the purpose of drawing, preparing and acknowledging said purported contract and said purported deed, the said defendant F. D. Studley did then and there, and at the time of the making and execution of said purported contract and said purported deed, prevail upon and importune the said Ola Bentson to make and execute said contract and said deed against his will, and without his consent, and said Ola Bentson was caused to so do by the previous threats, coercion, and undue influence of said F. D. Studley and to the continuance thereof at the very time he made said purported contract and said purported deed used to and upon him by said Studley, who did then and there, state, and threaten that, unless he, said Ola Bentson, so made and executed said purported contract and said purported deed, he (Studley) and wife would immediately cease taking care of him, nursing and providing him with food and clothing, and said Ola Bentson thus put in fear that said defendant Studley would carry out said threats as aforesaid, and he and his wife would desert and abandon him, and no longer administer to his immediate wants and necessities, and sick and unable to move or walk about, unless assisted, and in such distress of body and mind as hereinbefore alleged and as in these findings found, and under the exclusive care, charge, and control of said defendants and no immediate opportunity available to him to seek or hire others to perform such services for him, submitted to said threats, coercion, and undue influence of said defendant Studley as aforesaid, and did make and execute said purported contract and said purported deed, which said contract and said deed so made and executed as aforesaid was and were so made wholly without adequate or any consideration whatsoever, and the act of making said purported contract, and the act of making said purported deed, was and were not the free and voluntary act or acts or deed or deeds of said Ola Bentson, but was and were the result and consummation of the acts and deeds of said defendant F. D. Studley, and his said undue influence exercised by him to and upon the will and mind of said Ola Bentson, who then on account of his mental weakness, old age, infirmity, sickness, distress, and necessities as aforesaid, and of his then relation and association with said defendants, was unable to resist the desires and importunities of the dominant mind and will of said defendant F. D. Studley."

The court also found that the property, real and personal, turned over to the defendants by the deceased as indicated above was of no greater value than $12,000.

[1] The contention of the defendants is that the findings as to fraud and undue influence and the foregoing finding are wholly without any support from the evidence. We think the contention must be sustained.

The facts as we shall state them are gleaned from the uncontradicted testimony in the case. The plaintiff's intestate, at the time of the execution of the transactions sought to be annulled by this action, resided in the town of Elsinore, in Riverside county, and was of the age of 79 years. He was an unmarried man. It is not made to appear, except in a general and indefinite way, that he had any relatives in Elsinore or elsewhere. The petition by the plaintiff for letters of administration of the estate of the deceased or the other proceedings in connection therewith are not in the record, and we are hence without information as to the relationship, if any, of the plaintiff to the deceased.

The plaintiff's intestate, who hereinafter, for brevity, will be referred to as "the deceased," or "Bentson," and the defendants were adjoining neighbors in the town of Elsinore for about four years prior to the date of the execution of the contract and other instruments above mentioned; their respective homes being separated by a small lot. The deceased owned several lots in Elsinore—those named in the deed from him to the defendants—and it appears derived a livelihood from raising thereon vegetables and chickens and selling the same to the market or such persons as desired to purchase them. He at times also performed labor for other people. The defendants are husband and wife, and lived on neighborly or intimate terms with the deceased for the period above stated. F. D. Studley was a carpenter by trade, and worked thereat whenever his services as such were needed, and was paid for his labor at the rate of $1 an hour, or $8 for eight hours' work. These wages were fixed according to the wage rate established after the entry of the United States into the war with Germany and the increase in the cost of living brought about by that event.

In the latter part of the year 1922, the health of the deceased began to fail. In November of that year, realizing the necessity for medical aid, he called in Dr. Parker, a local physician, who diagnosed and pronounced his physical ailment as that of Bright's disease of the kidneys. Down to that time the deceased, as thus he had done for the whole of the period of 4 years during which the Studleys were his neighbors, as indicated, did his own cooking, and in other respects attended to his household affairs. On one of his professional visits to the deceased in the month of November or December, 1922, Dr. Parker advised Bentson that his food, as he (Bentson) prepared it, was without sufficient nourishment, and that in his condition he should have some capable person to prepare his meals and take care of him generally.

In the month of November, 1922, one James H. Mills, with whom the deceased had been acquainted for about 8 years, was employed by the latter to construct a cement walk around his three lots described in the deed from deceased to the Studleys. After starting the work of building the walks, Mills, on one occasion, found the deceased "in bed sick." The deceased then said to Mills that "he would like to have me hunt up some one that would look after him. So I took him up some broth a couple of nights." Mills proceeded to testify: "And I went down and saw Mr. Studley, and they agreed to look after him." F. D. Studley immediately called on the deceased, and asked him what he (Studley) could do for him. Mrs. Studley soon followed her husband, and the deceased asked her to make some broth for him. "I know you are a good cook," said deceased, addressing Mrs. Studley. Mrs. Studley then went to the butcher shop, procured some meat, and Mrs. Studley, at her own home, prepared some broth and took it to Bentson. At the end of a period of about 10 days after the Studleys took upon themselves the care of the deceased, the latter had so far recovered his strength as to enable him to leave his bed and sit in a rocking chair, and occasionally take short walks about his premises. Mills testified that, while the Studleys were taking care of the deceased at the latter's home, he (Mills) on several occasions called to see the deceased and found that he was receiving proper attention and care at the hands of the Studleys. F. D. Studley continued to wait on and care for the deceased for a period of about two months. Said Studley remained with the deceased, while Mrs. Studley, at her own home, prepared food for Bentson, and took it to his (Bentson's) home. Studley testified:

> "I tried to get him (deceased) a housekeeper, and succeeded after a while in getting a lady from Pasadena. She stayed there 10 or 11 days. He hired her for a month. She went away, and I got another lady to come there."

F. D. Studley, after taking the last-mentioned woman to the home of the deceased, and after he (Studley) had shown her where she could find the usual household equipments for caring for the house, returned to his own home, but it appears that during that day he was informed by a groceryman who had but a few hours previously delivered groceries to the home of the deceased that he found the latter alone and unattended by any one; the woman last employed by said Studley having for some reason refused to accept the employment and departed from the premises. Studley thereupon and immediately went to the home of the deceased, and asked the latter what he desired him (Studley) to do for him (deceased). Although, so he testified, he knew of no relatives that Bentson had, Studley suggested to the latter that he ought to call in any relative that he might have to attend and take care of him; or, if he had no relatives, to employ some man with a wife to take up his residence with him and give him the care and attention his physical condition required. Said Studley stated to the deceased that he (Studley) had on hand a job as a carpenter and that it was necessary for him (deceased) to make definite arrangements for his care. The deceased thereupon proposed that the defendants assume that responsibility for a consideration. Studley testified:

> "Up to that time I never had charged him a penny for my services. I said 'Mr. Bentson, you could not afford to pay me what I could get elsewhere. If I go to carpentering, I can get my $8 a day. You would not want to pay that.' And he says, 'If you will take care of me, I will give you all my property.' I says, 'Mr. Bentson, that is a pretty serious matter. You better think that over pretty well before you accept anything like that.' I says, 'If you would give me your property, how do you know but what I would turn around and kick you out?' He says, 'I know you well enough to know you would not do anything of the kind.' I says, 'Mr. Bentson, you think that matter over; don't be in a hurry about it. If there is anything else that I can do—my wife's condition is not very strong, and if you are both taken sick on my hands at the same time what would I do?' As near as I can remember, his answer was, 'I don't intend or want to be much trouble to anybody,' or something to that effect. I says, 'Mr. Bentson, there doesn't anybody know when they are sick how much trouble they are going to be to anybody else. You might be in bed for months. You would have to be waited on day and night. I really don't care to enter any contract. I would rather you would get some one else.' 'Well,' he says, 'I haven't anybody else that will do anything for me. I have got to have somebody.' And every time I would go there after that he would ask me in regard to taking care of him and I kept putting him off."

Studley finally accepted the proposition, but said to Bentson: "I can't take care of you here," referring to Bentson's home. This arrangement was made in Bentson's house, and, upon a suggestion made by the deceased, John T. Kuhns, a former banker of Elsinore, but at the time referred to engaged in the real estate business and a notary public, was asked by Studley to call at the home of the deceased for the purpose of preparing a contract in accordance with said arrangement. At this point, and parenthetically, it may be remarked that the testimony of F. D. Studley that the deceased was the first to propose giving the Studleys all his property as a consideration for taking care of him for the balance of his life is at variance with that of said Kuhns, whose testimony was in substance as follows: That F. D. Studley called on him, and stated that Mr. Bentson wished to see him; that Kuhns, accompanied by Studley, started to the Bentson home, and on the way Studley explained to Kuhns that the deceased desired to make some arrangement with him (Studley) for taking care of him during the remainder of his life; that they had thus far not agreed upon the terms upon which the Studleys were to take the contract; that, when they arrived at the home of the deceased, the latter and Studley proceeded to discuss the terms, the deceased insisting that the arrangement should be that the Studleys should take care of him for a stipulated sum of money, while Studley declared that he would not enter into a contract to take care of the deceased, as indicated, unless the latter would agree to turn over to him all his property, both real and personal, Studley stating that if he accepted the responsibility of caring for the deceased he would have to devote his entire time and attention to him, and therefore would be unable to work at his trade as a carpenter so long as the deceased might live. No definite arrangement was made between the deceased and Studley on that occasion.

Kuhns the following day was again called to the Bentson home for the purpose of preparing an agreement. He stated that the deceased said:

> "We haven't gotten along any further than we were last night. We haven't come to a decision yet."

An agreement was finally reached between the deceased and F. D. Studley, whereby the deceased agreed to convey to the Studleys all his estate upon condition that they would provide for and take care of him during the balance of his life. Bentson thereupon (in the first part of January, 1923), and in pursuance of the said agreement, walked over to the home of the Studleys, and there remained and was there taken care of by the defendants until he passed away on the 10th day of May, 1923.

R. J. Horton, president of the First National Bank of Elsinore, with which the deceased had always transacted his banking business, had on several occasions been present, both at the home of the deceased and the home of the Studleys, after the deceased had been removed to the latter place early in January, 1923, when the matter of the proposed contract or proposed arrangement for the care of the deceased by the Studleys was under discussion. He testified that a short time before the contract was executed F. D. Studley called at the bank and informed him that he (Studley) and the deceased had finally agreed upon the terms upon which the Studleys were to take care of the deceased; that the deceased did not accompany said Studley to the bank on that occasion; that Studley explained to the witness that the agreement arrived at was that the Studleys were to take Bentson to their home and provide and care for him as long as he might live, and that the deceased, as a consideration therefor, was at once to convey to the Studleys all his property, both real and personal. Studley requested Horton to prepare a contract in accord with said terms, but the latter declined to do so, stating that he did not feel that he was capable of properly drafting a contract of such importance, and suggested that a lawyer be employed to do the work.

Thereafter F. D. Studley employed an attorney at Santa Ana to put the agreement in writing. After the agreement was so prepared—about a week after the said conversation at the bank between Studley and Horton—Studley appeared at the bank with the contract in writing. Horton read the instrument. Subsequently (February 20, 1923), Horton was requested by Studley and also Bentson through Studley to call at the Studley home, where the deceased had in the meantime been taken, for the purpose of witnessing the execution of the agreement and taking the acknowledgment of the execution of the deed by Bentson conveying his real property to the Studleys in pursuance of the terms of said agreement, Horton being a notary public. Horton complied with the request, and took with him to the Studleys on said occasion G. R. Gough, cashier of the bank of which the former was president.

Before the agreement, the deed and the assignments were signed by the deceased, Horton held a conversation with Bentson relative to the proposed transactions. "I told Mr. Bentson," Horton testified, "as plainly as I could, just exactly what he was signing; that he was signing away all his property, and I told him he didn't want to do that without careful consideration." Bentson stated to Horton that he required care and attention, and that he had concluded that the best thing for him to do was to enter into and carry out the agreement proposed by Studley, and as evidenced by the written contract; but, said Horton, Bentson manifested some reluctance—not "very strong reluctance," however—about signing the contract. In fact, Horton said the deceased insisted that a provision be added to the contract that "the earnings and proceeds derived from the property during his life" should belong to and be paid to him. Studley assented to this proposal, and thereupon, at the request of Bentson, Horton inserted in the written agreement the provision, the language of which is in italics as the instrument is hereinbefore reproduced. This change in the contract, Horton said, seemed to "ease" Bentson's mind, and, remarking that he "might as well sign it now as any time," he thereupon subscribed his signature to the contract, the deed, and the other instruments mentioned. Horton, as a notary public, took the acknowledgment and, as seen, the written agreement was witnessed by both Horton and Gough. While the conversation and transactions just referred to were going on, Bentson was sitting in a chair.

G. R. Gough corroborated the testimony of Horton as to the conversation between the last named and the deceased on the occasion just adverted to and as to the warning Horton gave Bentson relative to the effect of the execution by the latter of the agreement, deed, etc.

At the time of the execution of the above-mentioned instruments, the deceased had on deposit in the bank of which Horton was president approximately the sum of $500. He also then had in his safe deposit box in said bank Liberty bonds amounting to $900, Nevada-California electric bonds of the value of $600 and the note and mortgage of Boothby, originally for $4,000, but subsequently reduced by payments on the principal. These securities were converted into cash through Horton's bank, and the proceeds credited to the deposit account of the deceased. At the time the contract and other instruments were signed, Bentson instructed Horton to make a change in his account in the bank so that the Studleys, as well as himself, could draw on the account in his lifetime, and "to make it so as to create a joint tenancy" in the account, to the end that "Mr. Studley, if Mr. Bentson should die, could get the money and pay his expenses," etc. These instructions were in writing, as follows:

"For Checking % of Ola Bentson.
"Term Account No. ——
"First National Bank of Elsinore.
"Elsinore, Cal.

"Find below duly authorized signature, which you will please recognize in payment of funds or the transaction of other business on my or our account:
Ola Bentson.
"F. D. Studley.
"Estelle T. Studley.

"Sign here.
"Address ——.
"Date ——. Introduced by ——."

The instructions were not strictly followed by Horton, but, as to this, he testified that the card on which the instructions were written "was the only signature card we had. We were out of regular joint tenancy cards at the time." He stated that he did not at the time or at any other time, tell Bentson that he had not made it appear in the records or books of the bank that the account was a joint tenancy account, but that he, as well as the deceased and Studley, treated it as such in accord with the specific instruction of Bentson to that effect. Prior to, and subsequent to, the death of Bentson, the Studleys checked on the account, appropriating much if not all the money to the payment of the expenses incurred in taking care of the deceased, and upon his death in payment of funeral expenses. These considerations, however, are of no special consequence in the decision of this case. The sole questions here are, as has been shown, whether the defendants procured the transfer of the property of the deceased, including the money in the bank and the securities referred to, through misrepresentations or fraud or the exercise of undue influence upon the deceased on the part of the Studleys or either of them, and whether the deceased was mentally incompetent to transact the business. If under such circumstances the execution of the agreement and the transfer of the property of the deceased were accomplished, the plaintiff would be entitled to recover all the property so transferred, regardless of the form in which the transfer was made. It is consequently immaterial whether the effect of transferring and changing the account in the bank was or was not to create a joint tenancy in said account.

It should here be stated that Dr. Parker, who, as seen, professionally attended and prescribed treatment for the deceased, testified that he advised F. D. Studley, while the latter was waiting on Bentson at his (Bentson's) home as to the physical condition of the deceased, "and what to expect * * * I told them (the Studleys) that he (deceased) had chronic Bright's disease, and could not get well; that he might live a few months or a few years. It was an uncertain condition." In this connection it may also be stated that F. D. Studley testified that he did not understand Dr. Parker to say the deceased "might live a few months or a few years," but understood the doctor to say that he might live for years. However, it is clear from Studley's testimony that he knew and realized that the deceased, at the time the transactions involved herein were under negotiation, was a very sick man, and the disease from which he was suffering would probably sooner or later result in his death.

[2] The foregoing embraces a statement in substance of all the testimony revealing the circumstances attending and eventuating in the execution of the agreement and the other written instruments in question. It is perfectly clear therefrom that the testimony does not justify the conclusion that the defendants practiced deceit or resorted to misrepresentation or other fraudulent conduct to induce the execution by the deceased of the agreement and other papers. Indeed, the court below, in its decision, recognized this proposition, since it made no specific finding that the transactions were brought about through fraudulent representations or conduct on the part of the defendants. The fraud in the transaction, if any, is to be implied from the findings that the defendants, taking advantage of the physical and mental condition of the deceased, by threats, coerced the latter into the execution of the agreements, etc., and that, by reason of his advanced age and serious physical illness, the deceased, at the times the transactions were in process of negotiation and finally consummated, was mentally incapable of exercising volition or intelligently transacting business. The finding, however, that the defendants by threats coerced the deceased into the making of the agreement and the execution of the instruments transferring his property to the defendant is wholly without evidentiary support, as the above statement of the evidence plainly shows. Indeed, in a written opinion (incorporated in the clerk's record herein) the learned trial judge, referring to the testimony of Kuhns to the effect that on his second visit to the deceased the latter remarked, "Well, we haven't gotten along any further than we were last night—we haven't come to any decision," concisely stated the situation, as the evidence disclosed it, when he said:

> "This would indicate that Bentson and Studley were driving a bargain; that Bentson was trying to get Studley to take care of him, but they had not agreed at that time, after considering the matter for a day. This agreement was that Bentson wanted Studley to take a stipulated amount for his care, which he was willing to pay, and insisted that he wanted Mr. Studley to name the same. Studley always insisted that Bentson should convey all of his property to him, otherwise he would not consider it."

If that statement of the judge constituted all there was of the findings, in so far as threats and coercion were concerned, the judgment would be entirely without a prop to uphold it in that particular; and carefully scrutinized, the findings, so far as threats or other coercive methods are concerned, do not go much further than what is comprehended within that statement. The finding as to that matter, is, in effect, that the defendants threatened that, unless deceased came to their terms, they would cease and refuse to take further care of him. Obviously, the defendants had a right to "drive a bargain," and the further right to refuse to care for the deceased, unless he agreed to their terms as to the compensation for the services required, even though it were true that the contract thus exacted was unreasonable, or called for compensation far beyond the value of the service to be performed. In other words, the proposal of the defendant and the acceptance thereof by the deceased might have constituted an improvident or unfair agreement, in so far as the deceased was concerned, and yet it was an agreement which the defendants had the legal, even if not the moral, right to demand and induce the consummation of, provided that they did not resort to misrepresentation or fraud to procure the same, and provided further that the deceased was not mentally incompetent to transact such business or any of the business affairs of life with that degree of intelligence which would enable one to fully understand and realize the nature of the transaction and consequences thereof.

[3, 4] The trial court, in its decision, as do counsel for the respondent in their brief, stresses the proposition that the deceased in carrying out the transactions, was without independent advice as to the nature and consequences to him of the proposed agreement. The undisputed evidence shows, as has been pointed out above, that Mr. Horton, president of the bank with which the de-

ceased had for many years deposited his money, explicitly explained to the deceased, before the agreement was consummated, and prior to its being reduced to writing, that the effect of the agreement, if executed by him, would be to transfer his entire estate to the defendants, and advised him to consider the proposition well before accepting it. If, therefore, this were a case where the relation of the parties was of a fiduciary or confidential character, the advice or caution thus given deceased by Mr. Horton, in whom we may assume the deceased had full confidence, since he had extensive dealings with him as a banker, would entirely measure up to the rule as to independent advice in such cases. The situation here, however, is not one to which the rule of independent advice is applicable. There was not, prior to the making of the agreement, a fiduciary or other confidential relation existing between the deceased and the defendants. See Robins v. Hope, 57 Cal. 493, 497; Hemenway v. Abbott, 8 Cal. App. 450, 463, 97 P. 190; 1 Story's Eq. Juris., § 218; Scattergood v. Kirk, 192 Pa. 263, 43 A. 1030, 1032. They were friends, it is true, and had been for several years, and no doubt the deceased had confidence in the integrity of the Studleys, and believed that they, above all others with whom he was acquainted, would give him that care and attention which his physical condition demanded. This, however, did not constitute a confidential relation within the meaning of that doctrine as it is known to the law. The entire transaction, from its inception to its consummation, involved a matter of contract only— no different in its general nature or the circumstances under which it was made from any other contract whereby one party agrees to perform certain personal services for another for a specified or stipulated compensation, and where such parties are strangers to each other, so far as relationship by consanguinity or affinity is concerned.

[5] The foregoing observations have proceeded upon the assumption that the deceased was mentally capable of transacting the business involving the transactions in controversy. But, as has been shown, the theory of the plaintiff, as is that of the decision below, is that, when the transactions in question were under consideration, and finally executed, the mind of the deceased had become so impaired or weakened from the disease with which he was afflicted that he was mentally incapable of fully appreciating the seriousness of said transactions or their effect upon his property rights; or, in other words (and this is as far as the findings really go), that his weakened mental condition rendered him easily and readily susceptible to pressure or the exercise upon him in the transactions of sinister influence by those in whom he had a high degree of confidence; that defendants, knowing of his impaired mental condition, took advantage thereof, and, as to the deceased, thus succeeded in bringing about an unfair or unreasonable bargain. As we have already stated, however, there is no evidence in the record which warrants any such conclusion. To the contrary, the uncontradicted evidence clearly shows that during all the time that the transactions were under discussion between the deceased and F. D. Studley, and at the time that they were executed, Bentson was mentally sound, and fully realized and appreciated the nature of the transactions and the effect thereof, so far as they affected him. Some five or six witnesses testified that they were acquainted with the deceased in his lifetime, met him before and after he went to the Studley home, conversed with him, and from their acquaintance with him and the character of the conversations held with him they were of the opinion that there was nothing the matter with his mentality; that he carried on his conversations intelligently, and seemed to understand everything that was said to him, and was able to discuss the subjects to which the conversations related understandingly. We will not undertake to state herein in detail all this testimony, although some of it may be briefly referred to.

Henry S. Drake and his wife met the deceased at the home of the Studleys, where the Drakes visited for a week in the month of February and prior to the time of the making of the agreement and other papers herein involved. They testified that he not only carried on his conversations in a rational manner, but frequently declared to them, or in their presence, that he was perfectly satisfied with the proposition to turn his property over to the Studleys as a consideration for the care and attention which his illness required. Both stated that he was able to sit at the family table at mealtimes, and said that he had declared that "he was very thankful to have people as good as Mr. Studley's folks to take care of him, for, if he had not had the care that he had, he would have been under the ground before that day." Henry S. Drake testified that the deceased stated that he was perfectly willing to turn his property over to the Studleys as a consideration for the aid that they were giving and intended to give him; that "he would not have any one to have his property but Mr. Studley; * * * that there was no one in the old country he wanted to have his property."

Dr. John S. Nation, a chiropractor located in Elsinore, testified that, while the deceased was at the home of the Studleys, Mr. Studley brought him to his (the doctor's) office for treatment on several different occasions; that the deceased on one occasion stated to the doctor that, "not being able to properly care for himself, he proposed to have Mr. and Mrs. Studley care for him"; that they had been "very nice and good to him"; and that he was going to leave them all the property he had; that he was "by himself," and had no one else to leave it to; and that "he had made up his mind to leave what he had to Mr. and Mrs. Studley"; that he (witness), from his acquaintance and conversations with Bentson, formed the opinion that he was mentally sound—that he was sane.

Banker Horton testified that the deceased seemed to him to be "mentally competent. He was as alert as the ordinary man mentally. I base my opinion upon my experience with him and my business transactions with him."

Thomas O. Boothby testified that, when he called on the deceased at the home of the Studleys for the purpose of making a payment of interest on his indebtedness to Bentson, the latter discussed the matter with Boothby as intelligently as he had ever discussed any business proposition with the witness, and suggested to Boothby that, since it was not convenient for him to go to the bank on account of his illness, he (Boothby) could pay the interest to Mr. Horton, who, Bentson then stated, was acting for him in his business matters.

There were several other witnesses who knew and had met and talked with the deceased prior and subsequent to the date of the execution of the transactions in dispute, and who testified that they were of the opinion that the deceased was mentally sound and capable of carrying on business in an intelligent way during the period of time covered by the negotiations and the consummation of said transactions.

But, it seems to us, more convincing evidence of the mental competency of the deceased and his ability to take good care of his own interests in the transactions could hardly be thought of than the fact that he deliberated and "bargained" several days before he came to the terms of the Studleys, and finally signed the agreement and the other papers, and refused to, or rather, as the witness Horton expressed it "showed reluctance" to, sign the papers until there was inserted in the agreement upon his suggestion and insistence a provision to the effect that he was to receive the rents, issues and profits derived from his estate during his lifetime, and that, when Horton inserted a provision in the agreement to that effect, the mind of Bentson appeared to be at "ease." Manifestly, a man of weak mind, or who was unable, by reason of a debilitated mind, to protect well his own interests or to express his real wish or intention in a transaction of such importance, would not have carried on the affairs involved herein with the degree of deliberation exhibited by the deceased therein.

[6, 7] An investigation of the record will force the conclusion that the court below planted its decision entirely upon these propositions, to wit, that, by reason of the fact that, at the times the transactions in question were under negotiation and ultimately completed as indicated, the age and serious illness of the deceased had so broken down or impaired his mentality that he was, at said times, mentally incapable of transacting business understandingly or with the ability to fully appreciate the nature thereof and its consequences to him, or at least easily influenced; that the Studleys had the confidence of the deceased, and could, therefore, the more readily impose upon or lead him into the making of an unfair or unconscientious bargain. Indeed, that these, together with the fact, as the court conceived it, that the consideration moving from the defendants to the deceased for the agreement and the transfer of his property under the terms of the agreement was inadequate, were the evidentiary factors persuading the trial court to its decision, is clearly disclosed in the discussion of the facts in the judge's written opinion filed with the record here. But it does not follow from the mere fact that a person has reached or passed the allotted three score and ten years in age that he has become mentally weak to the extent that he is rendered incapable of attending to his important business affairs intelligently, or with full understanding of the nature thereof. In other words, that fact alone affords no presumption of a grantor being incapable of understanding the nature of the transaction or of his being without sufficient mental power or volition to resist the importunities of one attempting to take advantage of him in a deal involving the proposed transfer of his property. See Rogers v. Scott, 28 Cal. App. 93, 99, 151 P. 379; Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910; Broaddus v. James, 13 Cal. App. 464, 466, 110 P. 158. Nor does the fact that the grantor was afflicted with a serious physical malady at the time of executing the grant itself warrant the conclusion that he was mentally incompetent to transact the business culminating in the execution of the grant. As is true here, as against the positive uncontradicted testimony of witnesses who were acquainted with the grantor, and who had ample opportunity to form an intelligent opinion as to his mental condition and capacity prior to, at the time of, and subsequent to, the transaction, and having no personal interest in the event of the issue, that, at the time he executed the grant, he was in a sound mental condition, fully capable of safeguarding his own interests or his property rights in any of the ordinary transactions with the general nature or character of which the average person is familiar, the mere fact that he was old when making the grant, even coupled with the fact that at such time he was afflicted with a serious physical malady, is entitled to no such weight as to justify the conclusion that the transaction was executed by him against his will or as the result of the exercise of undue influence by the grantee, or without full understanding on his part of the nature and the effect thereof upon his rights.

[8, 9] The matter of the consideration for a grant or the assignment of property is, in conceivable cases, of controlling importance, particularly where the consideration appears to be grossly inadequate. This declaration has peculiar application to suits in equity for the enforcement of executory agreements for the sale of real property. But in such cases, as in actions like the one before us, "the sufficiency of the purported or claimed consideration for a contract of the character under discussion [practically for the specific enforcement of an agreement to convey to plaintiff certain property] must be determined from the facts of the transaction as they existed when the contract was made, rather than by subsequent developments." Parsons v. Cashman, 23 Cal. App. 298, 301, 137 P. 1109, 1111. Applying that rule to the facts of the instant case, it is clear that the consideration for the conveyances moving from defendants to Bentson cannot justly be declared to be so inadequate as to constitute it a sufficient ground for vitiating the conveyances, or, of itself, or when considered in connection with the facts of Bentson's advanced age and serious illness, to be regarded (in view of the uncontradicted evidence disclosing all the circumstances leading to and attending the consummation of the transactions) as of sufficient probative significance to justify the conclusion that the agreement and the instruments thereupon following were procured to be executed by the deceased through fraud or the exercise of undue influence, or that deceased, when signing the instruments, was mentally incompetent to transact the business intelligently and freely. F. D. Studley, as we have seen, was a carpenter by trade, capable of earning $8 per day when engaged in work at the trade, and, at the time the transactions herein involved occurred, had open to him employment at said trade. The doctor attending the deceased, while stating to said Studley that Bentson was suffering from an incurable disease—a disease which would cause his death—also in effect stated to him (F. D. Studley) that the nature of the disease was such that Bentson might live a few months only, or he might linger for years. Under those circumstances, the Studleys could not know or determine how long they would be required to devote themselves to the care of the deceased, and with this understanding of the situation they entered into the agreement in question; F. D. Studley forfeiting all opportunity for work at a trade at which he could earn lucrative compensation, and giving himself over entirely to caring for the deceased. Obviously, the extent of the responsibilities imposed upon or assumed by the defendants under the agreement could not be measured at the time the instrument was executed, and, as is said in Parsons v. Cashman, supra, so it is peculiarly true here, the fairness or reasonableness of the agreement must be determined by the facts and circumstances existing at the time the transaction was had, and not by the fact that the death of the deceased, which might have been postponed for several years, according to the doctor, occurred within a few months after the agreement was made and the defendants began the performance of the services thereby required.

We think, as the foregoing discussion indicates, that the decision of the trial court is without evidentiary support. The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

80 Cal. App. 377

CULLINAN et al. v. MERCANTILE TRUST CO. OF CALIFORNIA et al. (Civ. 5472.) ★

(District Court of Appeal, First District, Division 1, California. Dec. 21, 1926. Rehearing Denied Jan. 19, 1927. Hearing Denied by Supreme Court Feb. 17, 1927.)

1. Pleading 🔑8(2)—Principal and agent 🔑189(1)—General allegation of agency is sufficient.

It is the general rule that an allegation that one is trustee is but a conclusion of law, though general allegation of agency is sufficient.

2. Pleading 🔑207—Objection that complaint is ambiguous or uncertain or that essential facts appear only inferentially, as conclusion of law must be raised by special demurrer.

Objection that complaint is ambiguous or uncertain, or that essential facts appear only inferentially or as conclusion of law or by way of recital must be raised by special demurrer, and cannot be urged on general demurrer.

3. Trial 🔑396(5)—Finding that one employing attorneys acted as trustee held authorized and not without issues.

In action to recover fees as attorneys for trust estate, finding that person employing plaintiffs acted as trustee *held* not without issues and unauthorized, where allegation of agency and trusteeship was undenied, and plaintiffs' opening statement that trusteeship was admitted was not denied, and court and counsel for plaintiffs, in subsequent proceedings, acted on defendant's tacit admission.

4. Estoppel 🔑88(1)—Admission must be of fact to create an estoppel.

Admission must be of a fact to create an estoppel, and not of a conclusion of law.

5. Estoppel 🔑88(2)—Party may be estopped to deny admission of conclusion of law if it induces opposite party to assume different position.

Party's admission of conclusion of law, which induces opposite party to assume position

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★Hearing denied by Supreme Court.

that he would not have otherwise assumed, may estop him to deny admission.

6. Trial 🔑396(5)—Court may treat facts as admitted, where inference is justified.

Court may treat as admitted facts which may be justly inferred to be admitted from conduct of cause.

7. Trusts 🔑171—Since trustee must preserve and protect trust property, acts within scope of authority are binding (Civ. Code, § 2267).

Trustee is bound to preserve and protect property of trust, in view of Civ. Code, § 2267, for which he is general agent, and his acts within scope of his authority bind trust property to same extent as acts of agent bind his principal.

8. Trusts 🔑262—Evidence held to sustain finding that trustee was authorized to employ attorneys suing for fees.

In action to recover fees as attorneys for trust estate, evidence *held* to sustain finding that trustee acted within authority in hiring attorneys, where trustee's employment of attorneys was reasonably necessary to protect and preserve trust fund.

9. Trusts 🔑211—Generally, trustee's attorneys must look to trustee only for payment for services.

Attorneys employed by trustee must, as a rule, look to trustee for payment and not to trust fund, but, where trustee is without funds of estate, he may by agreement require attorneys to look solely to trust estate.

10. Trusts 🔑256—Action to charge trust estate with reasonable value of legal services can be maintained before payment is due.

Action to charge trust estate with reasonable value of legal services rendered for its benefit can be maintained, although payment is not yet due.

11. Trusts 🔑265—Payment for legal services rendered trust estate, which became due during pendency of suit, might be required, though action was brought before payment was due.

Though in general equity operates on parties and subject-matter as standing at commencement of action, it might require payment in suit against trust estate for legal services brought before payment was due, but payment of which became due during pendency of suit.

12. Election of remedies 🔑12—Suit to recover attorneys' fees from trustee's estate held not to preclude recovery from trust fund, where recovery could not be had from trustee's estate.

That attorneys for trust estate sought recovery for legal services from trustee's estate *held* not to preclude them from seeking recovery from trust fund, where recovery could not be had from trustee's estate and there was no prejudice.

13. Appeal and error 🔑1071(6)—Omitting to find on special defenses, where findings would be adverse to appellants, is not ground for reversal.

Failure to find on special defenses is not ground for reversal, where findings would be adverse to appellants.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action for fees as attorneys for trust estate, brought by Eustace Cullinan and another, copartners doing business under the firm name and style of Cullinan & Hickey, against the Mercantile Trust Company of California, trustee, Adelaide McColgan as administratrix of the estate of Donald A. McColgan, and others. From the judgment, Adelaide McColgan, as administratrix of the estate of Daniel A. McColgan, and others appeal. Affirmed.

See, also, 193 Cal. 562, 226 P. 4; 252 P. 652.

Harrison & Harrison and L. P. Forestell, all of San Francisco, for appellants.

Eustace Cullinan, Julian D. Cohn, Cohn & Cohn, and W. T. Sweigert, all of San Francisco, for respondents.

Morrison, Dunne & Brobeck and Dunne, Brobeck, Phleger & Harrison, all of San Francisco, for defendant Mercantile Trust Co.

Glensor, Clewe & Van Dine, of San Francisco, for defendants Reginald Bell and Nellie McM. Donovan.

CASHIN, J. An action by respondents to establish the reasonable value of services rendered for the benefit of a trust estate, to charge the amount thereon, and for a decree directing payment from the trust funds.

On or about May 24, 1916, Daniel A. McColgan, a money broker, with whom appellant Reginald McColgan was in partnership, loaned to California Motion Picture Corporation the sum of $26,000, the aggregate of various sums advanced by himself, the partnership mentioned, and George L. Crabtree, Reginald Bell, C. H. Williams and Nellie McM. Donovan. The loan was evidenced by promissory notes executed by the corporation to the persons mentioned in the several amounts advanced by them with the exception of the sum advanced by the partnership, which was included in a promissory note payable to Daniel A. McColgan. Each note was indorsed by Herbert A. Payne and Clarence Payne as guarantors. During the same and the following year further loans aggregating the sum of $12,165.98 were made by McColgan to the corporation and to the guarantors mentioned who were interested in the corporation, all from his individual funds and those of the partnership, with the exception of the sum of $2,500 advanced by Thomas W. Hickey and which was held in trust by McColgan for that purpose. The latter loans, with the exception of a small amount, were also evidenced by promissory notes payable to McColgan, who subsequently assigned to Thomas W. Hickey an interest in one of these to the extent of the sum advanced by him. On January 2, 1918, no part of the loans having been paid, respondents, who are attorneys at law, were employed to collect, and subsequently, as the result of their efforts and with the assent of McColgan, a bond in the sum of $41,829.65, the aggregate of the sums then unpaid, less certain deductions agreed to by McColgan, with a mortgage on real property in the city of New York securing the same, were executed by a corporation known as the "383 Park Avenue Corporation," to Daniel A. McColgan, for his benefit and as trustee for the partnership and the others interested in the loans. The instruments last mentioned were dated April 5, 1919, the bond bearing interest at the rate of 6 per cent. per annum and being payable on April 5, 1924. Subsequently C. H. Williams, one of the beneficiaries, assigned to appellant Mary C. Williams his interest in the fund. Daniel A. McColgan died on May 12, 1921, whereupon an action was bought by Reginald Bell, Thomas W. Hickey, and Nellie McM. Donovan against Adelaide McColgan as administratrix of his estate, George L. Crabtree and Mary C. Williams, two of the beneficiaries mentioned, being joined as defendants, in which action it was adjudged that the instruments last mentioned were held by the deceased in trust as above stated, and the Mercantile Trust Company of California, a corporation, was appointed to succeed the deceased as such trustee, to which, pursuant to the decree, the bond and mortgage were transferred by the administratrix.

It appears from the evidence without contradiction that, between the date of the employment of respondents and the death of Daniel A. McColgan, payments on the principal and as interest on the loans aggregating the sum of $12,933.08 were made to the latter, and that between May 8, 1923, and May 23, 1924, the total amount of the unpaid portion of the loans represented by the bond and mortgage, with interest, aggregating the sum of $39,856.67, was received by Mercantile Trust Company of California as trustee.

The complaint alleged that the plaintiffs were employed to collect the unpaid amounts of the notes from the makers and guarantors thereof and the stockholders of the motion picture corporation; that they were to be paid the reasonable value of their services in the event of the success of their efforts, and then only from the amount recovered, it being further alleged that, "in making said loans and in so employing Eustace Cullinan and Thomas W. Hickey as attorneys at law as aforesaid, and in and about all the transactions herein, said Daniel A. McColgan acted for himself and also as agent of and trustee for said Reginald Bell, Nellie McM. Donovan, George L. Crabtree, C. H. Williams, Reginald McColgan, and Thomas W. Hickey, hereinafter called the beneficiaries, and he had authority from said beneficiaries so to act. Plaintiffs are informed and believe, and on such information and belief allege, that said Daniel A. McColgan so acted with the knowledge and express consent of said beneficiaries," and that the Mercantile Trust Company was about to distribute the fund without reserving sufficient to pay or paying the claim of respondents, concluding with a prayer for an order directing such payment from the fund and that distribution be enjoined pending compliance with the order.

Appellants denied the allegations of the complaint as to the reasonable value of the services, that McColgan agreed to pay therefor from the sum collected, or that any services were rendered after December 5, 1918, and denied that McColgan had express authority of appellants to employ respondents, or that he acted with their knowledge or express assent. Subsequently appellants, by permission of the court, amended their answer by denying the authority of McColgan to act and that he acted with their assent.

Defendants Mercantile Trust Company of California, as trustee, and Reginald Bell, with Nellie McM. Donovan, answered separately, denying the allegations of the complaint, but did not appeal from the judgment.

The appellants, viz. Adelaide McColgan, as administratrix, George L. Crabtree, Mary C. Williams, and Reginald McColgan, joined in an answer containing the denials above mentioned, and, as special defenses, alleging that respondents filed against the estate of the deceased a claim for the value of their services, and by so doing they elected to enforce the personal obligation of McColgan and waived any right against the fund, further alleging the action to be barred by the provisions of subdivision 1 of section 339, Code of Civil Procedure.

The findings were in accordance with the allegations of the complaint, no findings being made on the special defenses, and judgment was entered thereon against all the defendants, fixing the reasonable value of the services rendered and adjudging that such sum be paid "only out of any money that is in the possession or shall hereafter come into the possession of the Mercantile Trust Company of California as trustee," under the trust mentioned, and directing payment to be made by the latter therefrom, the trustee being restrained from dividing the fund without reserving sufficient therefrom to pay the claim, with interest and costs.

Appellants present their appeal on the judgment roll with a bill of exceptions, urging as grounds for reversal the failure to find on the special defenses, and the insufficiency of the evidence to sustain certain findings, in particular as to the value of the services, the finding that McColgan employed defendants on behalf of the persons referred to in the complaint as the beneficiaries, that in making the loans and in employing respondents he "acted for himself and also as agent and trustee," and that services were rendered after the execution of the bond and mortgage.

[1, 2] The evidence sufficiently shows that the services in question commenced immediately after the employment, and were diligently and effectively performed; and, while the major portion thereof was rendered during the period immediately preceding the execution of the bond and mortgage, it appears that McColgan continued thereafter to seek and obtain the advice of respondents in this and other matters until December, 1920. In view of the evidence, the conclusion of the trial court as to the period covered by the services, with the exception of the finding that services were rendered between the above dated and April 18, 1921, and their value is reasonably supported and cannot be disturbed. As stated, the allegation that McColgan, in making the loans and employing respondents, acted as the agent and trustee for the persons named, was not denied. While a general allegation of agency is sufficient (2 Corp. Jur., p. 906, "Agency," 611; Kjerschow v. Daggs, 24 Ariz. 207, 207 P. 1089; Cochran v. Goodman, 3 Cal. 244), it is the general rule that an allegation that one is a trustee is but a conclusion of law (39 Cyc. "Trusts," p. 620; 12 Ency. of Pl. & Pr. "Legal Conclusions," p. 1022; Francis v. Gisborn, 30 Utah, 67, 83 P. 571; Bartholomew v. Guthrie, 71 Kan. 705, 81 P. 491, 493), and appellants contend that no issue was tendered thereby, and that as a consequence the finding of its truth was not only without the issues, but unsupported by evidence sufficient to sustain the conclusion that McColgan at the time the contract of employment was made was a trustee in the strict and accurate sense of the term, or more than a mere agent as admitted by the pleadings. It has been held that an objection that the complaint is ambiguous or uncertain, or that essential facts appear only inferentially or as a conclusion of law or by way of recital, must be raised by special demurrer, and cannot be urged on a general demurrer. Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410; Burke v. Dittus, 8 Cal. App. 175, 96 P. 330; Green v. Darling (Cal. App.) 239 P. 70; Smith v. Peters, 46 Cal. App. 47, 188 P. 811.

[3-6] In the instant case, not only was no specific objection made to the insufficiency of the allegation either by demurrer or at the trial, but respondents, as part of their opening statement, read the material parts of the pleadings, stating with reference to the allegation mentioned as follows:

> "It is admitted that, in making said loans and employing Eustace Cullinan and Thomas W. Hickey, said Daniel A. McColgan acted for himself and also as agent and trustee for these other persons whose money Daniel A. McColgan had loaned; that it is admitted that he acted as trustee and agent,"

—to which counsel for appellants made no reply. It is clear from the record that in the subsequent proceedings, the court and counsel for respondents acted upon appellants' tacit admission of the truth of these allegations and that the finding of the court was based thereon. It is the rule that an admission must be one of fact and not of a conclusion of law (Chamberlayne, Ev., § 1293), yet a party may, where an admission has induced the opposite party to assume a position he would not have assumed had the admission not been made, be estopped from afterwards denying it (People v. Pittsburg, Ft. Wayne & C. R. Co., 244 Ill. 166, 91 N. E. 48). Where a cause is so conducted that the court and counsel may rightly and do infer that certain facts are conceded or admitted, the court may so treat them. Godwin v. State, 1 Boyce (Del.) 173, 74 A. 1101, 1103, Ann. Cas. 1913E, 940; Pratt v. Conway, 148 Mo. 291, 49 S. W. 1028, 71 Am. St. Rep. 602. As was said in Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 147 P. 90:

> "It seems to us that the reformed procedure would receive a decided shock if a defendant should be permitted to stand by and without objection allow an issue to be tried as though properly presented by the pleadings and on appeal escape the consequences by claiming that the complaint failed to present such issue."

[7, 8] While the admitted allegations of the complaint that certain of the notes executed by the motion picture corporation were made payable to the individuals who advanced portions of the sums loaned tend to negate the conclusion that McColgan was thereafter until the execution of the bond and mortgage a trustee in the strict sense, yet it does not appear but that, as the result of the transactions between these parties immediately preceding the employment of respondents, such relation was created. The authority of the trustee to contract for the services was denied by appellants' amended pleading, and its extent, which depended upon facts peculiarly within the knowledge of the latter, was not directly shown. It is, however, the duty of a trustee to preserve and protect the property of the trust (26 R. C. L. "Trusts," p. 1281, § 131), for which he is the general agent, and his acts within the scope of his authority bind the trust property to the same extent as the acts of an agent bind his principal (Civ. Code, § 2267). The trust relation being admitted, and the act being shown to have been reasonably necessary to protect and preserve the fund as in cases of ordinary agency (Leake v. Sutherland, 25 Ark. 219; C. E. Parkes Grain Co. v. Townsend [Tex. Civ. App.] 267 S. W. 1011; Nebraska B. S. & L. Co. v. Conway, 127 Iowa, 237, 103 N. W. 122; 2 Corp. Jur. p. 921, "Agency," § 652), it may reasonably be inferred, in the absence of proof to the contrary, that the trustee acted within his authority.

[9] As a rule, an attorney employed by a trustee must look to the trustee for payment, and can have no claim on the trust fund (6

Corp. Jur. p. 734, "Attorney and Client," § 306), but to this rule there is a well-recognized exception. When a trustee, authorized to make expenditures for the protection or safety of the trust estate, is without funds of the estate in his possession and is unwilling to make himself liable therefor, he may by agreement require those rendering the services to look solely to the trust estate (26 R. C. L. p. 1318, "Trusts," § 176; Hall v. Jameson, 151 Cal. 606, 91 P. 518, 12 L. R. A. [N. S.] 1190, 121 Am. St. Rep. 137), and, when facts creating the exception appear, the creditor may proceed in equity for the satisfaction of his claim out of the trust estate (New v. Nicoll, 73 N. Y. 127, 29 Am. Rep. 111; Jessup v. Smith, 223 N. Y. 203, 119 N. E. 403; Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252; Gill v. Carmine, 55 Md. 339; Wadsworth, Howland Co. v. Arnold, 24 R. I. 32, 51 A. 1041; Mason v. Pomeroy, 151 Mass. 164, 24 N. E. 202, 7 L. R. A. 771; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; King v. Stowell, 211 Mass. 246, 98 N. E. 91; Pomeroy, Eq. Jur. [4th Ed.] § 1085). Whether the creditor's right to obtain satisfaction from the trust estate depends upon the trustee's right to indemnity, and hence upon the state of the account between the latter and the trust fund, or, irrespective of such right, upon the principle that a trust estate should pay for the benefit conferred thereon by the creditor, it is unnecessary to decide, as no suggestion is made that McColgan was in default under the terms of the trust agreement and the finding as to the reasonable value of the services is fully supported by the evidence.

[10, 11] It is further contended that, if respondents' right to sue accrued before the death of McColgan, the action was barred by the provisions of subdivision 1 of section 339, Code of Civil Procedure, and that, if the obligation was to pay when the whole fund had been collected by the trustee, then no cause of action existed at the time the complaint was filed. It is clear from the allegations of the complaint and the testimony that the agreement was to pay from the trust estate when the fund represented by the notes should be paid to the trustee, and the right to relief was not barred by the statute mentioned. The complaint was filed on May 12, 1923, alleging that the trustee was about to collect the balance unpaid under the bond and mortgage and disburse the trust fund to the beneficiaries, which distribution respondents sought to enjoin; and it appears that the collection was made in full on May 23, 1924. An action to establish the equitable right to charge the trust estate with the reasonable value of services rendered for its benefit could be maintained (Jessup v. Smith, supra; Strong v. Dutcher, 186 App. Div. 307, 174 N. Y. S. 352), though payment was not yet due (Mason v. Pomeroy, supra), and, although it is the general rule that a decree in equity operates upon the parties and subject-matter as they stood at the commencement of the action, as was said by Mr. Justice Henshaw in Southern Pacific R. R. Co. v. Allen, 5 Cal. Unrep. Cas. 51, 40 P. 752:

> "It only does so to subserve the ends of justice. When * * * a * * * change in the status has been brought about by the passing of time, under the very terms of the agreement, and knowledge of this change is, as here, judicially before the court, or is brought in by appropriate pleading, its decree should be addressed to the rights existing, not at the commencement, but at the time of the determination of the action."

See 21 Corp. Jur. p. 663, "Equity," § 846. In view of our conclusion that by agreement the claim was not due until the loans had been paid, a finding on the defense of the statute of limitations would necessarily have been against appellants.

[12] The second defense presented the question of the effect of the claim filed against the estate as a waiver of the right to charge the trust fund. The agreement that Mr. McColgan should incur no personal liability prevented a recovery from his estate; and the fact that respondents were mistaken in this respect would not prevent them from subsequently availing themselves of the remedy to which they were entitled under the facts of the case. McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460; Snow v. Alley, 156 Mass. 193, 30 N. E. 691, 692; Doucette v. Baldwin, 194 Mass. 131, 80 N. E. 444; Herdan v. Hanson, 182 Cal. 539, 189 P. 440. As said in Mansfield v. Pickwick Stages, 191 Cal. 131, 215 P. 389:

> "'The doctrine of election as applied to a choice of remedies which precludes a party from claiming repugnant rights, is but an extension of the general principles of equitable estoppel, and proceeds upon a like theory that the inconsistent attitude of the party will put his adversary to some disadvantage' * * * under the well-settled principles of the doctrine of estoppel, the disadvantage here referred to must be a real injury, such as would, in contemplation of law, amount to a fraud upon the party invoking the estoppel."

It not being contended that the claim was acted upon by the administratrix, that proceedings were had to establish it, or that the trustee or beneficiaries were prejudiced thereby, its filing did not constitute an election to waive equitable rights in the trust fund. De Laval Pacific Co. v. United C. & D. Co., 65 Cal. App. 584, 224 P. 766.

[13] It appearing that findings on the special defenses would have been adverse to appellants this omission is not ground for reversal. United States Trading Corporation v. Newmark Grain Co., 56 Cal. App. 176, 205 P. 29; Lincoln v. Hoggard, 66 Cal. App. 197, 225 P. 770.

The trial court had jurisdiction both of the trust estate and of the cause, and no abuse of its discretion or error in its proceedings being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 442

CULLINAN et al. v. MERCANTILE TRUST CO. OF CALIFORNIA et al. (Civ. 5486.)

(District Court of Appeal, First District, Division 1, California. Dec. 27, 1926.)

Trusts 🔑266—Where judgment required trustee to pay attorneys' fees, order requiring payment was appropriate and notice thereof to beneficiaries unnecessary.

Where trustee and beneficiaries and trust fund were within jurisdiction, and judgment required attorneys' fees to be paid from trust fund, and proceeding by beneficiaries for supersedeas did not stay execution of judgment, order directing trustee to satisfy charge was appropriate, and might issue without notice to beneficiaries.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Eustace Cullinan and another, copartners doing business under the firm name and style of Cullinan & Hickey, against the Mercantile Trust Company of California, trustee, Adelaide McColgan as administratrix of the estate of Daniel A. McColgan and others. From orders requiring payment of attorney's fees, Adelaide McColgan, administratrix, and others appeal. Affirmed.

Alfred J. Harwood, Harrison & Harrison, and George D. Collins, Jr., all of San Francisco, for appellants.

Julius D. Cohn, of San Francisco, for respondents.

CASHIN, J. Appeals from orders made after the entry of a judgment fixing the reasonable value of services rendered for the benefit of a trust estate, and adjudging that the amount thereof be paid therefrom.

The orders required the trustee to pay the amount of the judgment. The judgment mentioned was appealed from by certain of the beneficiaries of the trust, who are also the appellants here, and the judgment was affirmed by this court. Eustace Cullinan et al. v. Mercantile Trust Co., 252 P. 647, No. 1 Civ. 5472, decided December 21, 1926. The trustee, which was joined as a defendant in the original action and to which the orders were directed, took no appeal either from the judgment or the orders. The orders were made without notice to appellants, and followed a hearing on an order to show cause served on the trustee. Following their appeal from the original judgment two of the appellants applied to the Supreme Court, where the appeal was then pending, for a writ of supersedeas to stay its execution. Cullinan et al. v. Mercantile Trust Co., etc., et al., 193 Cal. 562, 226 P. 4. The court on denying the writ said:

> "The judgment as rendered required nothing of these petitioners, but they are, nevertheless, parties interested therein and aggrieved thereby and are entitled to appeal therefrom. They contend herein that the perfection of their appeal operates as a statutory supersedeas against the entire judgment, including the portion thereof requiring the payment of the fund by the trust company to the plaintiff. In this they are mistaken. Their appeal does not stay the execution of that portion of the judgment which is directed at the trust company, which has not appealed"—citing Halsted v. First Savings Bank, 173 Cal. 605, 608, 160 P. 1075.

The right of plaintiffs was adjudicated in an action to which the trustee and beneficiaries were parties defendant, and the judgment required the claim to be paid from a trust fund of which the court had jurisdiction. It having been held in the proceeding for the writ of supersedeas that the execution of the judgment as to the trustee was not stayed, the plaintiffs were entitled to the means provided by law for its enforcement. An order directing the trustee to satisfy the charge created by the judgment on the trust fund was an appropriate means for its enforcement, and, like the ordinary process for the enforcement of a money judgment, might issue without notice to appellants.

The orders are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 450

FRANCISCO & ELLINGTON, Inc., v. PASADENA TOURNAMENT OF ROSES ASS'N. (Civ. 3146.)

(District Court of Appeal, Third District, California. Dec. 27, 1926.)

1. Appeal and error 🔑1011(1)—Findings on conflicting evidence are conclusive.

Findings of trial court on conflicting evidence are conclusive on appeal.

2. Contracts 🔑10(2)—Excavating contract held not void for want of mutuality after work was completed, though defendant reserved right to terminate work.

Contract for excavation *held* not void for want of mutuality after work thereunder was completed and stipulated payments made, though it bound contractor to complete work but allowed other party right to terminate it.

3. Work and labor 🔑28(5)—Evidence held to show that there was no change in plans for excavation after agreement constituting release and entitling contractor to recover on quantum meruit.

Evidence *held* sufficient to support implied finding that there was no change in plans and specifications for excavation after contractor agreed to complete work releasing him and entitling him to recover on quantum meruit.

4. Appeal and error ⚷1056(2)—Exclusion of evidence of reasonable value of services held not prejudicial, where there was no right to recovery except under contract.

Exclusion of evidence of the reasonable value of plaintiffs' work as excavators *held* not prejudicial, where no right of recovery existed except under contract fixing definite price.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Francisco & Ellington, Inc., against the Pasadena Tournament of Roses Association, to recover a balance due on a contract for excavating. From a judgment allowing insufficient recovery, plaintiff appeals. Affirmed.

Shaw & McDaniel, of Los Angeles, for appellant.

Hahn, Hahn & Landreth, of Pasadena, for respondent.

FINCH, P. J. [1] Plaintiff was given judgment for the sum of $834.90 as the balance due upon a contract for making certain excavations in the construction of a stadium for defendant, and has appealed therefrom, contending that a much larger balance is due. Appellant's principal contention is that the findings are not supported by the evidence, in that no "binding contract between the parties" was proved and that, even assuming that there was a binding contract, "yet the plans of construction were so materially deviated from * * * on matters not contemplated within the terms of the contract that appellant is entitled to recover upon a quantum meruit." It is conceded that the judgment is for the correct amount if the contract which the defendant attempted to prove is the measure of plaintiff's right of recovery. Since the findings of the trial court from conflicting evidence are conclusive on appeal, the evidence will be stated in the light most favorable to the support of the judgment, omitting contradictory evidence. Plaintiff was paid for certain extra work which was not within the terms of the agreement upon which the defendant relies. Compensation for such extra work is not involved in this action.

About February 15, 1922, the defendant undertook the construction of a stadium in the shape of a horseshoe, with the open end to the south, the surrounding embankment to be raised approximately 50 feet above the finished floor level with earth taken from within the inner line of the embankment, the floor to be about 250 feet wide by 850 feet long. W. A. Taylor was the authorized representative of the defendant and Myron Hunt was the architect of the structure. W. T. Ellington represented the plaintiff in most of the transactions between the parties; he and Herbert Francisco then being copartners, but subsequently forming the plaintiff corporation. He offered, in behalf of the copartnership, to do the contemplated excavating at 30 cents a cubic yard and Taylor agreed to that price, but stated that he "wanted him (Ellington) to make an accurate figure and submit a lump sum bid." Ellington "said he had not figured it accurately enough," that "it would require somewhere from two to three weeks for him to do it, and he didn't have time to do it right then." No "lump sum bid" was ever submitted, but it was agreed that plaintiff would "move on the job and go to it," and work was commenced about February 20th with a small force. Plaintiff had a large force at work by March 20th and continuously thereafter until the excavations were completed. After the work was commenced, Taylor received such instructions from defendant as to prevent the execution of a "lump sum" contract with plaintiff. It does not appear that either party thereafter expressed a desire to enter into such a contract, and it is a fair inference that the original understanding in that respect was abandoned by mutual consent. April 3, 1922, Taylor presented to Ellington for signature a proposed written contract, binding the plaintiff to "do all the excavation necessary in the construction of said stadium" for 30 cents per cubic yard, the yardage to be computed from the map of the premises provided by the architect "and the finished grades as shown in the plans furnished by the architect." The last clause of the proposed contract was as follows:

> "It is further agreed that first parties may terminate this agreement upon three days' notice to second parties by paying to them all money owed them to date, and in addition thereto the actual cost of removing their equipment from the premises."

Ellington refused to sign the contract, objecting particularly to the clause providing for its termination. "It was agreed by both parties that * * * the rest of the document was substantially all right." Both parties then agreed that, in the event of a termination of the contract, the amount to be paid to plaintiff would be left to the decision of Hunt. Hunt delivered to each party a letter accepting the proposal that he act as arbitrator between them, attaching thereto a copy of the proposed contract. The parties, however, never signed the contract, but the plaintiff continued the work. The plans were changed in certain particulars after plaintiff had first offered to do the excavating at 30 cents a yard. Among other changes, the tunnels were lengthened and the floor level was lowered two feet. The plaintiff made claim for extra compensation on account of the changes in the plans and on the

5th of July the parties met together in an effort to agree upon the amount of such extra compensation to which plaintiff was entitled. The conference resulted in the execution of the following document by the parties whose signatures are attached thereto:

"To W. A. Taylor and Rea P. Taylor: Copy to —M. J. J. Mitchell, President Tournament of Roses Ass'n. Mr. W. F. Creller, Chairman Building Committee. Francisco & Ellington. Architects' Superintendent.

"Referring to our memorandum A4216, contract B3801, dated June 26, 1922, regarding your settlement of extra items under your contract with Francisco & Ellington.

"After consultations with the building committee by both yourself and this office, we, in that memorandum, approved your allowing Francisco & Ellington a total added charge for various items as therein set forth, amounting to $9,000. The bill which they put in totaled something over $14,000. Other items in the bill were not allowed. After a further consultation to-day they convinced you and convinced me that there was a proper charge coming from them as the result of the change back to the original level of the bottom of the Bowl, from a level 2' higher, which latter level was contemplated at the time you made your agreement with them. You are authorized to make a settlement with them in full for all items not covered by the flat agreement to move dirt at 30 cents per yard, providing they will accept, as they have agreed to accept, an additional $3,000, bringing their total bill exclusive of the 30 cents figuring, up to $12,000.

"Our contract A4210, dated June 22, 1922, authorized you to pay Francisco & Ellington the sum of $6,000 on account of extra charges as definitely set forth in this memorandum. You are hereby authorized to pay Francisco & Ellington the further sum of * * * $8,000, which, together with the $8,000 payment referred to above, brings the total payments on account of extra charges to $12,000 as set forth above.

"As stated to you in our order of July 6th, being memorandum A4233, contract B3801, it is left to you to determine the rapidity with which you can afford to pay out these moneys and still protect yourself in the matter of the cash bond which you have put up with the owner.

"It should be definitely understood and agreed between you and Francisco & Ellington, that the acceptance of this additional $12,000 binds Francisco & Ellington to the completion of all excavating as required or directed in connection with the Stadium, under their unit price of 30 cents per cubic yard, plus only the additional $12,000 authorized by this memorandum. Myron Hunt, Architect, by Myron Hunt, K. & O. E., July 6, 1922. Approved: Pasadena Tournament of Roses Building Committee, by W. F. Creller. Approved and accepted: Francisco & Ellington, by H. Francisco."

Relative to what took place at this conference, Hunt testified:

"I did my utmost to make it plain * * * that we were making an effort to clean up the entire situation, and coming to one agreement as of this date that would settle all questions of cost and that this agreement contemplated settling for work already completed and certain work partly started and yet to be completed. * * *

"Q. Were Francisco and Ellington both there? A. Yes. * * * The agreement was that the dirt was thereafter to be placed where directed. * * * The entire settlement was accepted, and that was a part of the settlement. * * *

"Q. After this settlement of $12,000 * * * July 5, 1922, do you know whether any changes had been made in the plant * * * which caused a change in the grading? * * * A. It is just possible that pulling in 14 feet at the south end was done after that. * * * August 14th is the date of a drawing that shortened the field 14 feet and widened it 30 feet at the end. * * * It put the center of gravity of the remaining soil to be moved slightly nearer the point where it had to be dumped, perhaps a foot, * * * a very slight advantage to the contractor."

Prior to the meeting of July 5th it had been determined that the earth to be excavated would be insufficient to raise the embankment to the height planned at all points, and it was decided to leave the south ends thereof unfinished and to use the yardage thus saved in completing the remainder. The change naturally resulted in a longer average haul. This shortage of earth for the embankment was due to the lengthening of the tunnels. Hunt testified that the additional expense of the longer haul was discussed and taken into consideration in fixing the amount of extra compensation which was agreed upon at the conference. W. A. Taylor testified that he first discovered that there would be a shortage of earth in May; that he did not know whether he informed plaintiff of that fact, "but I suppose that I did, because that was in the general discussion at the time of this adjustment of July 5th, and it was what I understood all the time they were charging for and what they got paid for was the lengthened haul occasioned by the widening of the tunnels and placing the fill in a different position from * * * what the plan originally showed"; that at that conference Francisco and Ellington said that if the defendant would pay $12,000 for the extra work they "would finish * * * the excavating of the stadium, as directed, place the dirt * * * as directed" at 30 cents a cubic yard, and that no material changes were made in the plans thereafter "excepting that the south end of the cut was shortened and widened, approximately balancing the excavation. * * * It made a very little shorter haul." W. F. Creller testified that the July settlement was made with the understanding that "this would be all the extras there would be in connection with the completion of the stadium." Ralph Taylor testified that he knew on May 10th that there would be a shortage of earth and so informed Ellington a few lays later, and that Ellington replied that "he knew there would be a shortage and had known it all along"; that "it was made very plain to them (at the conference) * * * that the balance of the excavating must be done at a cost of 30 cents per yard without additional extras, to which Francisco & Ellington agreed. * * * The south end of the excavation was (thereafter) moved in some 14 feet and the width at the southerly end increased by some 28 feet. * * * Q. Do you know whether or not that change produced more earth to be excavated than if the plans had not been changed? A. There was no change made in quantity. * * * The only difference was this, that the haul was shortened slightly." July 15th, August 1st, August 16th, and September 1st, respectively, the plaintiff presented itemized bills for work done during the preceding semimonthly periods, computing the yardage at 30 cents, and received payment therefor. No claim was made for the extra compensation here sought to be recovered until after the work was completed.

[2] Appellant contends that the agreement of April 3d was void for want of mutuality, in that it purported to bind the plaintiff to complete the contemplated work "but that respondent still reserved the right to terminate the work at any time and for any unforeseen reason." If the question had arisen prior to performance, there would be much force in appellant's argument, but the contract has been executed by both parties. The plaintiff has completed the work and the defendant has made all stipulated payments therefor, except the last, which is in dispute because the plaintiff demanded a larger sum than provided by the contract, and the defendant has made no attempt to exercise its option to terminate the agreement. "Even contracts unilateral at first are sustained upon execution of the optional consideration." Marin Water, etc., Co. v. Town of Sausalito, 168 Cal. 587, 600, 143 P. 767, 773; North Confidence, etc., Co. v. Morrice, 56 Cal. App. 145, 149, 204 P. 851.

[3] Appellant contends that, if it be held that the agreement of April 3d is valid, "even then the plaintiff is entitled to recover upon quantum meruit because of the changes made in the plans and specifications after the contract was entered into." The contract of April 3d was supplemented by the agreement of July 5th, and appellant does not contend that any changes made prior to the latter date are material to the question under discussion. In appellant's reply brief it is said:

> "Appellant contends the evidence shows that two changes were made about August 1st: (1) The south end of the field was shortened 14 feet and widened 30 feet. (2) The south ends of the embankment were shortened approximately 300 feet."

The evidence hereinbefore quoted shows that the first change mentioned was to the advantage of the plaintiff. In addition to the testimony already set forth, Rea P. Taylor testified that:

> At the July conference "it was stated that this increase in length of the tunnels had caused the increase in the yardage of the fill, and that would necessitate putting more of the dirt in the wide part of the fill, leaving the toes of the fill to be filled in at a later date, from material excavated from the river channel that was then contemplated. * * * There was not enough fill called for in the original plan opposite the south end to take the dirt that was excavated from it; that was just a very small section of fill in there.
>
> "Q. I know, but there was some bank to be filled there according to the plans? A. Comparatively small.
>
> "Q. As it was finished, the lower ends of the horseshoe were practically not filled at all? A. Quite right. And at the meeting that this settlement was made, Mr. Hunt then had said that, if we did not have sufficient earth to complete absolutely all that was shown in the drawings in the way of a fill, that the earth would be available to place on the south ends of the horseshoe * * * where there was no seats to go, that earth would be available from the wash they were to cut in there with their steam shovel, or the river channel, they were to cut in there with their steam shovel.
>
> "Q. That was to be filled in from the river channel which is outside of the stadium? A. What it lacked was to be filled in from the river channel.
>
> "Q. Was it understood that plaintiffs were to do that? A. No, sir; had nothing to do with that.
>
> "Q. You say that was the conversation at the meeting in July? A. No; said if there was any material lacking we would leave it at the south end where the fill had no seats on it and it could be placed in at a later date, and the probabilities were material would be available from the channel to be dug up at a later date.
>
> "Q. Was there anything said then that the earth should be moved by them from the south end of the excavation up on the bank * * * north of the embankment and not opposite the place of excavation? * * * A. I don't remember of anything being said to the effect that the dirt would have to be placed not opposite of where it was excavated."

It appears from the foregoing testimony that, while it was not specifically stated at the July conference that the plaintiff would be required to move earth from the south end of the excavation to parts of the embankment lying farther north, the parties must have understood from what was said that it would be necessary to do so. The fills at the south ends of the embankment were "comparatively small," according to the original plans, "not enough * * * to take the dirt that was excavated" from the south end of the field, and it follows that the surplus thereof was to be deposited at other points in the embankment. The statements that it was necessary to place more earth in the wide part of the fill, "leaving the toes of the fill to be filled in at a later date," and that, "if there was any material lacking, we could leave it at the south end where the fill had no seats on it," justify the inference that the parties understood at the July conference that the south ends of the embankment were to be left unfinished and consequently that the earth from the south end of the excavation was to be placed in the embankment at points other than those opposite the place from which it was taken.

[4] The complaint consists of a general allegation of indebtedness for services performed. The answer and the findings are equally general. The foregoing evidence is amply sufficient to support the implied finding that there was no change in the plans and specifications after July 5th to the prejudice of the plaintiff or which released it from its agreement of that date binding it "to the completion of all excavating as required or directed in connection with the stadium, under their unit price of 30 cents per cubic yard, plus only the additional $12,000 authorized by this memorandum." Since the agreement is the measure of plaintiff's right of recovery, it was not prejudiced by the court's refusal to admit proof of the reasonable value of the services performed.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

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80 Cal. App. 363

GOETTING v. GOETTING. (Civ. 5478.)★

(District Court of Appeal, First District, Division 1, California. Dec. 20, 1926. Rehearing Denied Jan. 19, 1927. Hearing Denied by Supreme Court Feb. 17, 1927.)

1. Appeal and error 🔑1040(10)—To warrant reversal, error in overruling special demurrer on ground of uncertainty must be prejudicial and affect a substantial right.

When case has been tried and judgment rendered on facts, in order to warrant reversal because of error in overruling special demurrer interposed on ground of uncertainty, it must appear that some substantial right of demurrant has been prejudicially affected; otherwise he has no ground for complaint.

2. Husband and wife 🔑247—Where misconduct complained of occurred after amendment of statute relating to husband's power over community property, held statute relating to disposition of property in separate maintenance actions applied without retroactive construction (Civ. Code, § 172, as amended by St. 1917, p. 829, and § 137, as amended by St. 1917, p. 35).

Where acts of misconduct, relied on by plaintiff in action for permanent support and maintenance, occurred after the amendment of Civ. Code, § 172, by St. 1917, p. 829, relating to power of husband over community property, *held* Civ. Code, § 137, as amended St. 1917, p. 35, authorizing court in action for separate maintenance to make same disposition of community property as in actions for divorce, was applicable without being given a retroactive effect and was properly followed by the court.

3. Husband and wife 🔑285½—Husband's duty under statute to support wife is continuing one and basis of action for separate maintenance (Civ. Code, § 155).

Under Civ. Code, § 155, a husband contracts toward his wife the obligation to support, which obligation is a continuing one, and is basis of action for separate maintenance.

4. Husband and wife 🔑247—Statute authorizing disposition of community property in actions for separate maintenance as in divorce actions held not invalid, though it incidentally divests husband of rights in such property (St. 1917, p. 35, amending Civ. Code, § 137).

Vested property rights are held subject to the laws for the enforcement of public and private duties, and hence St. 1917, p. 35, amending Civ. Code, § 137, and authorizing courts in separate maintenance actions to dispose of community property as in actions for divorce, is not invalid, though it may incidentally divest a husband of rights in community property.

5. Constitutional law 🔑93(1)—Vested property rights may be divested through operation of laws for enforcement of public and private duties.

While vested property rights cannot be divested by mere force of legislative enactment, such rights are held subject to laws for enforcement of public and private duties, and may be divested through operation of such laws.

6. Limitation of actions 🔑39(1)—Action for separate maintenance held not barred by four-year limitation statute (Code Civ. Proc. § 343).

Action for separate maintenance *held* not barred by four-year statute of limitation (Code Civ. Proc. § 343), it being inapplicable to actions for divorce or to actions where obligation is a continuing one rather than one to recover for past derelictions.

7. Husband and wife 🔑283(1)—Power to compel husband to support wife is not limited to cases where she has cause of action for divorce, although existence of such cause of action is occasion for its exercise (Civ. Code, § 137, as amended by St. 1917, p. 35).

The power of court to compel a husband to provide for his wife from the community property is not confined to cases where she has a cause of action for divorce, though under Civ. Code, § 137, as amended by St. 1917, p. 35, existence of cause of action for divorce is made occasion for the exercise of such power.

8. Husband and wife 🔑285½—Action for separate maintenance, based on cause of action for divorce, is not barred unless divorce on grounds alleged would be barred (Civ. Code, §§ 124, 125, and 137, as amended by St. 1917, p. 35).

An action for separate maintenance under Civ. Code, § 137, as amended by St. 1917, p. 35,

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★Hearing granted by Supreme Court.

in which cause of action for divorce is made the ground for relief, is not barred unless a divorce on the grounds alleged should be denied under the provisions of Civ. Code, §§ 124, 125.

9. Appeal and error 🔑1008(1) — Whether lapse of time before bringing action for separate maintenance is unreasonable is for trial court.

Question of whether lapse of time after misconduct complained of before bringing suit for separate maintenance is reasonable is for trial court to determine.

10. Husband and wife 🔑299(1)—Pleading in contested action for separate maintenance held sufficient to sustain award without averment that award was necessary (Civ. Code, § 137, as amended by St. 1917, p. 35).

In contested action under Civ. Code, § 137, as amended by St. 1917, p. 35, for permanent support and maintenance, allegation of existence of certain community property and prayer for the allowance of a monthly sum for plaintiff's support, *held* sufficient to sustain an award made without any allegation that award was necessary for plaintiff's support, in view of defendant's pleadings seeking an award of all community property, but not alleging that amount sought by plaintiff was excessive.

11. Husband and wife 🔑299(1)—In contested action for separate maintenance, any relief authorized by facts alleged and proved or admitted may be awarded (Code Civ. Proc. § 580).

While relief granted in default case for separate maintenance is governed by averments of complaint under Code Civ. Proc. § 580, in contested cases any relief authorized by facts alleged and proved or admitted may be awarded; defendant being able, by answering, to enlarge scope of relief to any extent consistent with pleadings and embraced within issues.

12. Appeal and error 🔑1071(6)—In separate maintenance action, failure concerning alleged misconduct by plaintiff held not reversible error (Civ. Code, § 137, as amended by St. 1917, p. 35).

In action for separate maintenance under Civ. Code, § 137, as amended by St. 1917, p. 35, court's failure to find on certain allegations of answer, wherein defendant sought to justify his conduct by averring similar acts by plaintiff, *held* not to warrant reversal; such allegations, if true, being no bar to relief sought.

Appeal from Superior Court, City and County of San Francisco; J. E. Woolley, Judge.

Action by Frances L. Goetting against Charles L. Goetting for separate maintenance, in which defendant filed a cross-complaint for divorce. From a judgment for plaintiff defendant appeals. Affirmed.

S. Joseph Theisen, of San Francisco, for appellant.

Wm. M. Stafford, of San Francisco, for respondent.

CASHIN, J. An action by respondent, Frances L. Goetting, against her husband, Charles L. Goetting, for permanent support and maintenance. The action as to Daisy L. Ford, who was joined as a defendant, was dismissed. Judgment was entered for respondent, from which the husband appealed on the judgment roll alone, urging as grounds for reversal the insufficiency of the complaint to support the judgment awarding portions of the community property to respondent, that the special demurrer thereto on the ground of uncertainty should have been sustained and that the action is barred by the provisions of section 343 of the Code of Civil Procedure.

The complaint, which was filed on October 9, 1923, alleged that the parties, who had been married for nearly 30 years, separated on August 17, 1917, that on numerous occasions during their married life, the exact dates of which respondent was unable to state, appellant, without cause or provocation, had cursed her, calling her vile and obscene names, and on numerous occasions had struck and knocked her down; further alleging that, without respondent's knowledge or consent, he had on numerous occasions prior to the separation accompanied defendant Ford to various cafes and roadhouses, remaining away from his home during the night, that since the separation he had lived with the latter in an apartment house in San Francisco, and that his conduct had inflicted on respondent great bodily harm and grievous mental suffering. The allegations of cruelty were denied by appellant, who filed a cross-complaint for divorce on similar grounds, in which he prayed that the community property be awarded to him.

[1] The averments of the complaint show that the acts of cruelty complained of were wrongfully inflicted, and were sufficient to state a cause of action for divorce. The uncertainties to which the special demurrer was directed related to the language applied to respondent and to the times and places of the commission of the acts alleged. While the special demurrer to these allegations might properly have been sustained (Johnson v. Johnson, 4 Cal. Unrep. Cas. 446, 35 P. 637), as stated, the allegations were denied by answer and the case tried on the issues presented. When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal on the ground of error in overruling a demurrer interposed on the ground of uncertainty, it must appear that some substantial right of the demurrant has been affected, some prejudicial error as distinguished from abstract error suffered by him, or he has no ground for complaint. Rooney v. Gray, 145 Cal. 753, 79 P. 523.

The complaint alleged that the appellant was the owner of a mercantile business, from which he derived a large income, together with deposits in certain banks; and, by the cross-complaint, this with other described property, both real and personal, was alleged to be the community property of the parties. By the prayer of the complaint respondent asked for attorney's fees and costs and for a decree awarding the sum of $400 per month for her support and maintenance, the latter sum being alleged in the prayer to be reasonable in view of the financial condition of appellant. The court found respondent's allegations of personal violence and verbal abuse to be true, that certain of these acts were committed prior to the year 1919, and others before the year 1917, and that the allegations of cruelty contained in the cross-complaint were untrue. The decree divided the real and personal property between the parties, awarded respondent the sum of $125 per month for her support, with a lien on appellant's undivided interest in one of the parcels of real estate as security for its payment.

[2] Appellant contends that, it appearing that the community property was acquired previous to the year 1917, he had a vested right to its management and control, with the power of disposition, subject only to the provisions of section 172 of the Civil Code in force prior to the amendment of that section in 1917 (Stats. 1917, p. 829), and that the provisions of the amendment to section 137 of the Civil Code, adopted at the same session (Stats. 1917, p. 35), granting the power in actions for separate maintenance to make the same disposition of the community property as in actions for divorce, and pursuant to which the court acted in the instant case, could be given no retroactive effect, and hence were not applicable to community property acquired before its adoption, citing Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22. Whatever force this contention might have if the action was based wholly on facts arising before the adoption of the amendment it is not necessary to discuss, as it impliedly appears from the findings that the course of conduct on which the court based its decree commenced before its adoption and continued thereafter during the years 1917 and 1918, and that the acts committed during the latter period, which were found to have caused respondent grievous mental suffering, were alone sufficient to constitute a cause of action for divorce.

[3-5] A husband contracts towards his wife the obligation to furnish support. Section 155, Civ. Code. This duty is a continuing one, upon which the action for separate maintenance is based, and its specific performance is compelled by the decree. The amendment added to the means of enforcing existing rights, and requires no retroactive construction to make it applicable to the facts of the instant case. That it might, as a means of enforcing the duty of appellant, incidentally divest him of rights in the community property, does not affect its validity. While vested property rights cannot be divested by the mere force of legislative enactment, such rights are held subject to the laws for the enforcement of public and private duties, and may be divested through their operation.

[6-9] We are of the opinion that the action was not barred by section 343 of the Code of Civil Procedure. That section has no application to actions for divorce (Morgan v. Morgan, 190 Cal. 522, 213 P. 993), and, where the action is one upon a continuing obligation to compel future support, and not to recover compensation for past derelictions, the statute is not a bar to relief (Glynn v. Glynn, 139 Ill. App. 185; Carr v. Carr, 6 Ind. App. 377, 33 N. E. 805). The power of a court to compel a husband to provide for his wife from the community property is not confined to cases where she has a cause of action for divorce (Galland v. Galland, 38 Cal. 265; Civ. Code, § 137), but the existence of such a cause of action has been made by statute an occasion for its exercise. The object of the present proceeding being as stated, it was the evident intention of the Legislature that, when a cause of action for divorce is made the ground for relief under section 137, Civil Code, the right thereto is not barred unless a divorce on the grounds alleged should be denied under the provisions of section 124 of the Civil Code. The latter section provides no specific limitation for an action for divorce on the ground of extreme cruelty; it being provided merely that a divorce must be denied "when there is an unreasonable lapse of time before the commencement of the action," and by the following section "unreasonable lapse of time" is defined as "such a delay in commencing the action as establishes the presumption that there has been a connivance, collusion, or condonation of the offense, or full acquiescence in the same, with intent to continue the marriage relation notwithstanding the commission of such offense." Section 125, Civ. Code. The trial court impliedly found that the period which elapsed before the commencement of the action was not unreasonable. The question whether such lapse of time is reasonable or not is for the trial court to determine (Johnston v. Johnston, 21 Cal. App. 181, 131 P. 81), and the evidence not being before us, we cannot say that its conclusion was not supported, or that as a matter of law the period which elapsed was unreasonable (Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248).

[10, 11] It is urged that the averments and prayer of the complaint were insufficient to warrant the relief granted. After alleging the existence of certain community property, respondent asked for the allowance of a monthly sum for her support. Appellant by his cross-complaint sought, in addition to a decree of divorce, to have all the property set aside to him. In Sherman v. Sherman, 47

Cal. App. 208, 190 P. 464, an action for separate maintenance in which the defendant defaulted, it was held that an award of the community property to the wife, in the absence of allegations that an award thereof was necessary for her support and of a prayer for such relief was erroneous—this on the ground that the court was bound by the averments of the complaint, which alone were admitted by the default, and that, if other relief was sought, the defendant was entitled to notice. Such is the rule in default cases (section 580, Code Civ. Proc.); but in contested cases any relief authorized by the facts alleged and proved or admitted may be awarded (Murphy v. Stelling, 8 Cal. App. 702, 97 P. 672) and the defendant by answering may enlarge the scope of the relief to any extent consistent with the pleadings and embraced within the issues (Nathan v. Dierssen, 164 Cal. 607, 130 P. 12; Woods C. I. Ditch Co. v. Porter S. Ditch Co., 173 Cal. 149, 159 P. 427). In the instant case the question of the proper disposition of the community property was made an issue by appellant's pleading. It is not claimed that he was misled to his injury, or that, in view of the findings the monthly allowance awarded respondent which was less than the amount asked for, was excessive, or that in its division of the community property the court abused its discretion.

[12] The failure to find on certain allegations of the answer wherein appellant sought to justify his conduct by averring similar acts by respondent does not warrant a reversal (Mohr v. North Rawhide M. & D. Co., 177 Cal. 264, 170 P. 600); and these allegations if true would not bar relief (Mattson v. Mattson, 181 Cal. 44, 183 P. 443).

We find no error in the record which can reasonably be held to have been prejudicial to appellant or to have resulted in a miscarriage of justice, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

CHARLES L. DONOHOE CO. v. SUPERIOR COURT OF GLENN COUNTY et al.★
(Civ. 3222.)

(District Court of Appeal, Third District, California. Jan. 8, 1927. Hearing Granted by Supreme Court March 3, 1927.)

1. Attorney and client ⟹86—Stipulation for extension of time by attorney not of record is ineffectual to prevent dismissal five years after answer (Code Civ. Proc. § 583).

Within Code Civ. Proc. § 583, providing for dismissal of action if not brought for trial within five years after answer, except where the parties have stipulated in writing for extension of time, stipulation by attorney other than defendant's attorney of record, though purporting to be defendant's attorney, is ineffectual.

2. Corporations ⟹425(5)—Defendant corporation held not estopped by attorney other than its attorney of record asking postponement and its officers not objecting.

As only defendant's attorney of record has authority to ask for postponement, it is not estopped by another attorney purporting to act for it asking therefor and its officers present making no objection, plaintiff not being justified in relying thereon.

3. Mandamus ⟹43—Court will be compelled to dismiss action, where express mandatory conditions appear.

There appearing the express mandatory conditions requiring dismissal of action under Code Civ. Proc. § 583, mandamus will lie to the court refusing to dismiss; it having no discretion in the matter.

Application by the Charles L. Donohoe Company for writ of mandate to the Superior Court of Glenn County, Claude F. Purkitt, Judge thereof. Writ granted.

See, also, 248 P. 1007.

W. T. Belieu, of Willows, and Frederick Olds, of San Francisco, for petitioner.

George R. Freeman, of Willows, for respondents.

GLENN, Presiding Justice pro tem. Petitioner seeks a writ of mandate directing respondents to dismiss as to it a certain action for the foreclosure of a mortgage pending in the superior court of the county of Glenn, wherein Frank Freeman is plaintiff and Charles L. Donohoe, Charles L. Donohoe Company, a corporation, petitioner herein, and others, are defendants.

The petition for the writ is based upon a motion for a dismissal of said action made by the petitioner, one of the defendants therein, in said superior court, and the denial thereof by said court; said motion having been so made on the ground that the said action was not brought to trial within five years after the filing of the answer of the defendants, and that no written stipulation extending the said time had been made by the said defendant. In the action referred to all of the defendants appeared by their attorney, W. T. Belieu; their answer having been filed on April 6, 1921. The case was not brought on for trial within five years after the filing of the answer, nor was the trial thereof continued beyond the said five years from the filing of the answer upon notice to, or consent of, the said W. T. Belieu, the attorney of record for the said Charles L. Donohoe Company, a corporation. Likewise, no stipulation, either oral or written, was ever made by the attorney of record for the said defendant Charles L. Donohoe Company, extending the time for the trial of said action beyond

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★Superseded by opinion of Supreme Court 258 P 1094.

five years from the filing of the answer of the said defendants. On May 7, 1926, said Charles L. Donohoe Company, a corporation, through its said attorney, W. T. Belieu moved the said superior court for a dismissal of said action as to it, pursuant to notice of motion theretofore duly given; said motion having been based on the ground above stated. The court made its order denying the motion after hearing the evidence produced by the respective parties.

The motion should have been granted. The undisputed facts as above recited present a plain case for dismissal under the latter portion of section 583 of the Code of Civil Procedure, which provides for the dismissal of an action which has not been brought on for trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended. That portion of the said section applicable to the facts as above set forth has frequently been held to be mandatory. Anderson v. Superior Court, 187 Cal. 95, 200 P. 963, and cases cited; Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006.

The answer sets forth, in substance, three grounds of defense: (1) That a written stipulation was made by the said defendant (petitioner), extending the time for the trial of the said cause beyond the said five-year period; (2) estoppel; (3) that the action of the superior court in denying the motion to dismiss is conclusive so far as this proceeding in mandamus is concerned. The answer, however, when examined in the light of the evidence produced on the hearing of the motion to dismiss, will be found to be evasive, and, in fact, tenders no material issue. There is no denial, and in the face of the record there could be none, of the fact that W. T. Belieu had been at all times the sole attorney of record for the said defendant, Charles L. Donohoe Company, a corporation, and also the further fact that there had been no written stipulation signed by him extending the time within which to bring the case to trial as provided by section 583 of the Code of Civil Procedure. These important facts are attempted to be met by the claim of the defense that a certain attorney at law, other than the said W. T. Belieu, the attorney of record, was in fact acting as the attorney in the foreclosure case for the said Charles L. Donohoe Company. This claim is based upon the contention of the respondents, evidence as to which was introduced on the hearing of the motion to dismiss, to the effect that said attorney had so represented himself at various times to George R. Freeman, attorney for plaintiff, one of said occasions being in the presence of Charles L. Donohoe and his wife, officers of said company, in open court, and another occasion being in the chambers of the judge thereof; that it was pursuant to correspondence between said George R. Freeman and the said attorney not of record that the trial of said foreclosure action was postponed beyond the said five-year period mentioned in said section 583 of the Code of Civil Procedure. The plea of estoppel is based upon the same facts.

It might be added here that, in explanation of the position of the said attorney above referred to, it was the latter's claim that, having been the attorney of record for the Charles L. Donohoe Company in a suit to quiet title, he intended in his letters to Mr. Freeman to refer to that case, which was somewhat similar in its title to that of the foreclosure case, and disclaimed any connection with the latter suit. We refrain from referring to the facts of this feature of the case in detail or to the testimony to the effect that he was not authorized to act for said company in the foreclosure case, as it is immaterial so far as the merits of the case is concerned.

The written stipulation purporting to extend the time for the trial of said foreclosure action alleged in the answer filed herein to have been made "by the defendant in said action" consists of certain correspondence between said George R. Freeman, attorney for plaintiff in the foreclosure suit, and the said attorney, who, as above stated, was not an attorney of record for any of the defendants in said action, and who had never been associated with or requested to appear or act for the said attorney of record, W. T. Belieu. There is no assertion made of bad faith on the part of Mr. Belieu. In fact, the record shows that apparently he was entirely unaware of the communications passing between Mr. Freeman and the attorney referred to with reference to postponing the trial of the foreclosure case until about the time the notice of motion to dismiss was served.

[1] 1. Under the facts of the instant case, the purported stipulation (assuming for the purpose of this decision that the correspondence referred to above constituted such), extending the time for the trial of the action, having been made by an attorney not of record in the action, and who was without authority to enter into the same, must be disregarded. The rule of law applicable to the facts recited above is stated in 3 California Jurisprudence, p. 3, as follows:

> "A party may appear either in propria persona or through an attorney, but he cannot do both; and if, and as long as, he has an attorney of record, the court cannot recognize anyone in the conduct of the case except such attorney. It is indispensable to the orderly conduct of the case that if a party has engaged an attorney who appears in the case, that the attorney shall have the sole management and control of the action, so long as he is the attorney of record. The client, therefore, cannot assume control of the case as against his attorney."

Also, to the same general effect, are the following: Boca & Loyalton R. R. Co. v. Superior Court, 150 Cal. 153, 88 P. 718; McMunn v. Lehrke, 29 Cal. App. 298, 155 P. 473; Board of Commissioners v. Younger, 29 Cal. 147, 87 Am. Dec. 164; Mott v. Foster, 45 Cal. 72; Wylie v. Sierra Gold Co., 120 Cal. 485, 52 P. 809; Crescent Canal Co. v. Montgomery, 124 Cal. 134, 56 P. 797.

If we assume that the Charles L. Donohoe Company, a corporation, one of the defendants in the foreclosure case, desired to change its attorney in said suit, although there is no evidence to this effect other than the statement attributed to said attorney before referred to, that result could have been accomplished in the method provided by law, but not otherwise. McMunn v. Lehrke, supra; Board of Commissioners v. Younger, supra.

[2] 2. There is no merit in the plea of estoppel by respondents. The acts of estoppel relied on consist of the statements attributed to the said attorney hereinbefore referred to and the conduct of Charles L. Donohoe and his wife, officers of said company, as previously set forth herein; it being alleged in the answer of respondents that the said Charles L. Donohoe and his wife were present in court and also in the chambers of the judge thereof when said statements of said attorney were so made, and offered no objection thereto.

On the question of estoppel the facts of this case clearly bring it within the rule laid down in Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006. The instant case presents a stronger one against the plea of estoppel than the case last cited. It is clear from the authorities heretofore cited that, had its been established that the Charles L. Donohoe Company directed an attorney not of record to appear for it in the foreclosure suit and request a postponement of the trial of said action (and there is no evidence to this effect other than the statements attributed to such attorney himself), and the latter had acted accordingly, the court would have been without authority to entertain the same. Even a written stipulation signed in person by a party to an action who has an attorney of record must be treated as a nullity (Mott v. Foster, supra), and disregarded by the court (Crescent Canal Co. v. Montgomery, supra). Under these circumstances neither the plaintiff in the foreclosure suit, nor his attorney, was justified in relying upon an unauthorized consent to a postponement of the trial of said action, and waiver by way of estoppel cannot be predicated thereon.

[3] 3. Respondents earnestly contend that mandamus will not lie in this proceeding, for the reason that the superior court acted judicially upon the facts presented, and, under its discretionary power, denied the motion. There can be no question as to the correctness of the rule, and hence we refrain from referring to the many cases cited by respondents to the point. The contention of respondents, in this regard, cannot be successfully maintained under the undisputed facts of the instant case. The Supreme Court of this state, in disposing of a similar point, states the rule as follows:

> "The proposition so strongly urged in behalf of respondent that mandamus will not lie in this proceeding because the matter submitted under the motion to dismiss called for the exercise of judicial and discretionary powers of the court, which cannot be called in question in this manner, is not maintainable. As already pointed out, the requirement to dismiss after five years, in the absence of a stipulation in writing extending the time, is mandatory. There was no issue presented that the five years had not elapsed, or that there had been a stipulation made between the parties. If such an issue had been made and the court had found as a fact in the case that no answer had been filed, or that five years had not elapsed, or that there had been a written stipulation between the parties for an extension of time, it may be conceded that the decision of the court as to such facts could not be reviewed in this proceeding. But where the express mandatory conditions for a dismissal are clearly established, and without contradiction, the court was without discretion in the matter." Anderson v. Superior Court, 187 Cal. 95, 200 P. 963.

To the same effect also is the case of Miller & Lux, Inc., v. Superior Court, supra.

Reference in the excerpt as quoted above from the Anderson Case to "a written stipulation *between the parties* for an extension of time" (italics mine) means, of course, the parties *authorized* to sign such; otherwise there can be no such stipulation. Bearing this in mind, we think there can be no doubt but that the express mandatory conditions requiring a dismissal as contained in section 583 of the Code of Civil Procedure clearly appear without contradiction.

The writ will issue as prayed for in the petition herein.

We concur: HART, J.; PLUMMER, J.

80 Cal. App. 571

BENNETT v. LOGAN & BRYAN et al.★

(Civ. 3178.)

(District Court of Appeal, Third District, California. Jan. 6, 1927. Hearing Denied by Supreme Court March 3, 1927.)

1. Brokers 🔑26—Customer, depositing bonds as security for future marginal purchases, could not defeat pledge thereof to another broker; first broker having apparent authority to repledge (Civ. Code, § 2991).

Where client of brokerage concern deposited Liberty bonds as security for future marginal purchases by him, such transaction being not merely a bailment, brokerage firm with whom bonds were deposited had apparent right to repledge them with other brokers, customer being familiar with customary manner of handling such transactions, so that such customer could not subsequently defeat pledge with second brokerage house, under Civ. Code, § 2991.

2. Brokers 🔑26—Customer, depositing bonds to open brokerage account, could not defeat right of brokerage firm with whom bonds were repledged (Civ. Code, § 2991).

Where customer opened his account by depositing $3,000 of Liberty bonds with brokerage firm, such customer could not defeat repledge of securities to another broker to secure entire indebtedness of first brokerage firm; relation between marginal customer and first brokerage firm being that of pledgor and pledgee, with implication that broker had right to repledge, in view of Civ. Code, § 2991.

3. Brokers 🔑26—Customers being subject to regulations permitting repledging of securities given for future marginal purchases, could not recover from brokerage firm to whom repledged.

Where each customer of brokerage firm ordered securities to be purchased "subject to rules, regulations, and customs of the exchange in which this order is executed," such rules, regulations, and customs thereby became special terms of contract, so, all transactions whereby brokerage firm repledged securities given as security for future marginal purchases being in strict compliance with such regulations, customers of brokerage house repledging securities could not hold liable brokerage firm to whom securities were repledged.

4. Brokers 🔑26—Repledging of securities given to brokerage firm as security for future marginal purchases held not fraud on customers.

Where customers deposited securities as security for future marginal purchases by brokerage firm, repledging of such securities by such firm with another brokerage firm *held* not fraud on customers; transaction being handled in good faith within rules and regulations binding upon such customers.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by P. B. Bennett against Logan & Bryan, a copartnership, and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Will J. Thayer, of San Diego, for appellant.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (Homer D. Crotty, of Los Angeles, of counsel), for respondents.

FINCH, P. J. Logan & Bryan are stockbrokers, holding membership in the New York Stock Exchange, and having offices in New York City and elsewhere. For some time prior to October, 1919, George G. Prentice conducted business as a stockbroker in San Diego under the name of Prentice & Co. As such broker he purchased from Logan & Bryan for his customers certain securities, which were thereafter held by Logan & Bryan as security for the general indebtedness of Prentice & Co. At the time mentioned, "the business of Prentice & Co. was purchased by Mason & Owen, who thereafter, until the time of their failure, carried on a general brokerage business in said city of San Diego." All of such securities, purchased on the order of Prentice & Co., were, "with the consent of the purchasers, transferred to the account of Mason & Owen upon or shortly after Mason & Owen purchased the business and good will of Prentice & Co., and * * * were held by Logan & Bryan to secure the entire account of Mason & Owen." Neither Prentice & Co. nor Mason & Owen were members of any stock exchange. Other securities were purchased by Mason & Owen, for their customers, from Logan & Bryan, and were held by the latter firm as security for the general indebtedness of the former. Each and all of the securities were purchased upon a written order to either Mason & Owen or Prentice & Co., as the case was, containing the following written direction:

> "Subject to the rules, regulations, and customs of the exchange in which this order is executed, and any rules, regulations, and requirements of its board of directors, and all amendments that may be made thereto, buy for my account and risk (name of security)."

"All of the securities involved in this litigation were purchased by Logan & Bryan upon the New York Stock Exchange," and the purchasers knew that they were to be so purchased. The parties stipulated at the trial as follows:

> "That at all times mentioned in the complaint it was and is, and for a great number of years has been, a general custom of the New York Stock Exchange, the Chicago Board of Trade, and of all markets on which Logan & Bryan had any transactions for the account of Mason & Owen, and of all of the Boards of Trade and Exchanges throughout the United States, and generally of the brokerage business throughout the United States, that if a broker who is a nonmember of the board or exchange, desires to trade in commodities dealt with on such

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★Hearing denied by Supreme Court.

Board or Exchange, that the broker must execute all orders of his customers through a member of the board or exchange, and the order of such nonmember broker did not show the individual customers, or for whose benefit any order to sell or purchase a security or a commodity was given, and that the board member carried all orders placed by the nonmember broker to the account of the nonmember broker and would charge all liability incurred in executing the orders of such nonmember broker to said nonmember broker, and would credit said nonmember broker with all assets derived from the execution of his orders, including all dividends and interest paid on the securities purchased on the order of the nonmember broker, and would hold all securities purchased and/or pledged by such nonmember broker to secure the entire indebtedness of such nonmember broker, including all advances made by such board member and commissions earned by him in executing the orders of such nonmember broker until all contracts made by such nonmember broker through the board member should be justly executed or closed, and that all members of the New York Stock Exchange, before accepting an account from a nonmember broker, required a contract from such broker substantially the same as Exhibit D of defendants' answer."

"Before any orders were given by Mason & Owen to Logan & Bryan * * * Mason & Owen executed and delivered to Logan & Bryan," the following written instrument, referred to in the stipulation as exhibit D:

> "Logan & Bryan, 42 Broadway, N. Y. City—Gentlemen: I hereby consent: First, That all transactions heretofore or hereafter made by you for my account are subject to the rules, regulations and customs of the New York Stock Exchange and its clearing house, or the rules, regulations, and customs of the Exchange or market upon which any transaction by my order is made for my account.
>
> "Second, that all securities, evidences of indebtedness or other property now or hereafter carried in my account or deposited to protect the same, may be loaned or pledged by you, either separately or together with other securities belonging to others, either for the sum due thereon or for a greater sum; that said securities, evidences of indebtedness or other property may be transferred to your own account on the books of the corporation, may be sold by you, either in whole or in part, without notice to the undersigned, at any time when in your judgment the margin of protection in my account shall become impaired to a point where you deem it unsafe to carry it longer, such sale to be made at public, brokers' board or private sale, less the brokerage or other expense of said sale, to be placed to the credit of the undersigned as an offset against the debit in my account.
>
> "Furthermore you shall not be required to return to me the identical bonds or other securities deposited by me or carried in my account; it being understood that bonds or securities of like kind can be returned to me. It is the purpose of this letter and consent to give to you, and I hereby expressly give, the consent provided for in section 956, subdivision 2, of the Penal Code, as added by chapter 500 of the Laws of 1913.
>
> "Very truly yours,
> "Mason & Owen,
> "By Wm. McD. Owen.
>
> "Dated Dec. 2, 1919, in the presence of A. A. Allen."

Section 956 of the Penal Law of New York (Consol. Laws c. 40), referred to in the foregoing instrument, provides:

> "* * * A person engaged in the business of purchasing and selling as a broker stocks, bonds or other evidences of debt of corporations, companies or associations, who * * *
>
> "2. Having in his possession stocks, bonds or other evidences of debt of a corporation, company or association belonging to a customer on which he has a lien for indebtedness due to him by the customer, pledges the same for more than the amount due to him thereon, or otherwise disposes thereof for his own benefit, without the customer's consent, and without having in his possession or subject to his control, stocks, bonds or other evidences of debt of the kind and amount to which the customer is then entitled, for delivery to him upon his demand therefor and tender of the amount due thereon, and thereby causes the customer to lose, in whole or in part, such stocks, bonds or other evidences of debt, or the value thereof,
>
> "Is guilty of a felony, punishable by a fine of not more than five thousand dollars or by imprisonment for not more than two years, or by both.
>
> "Every member of a firm of brokers, who either does, or consents or assents to the doing of any act which by the provisions of this or the last preceding section is made a felony, shall be guilty thereof. (Added by L. 1913, c. 500 [in effect May 14, 1913].)"

All orders for the purchase of securities given by their customers "were by Mason & Owen telegraphed to Logan & Bryan in the name of Mason & Owen." Such telegraphic orders "did not contain any information as to the name of Mason & Owen's customer." The transactions between Logan & Bryan and Mason & Owen were conducted in accordance with the custom described in the stipulation. The orders of Prentice & Co. "were executed in precisely the same manner." All of the securities mentioned in the complaint "were either negotiable in form or were indorsed in blank so as to be negotiable and to pass by delivery."

December 1, 1920, the indebtedness of Mason & Owen to Logan & Bryan "was considerably in excess of the entire indebtedness owing to Mason & Owen from all of their customers," but the securities held by Logan & Bryan "were amply sufficient to secure the indebtedness due from Mason & Owen to Logan & Bryan." On the day last mentioned, Mason & Owen, on petition of the plaintiff herein and other creditors, were adjudged to be bankrupt. Their failure "was caused by Charles F. Mason and one of the clerks of Mason & Owen, with the consent of Mason & Owen, purchasing securities as a part of the account between Mason & Owen and Logan & Bryan and charging the expense thereof against all of the securities which were carried in said account and afterward selling said securities for less than they had been purchased for. * * * Said securities purchased by Mason and his said clerk were purchased on telegraph orders given to Logan & Bryan by Mason & Owen in precisely the manner and way" that securities for the customers of Mason & Owen were purchased.

Will J. Thayer, one of the customers of Mason & Owen and now attorney for appellant herein, was duly appointed receiver of the bankrupt estate. As such receiver he petitioned the court for an order directing him "to make sale of all securities including stocks and bonds now pledged with Logan & Bryan by * * * Mason & Owen." The court, on December 2, 1920, ordered the securities involved herein to be sold and the "net proceeds derived therefrom" deposited with the receiver, and that "such sale or sales be had in the manner provided by the rules of the New York Stock Exchange." A certified copy of the order was served on Logan & Bryan and the receiver "authorized and requested" Logan & Bryan to sell the securities "in accordance with the provisions of said order." December 3, 1920, the attorney for the receiver wrote Logan & Bryan relative to the order of the court, saying, among other things, "It is the understanding of the receiver that the words, 'net proceeds derived therefrom,' refer to the proceeds of all the stock sold after the entire indebtedness owed by Mason & Owen to Logan & Bryan has been liquidated." Logan & Bryan thereafter sold such securities and, after deducting the entire amount due them from Mason & Owen, deposited the remainder with the receiver. "No claim is made by the plaintiff that said securities were not sold for the full market value at the time of sale." No notice was given to any of the customers of the time or place of such sale.

Logan & Bryan "did not file any claims in the bankrupt proceedings against the estate of Mason & Owen." Each of the customers of Mason & Owen, whose rights are involved herein, filed a claim against the bankrupt estate for the amount for which his securities had been sold as aforesaid by Logan & Bryan, less his indebtedness to Mason & Owen, and received from the bankrupt estate 62¼ per cent. thereof. No claim or demand was ever made by any of such customers against Logan & Bryan until after payment of such dividend of 62¼ per cent., and after it became apparent that there was no reasonable probability of any further substantial dividend being paid. Thereafter the plaintiff, in his own right and as assignee of twelve other customers of Mason & Owen, brought this action to recover the amount of the unpaid parts of the claims filed in the bankruptcy proceedings. Judgment was entered in favor of defendants, and the plaintiff has appealed.

[1] Among the securities held by Logan & Bryan were certain Liberty bonds which had been deposited with Mason & Owen by one of the former customers of Prentice & Co. and also of Mason & Owen, but who was not indebted to Mason & Owen at the time of their failure. This customer testified:

> "I gave them the bonds so in case I wanted to buy securities I could have the bonds sold and buy the securities with it. * * * I think I did some trading with them (Mason & Owen) previously. * * * Q. By that you mean purchasing stocks on what is commonly known as margins. A. Yes, sir. Q. At the time you pledged these four Liberty bonds, * * * had you any margin accounts with them? A. No, sir; just the bonds. My accounts were all square. * * * Q. What was the idea of giving them your bonds? * * * A. So that I might call them on the telephone to enter an order."

This customer knew that Mason & Owen had sent the Liberty bonds to Logan & Bryan, for he testified that they "charged me 30 cents as insurance and registry fees on my bonds to Logan & Bryan in New York." The transaction was not a mere bailment, but the bonds were delivered to Mason & Owen as security for future marginal purchases by the owner. Since the owner of the bonds had theretofore purchased securities through Prentice & Co. and through Mason & Owen, he doubtless was familiar with the customary manner of handling such transactions as shown by the stipulation of the parties. Mason & Owen were given the apparent right to repledge the bonds.

> "One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it, cannot set up his own title, to defeat a pledge of the property, made by the other, to a pledgee who received the property in good faith, in the ordinary course of business, and for value." Civ. Code, § 2991; Brittan v. Oakland Bank of Savings, 124 Cal. 282, 57 P. 84, 71 Am. St. Rep. 58; Fowles v. National Bank of California, 167 Cal. 653, 656, 140 P. 271; Grange v. Judah Boas Co., 60 Cal. App. 484, 492, 213 P. 712.

It may be conceded that the owner of the bonds could have required the exhaustion of other securities held by Logan & Bryan before resorting to such bonds to satisfy the indebtedness of Mason & Owen, or that he was entitled to a preference in the payment of his claim in the proceeding in bankruptcy, but he is not now in a position to claim reimbursement from defendants.

[2] Another customer had opened his account "by depositing with Mason & Owen $3,000 of Liberty bonds." On the credit of such bonds, certain securities were purchased by him and became a part of his account. November 6, 1920, these Liberty bonds were

sold for more than the amount of his indebtedness. Thereafter his account stood credited with the excess in cash and the securities purchased for him, without any indebtedness to Mason & Owen. Since these securities had been repledged to Logan & Bryan to secure the entire indebtedness of Mason & Owen, it does not appear that, as between Logan & Bryan and the owner thereof, they were in a more favorable position than other securities for which full payment had not been made. All the other securities had been purchased by marginal customers of either Prentice & Co. or Mason & Owen. The relation between each of these marginal customers and Mason & Owen was that of pledgor and pledgee, and Mason & Owen had the implied consent of such customer lawfully to repledge the same. Blankenhorn-Hunter-Dulin Co. v. Thayer (Cal. Sup.) 247 P. 1088. The securities purchased through Prentice & Co. were, "with the consent of the purchasers, transferred to the account of Mason & Owen," and therefore no reason appears for making any distinction between them and those purchased through Mason & Owen.

[3] Each customer ordered the securities to be purchased "subject to the rules, regulations and customs of the exchange in which this order is executed." Such rules, regulations, and customs thereby become special terms of the contract. Clews v. Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. Ed. 1183, 1194; Goldsmith v. Sawyer, 46 Cal. 209, 212; Woltz v. E. F. Hutton & Co., 55 Cal. App. 741, 743, 204 P. 248. See, also, Miller v. Germain Seed, etc., Co., 193 Cal. 62, 77, 222 P. 817, 32 A. L. R. 1215. All the transactions in question were, on the part of Logan & Bryan, conducted in strict compliance with such rules, regulations, and customs. It does not appear, therefore, upon what grounds they can be held liable to the customers of Mason & Owen.

Appellant contends that Logan & Bryan were not bona fide pledgees, "as they knew at all times that the stocks did not belong to Mason & Owen." No authority is cited in support of this contention. Of course, Logan & Bryan knew that Mason & Owen, who were engaged in business as brokers, were not buying all the securities purchased by them for themselves, but the latter had the right "lawfully to repledge the same." Blankenhorn-Hunter-Dulin Co. v. Thayer, supra; Fowles v. National Bank of California, supra, page 662 (140 P. 271). The evidence does not support the contention that Logan & Bryan were the agents of Mason & Owen. It may be conceded that it was unlawful, as between Mason & Owen and their customers, to repledge the securities for more than the indebtedness of their customers to them. The purchases for which unlawful repledges were given, however, were made "in precisely the manner and way" as purchases for the customers of Mason & Owen. The court found that these securities of the customers were repledged to Logan & Bryan for individual purchases made by an employee and a member of the firm of Mason & Owen, but "that defendants did not know or have means of knowing until a short time prior to the filing of the petition in bankruptcy, * * * of such practice; * * * and that, * * * as soon as such fact came to the notice of the defendants, they refused to transact or carry on any new business for said Mason & Owen," and that, until that time "defendants did not know, nor did any of them know or have means of knowing, or reason to believe or suspect, that the indebtedness of Mason & Owen to these defendants was greater than the total amount of indebtedness due to Mason & Owen from their customers."

[4] Appellant contends that "the manner in which these two firms of brokers manipulated the customers' stocks was a fraud on the customers." Plaintiff did not allege fraud, however, and the court found against the plaintiff, on sufficient evidence, upon his allegations tending to show any element of fraud on the part of defendant. Fraud cannot be based upon the fact that Logan & Bryan, in good faith, handled the transactions in accordance with the rules, regulations and customs which the customers made terms of their contracts of purchase.

Appellant quotes a part of one of the findings of the court as follows:

> "And said defendants * * * held each and all of the securities so purchased on the order of Prentice & Co. to secure the general indebtedness of Prentice & Co., and held the securities purchased on the order of Mason & Owen to secure the indebtedness of Mason & Owen, as hereinbefore found."

It is then said:

> "The above finding, drawn by the defendants themselves, excludes any contention that they ever held the Prentice stocks as security for the debts of Mason & Owen. * * * Prentice & Co. had completely discharged their indebtedness."

But the court further found, in the same paragraph, that:

> "Each of the various customers of Prentice & Co. gave to Prentice & Co. written consent to have the securities previously purchased by Prentice & Co. on the order of said customer, transferred to the account of Mason & Owen, and that Prentice & Co., from time to time, as they received the written consent of their respective customers to the transfer of the respective securities to Mason & Owen, gave orders to the defendants to transfer such securities to the account of Mason & Owen, but that none of said orders from Prentice & Co. to transfer such securities to Mason & Owen contained the names of any of the customers of Prentice & Co., and defendants did not know or have the means of knowing who were the customers of Prentice & Co., * * * that each and all of the customers of Prentice & Co. allowed and permitted all securities pur-

chased by Prentice & Co. on their respective orders, and transferred to the account of Mason & Owen by Prentice & Co., to remain in the hands of defendants, subject to the orders of Mason & Owen, and so treated and dealt with said securities so transferred * * * as to lead defendants to believe that Mason & Owen had full power and authority to sell, pledge or otherwise dispose of said securities."

It clearly appears that all the acts of the defendants were lawful and within their rights as brokers, and it seems unnecessary to pursue the matter further. The pleadings and findings together cover more than 200 pages, and the briefs contain more than 350 pages of argument. It would require an unreasonably long opinion to discuss specifically all the contentions of appellant. They have been given careful consideration, and it is deemed sufficient, as to the points not discussed herein, to say that no merit has been discovered in any of them.

Respondents contend that, by filing their claims in the proceeding in bankruptcy, the customers elected to pursue their remedy therein and are therefore estopped to maintain this action against the defendants. It is true that, if the defendants had been required to pay the customers the moneys herein claimed, or to pay the same into the court in bankruptcy prior to the settlement of the bankrupt estate, they would have been in a position to file their own claims therefor and to share in the distribution of the assets of the bankrupts, whereas, if judgment were rendered against them in this action, since the funds which came into the hands of the receiver have been paid out in partial liquidation of other claims, they would be unable to recover any part thereof. Appellant contends that neither election nor estoppel was properly alleged in the answer. The case was tried, however, upon the theory that both were in issue. Appellant urges other reasons why the plea of estoppel or election of remedies is not available to the defendants. It is unnecessary to consider these contentions of the respective parties, because the judgment must be affirmed on the other grounds discussed.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

80 Cal. App. 655

PEOPLE v. EMMONS et al. (Cr. 1317.)

(District Court of Appeal, First District, Division 1, California. Jan. 14, 1927.)

1. Criminal law 🔑1037(1), 1129(1)—District attorney's misconduct in questioning defendant concerning prior convictions and prison escapes held not reviewable, in absence of objection or assignment of prejudice.

In prosecution for robbery, claimed misconduct of district attorney in questioning defendant concerning former convictions and prison escapes, which were not objected to nor assigned as prejudicial, *held* not reviewable on appeal.

2. Criminal law 🔑407(2)—Jury may consider silence in face of accusation, when having opportunity to reply, as admission of truth of accusation.

If defendant, confronted by accusatory statement, stands mute when having opportunity to reply, jury may consider such action as admission of truth of statements or facts therein with which he has been confronted.

3. Criminal law 🔑407(1)—Statement in accused's presence, though not inadmissible to prove facts narrated therein, is admissible to show accused's acquiescence thereto.

While statement made in presence of defendant is not admissible as being itself evidence of any fact narrated in such statement, it is admissible to show that accused acquiesced in statement either by express assent or by silence, or by such conduct as to fairly imply assent.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Alvin Emmons and Fred Richardson were convicted of robbery, and they appeal. Appeal as to Emmons dismissed. Affirmed as to Richardson.

Nathan C. Coghlan, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendants were accused of the crime of robbery in the first degree. The information, in substance, alleged that on August 21, 1925, they unlawfully took and carried away from the person and possession of one George F. Neely, an agent of the Standard Oil Company, money and other personal property of the approximate value of $1,240 and that such act was accomplished though putting said Neely in fear.

Subsequent to the commission of the act, defendants were taken into custody and both made statements admitting their guilt. Upon the trial they both pleaded not guilty. They were convicted and sentenced to the state prison. They appealed from the judgment and order denying a new trial. The appeal as to Emmons has been dismissed.

[1, 2] It is urged on behalf of Richardson, as ground for reversal, that the district attorney was guilty of prejudicial misconduct resulting in a miscarriage of justice. It is also claimed that the trial court erred in instructing the jury. The evidence upon which the prosecution relied for a conviction was the positive testimony of the victim of the robbery in identifying both defendants as the perpetrators of the crime, the extrajudicial confession of appellant, and the extrajudi-

cial confession of appellant's codefendant, together with evidence showing that it was read to appellant and that in the face of such accusation he stood mute. The misconduct relied upon for a reversal consisted of questions relating to appellant's former conviction of various offenses, and his escape from certain penal institutions. The record shows, however, that the alleged misconduct was not objected to nor assigned as prejudicial. Under these circumstances it cannot be reviewed upon appeal. People v. Brittan, 118 Cal. 409, 50 P. 664. Nor is there any merit in appellant's claim that the court committed error in instructing the jury. The jury was charged with regard to the confession of appellant's codefendant as follows:

> "A statement of one defendant is not proof of facts concerning another. For instance, if the defendant whose statement was first read to you has made certain statements regarding the codefendant, that in itself is not independent or any evidence which is binding upon his codefendant. However, another principle of law invokes itself. One who is confronted by an accusatory statement, it is the well-settled law of this state, if he stands mute when so confronted, under circumstances which afford him an opportunity to reply, the fact of his standing mute may be taken by you as an admission of the truth of the statements or the facts in the statements which may have been read to him."

[3] It is appellant's contention that the portion of the instruction with reference to the action of a defendant in standing mute when accused is erroneous. We do not so consider it. It is well established that, while a statement made in the presence of the accused is not admissible as being itself evidence of any fact narrated in such statement, it is admissible primarily for the purpose of showing that the accused acquiesced in the statement, either by express assent, or by silence, or by such conduct as fairly implied assent. People v. Mallon, 103 Cal. 513, 37 P. 512; People v. Ong Foo, 182 Cal. 697, 702, 189 P. 690. This is all the instruction meant to imply.

The appeal is without merit.

The judgment and order are affirmed as to appellant Richardson.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

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80 Cal. App. 704

MATHEWS v. HORNBECK. (Civ. 3181.)★

(District Court of Appeal, Third District, California. Jan. 18, 1927. Hearing Denied by Supreme Court March 17, 1927.)

1. Appeal and error 🔑1011(1)—Findings of trial court on conflicting evidence are conclusive on appeal.

Where there was clear and substantial conflict in evidence relating to issues in question on appeal, findings of trial court were conclusive.

2. Bastards 🔑33—Mother can sue in own name to compel father to contribute to support of illegitimate child (Civ. Code, § 196 [a]).

Under Civ. Code, § 196(a), mother of illegitimate child can sue father in her own name on behalf of child to compel him to support child.

3. Bastards 🔑78—In action to compel father to support illegitimate child, commenced December 18, 1923, judgment rendered July 28, 1924, requiring defendant to pay from December 18, 1923, held not erroneous.

Where action by mother to compel father to support illegitimate child was commenced December 18, 1923, judgment rendered July 28. 1924, requiring defendant to pay plaintiff $25 a month from December 18, 1923, *held* not erroneous, since it was father's legal duty to support child at time action was commenced.

4. Bastards 🔑33—Purpose of statute providing that mother may sue father for support of illegitimate child is to provide for child's support (Civ. Code, § 196[a]).

Purpose of Civ. Code, § 196(a), relating to support of illegitimate child and providing that mother may bring suit against father to compel him to support child, is to provide for child's support.

5. Jury 🔑25(2)—Where defendant's counsel, having notice of time of setting of case for trial, failed to demand jury trial, refusal to reset case for jury trial held not error (Code Civ. Proc. § 631).

Where defendant's counsel had notice of time at which action for support of illegitimate child would be called to be set for trial and failed to demand jury trial, and case was set for trial without jury, and defendant, upon learning facts, employed other counsel, refusal to reset case for jury trial *held* not error, in view of Code Civ. Proc. § 631.

6. Bastards 🔑63—Producing child in court, in action to compel support of illegitimate child, to show resemblance to defendant held not error.

In action against father to compel support of illegitimate child, producing child in court to show resemblance to defendant *held* not error.

7. Bastards 🔑3—Where evidence showed that plaintiff was not cohabiting with her husband, statutory presumption that child was legitimate was not applicable (Code Civ. Proc. § 1962, subd. 5).

Where undisputed testimony of plaintiff, in action to compel father to support illegitimate child, showed that she had not been cohabiting with her husband for over two years before child was born, presumption provided for in Code Civ. Proc. § 1962, subd. 5, that issue of wife cohabiting with husband, who is not impotent, is indisputably presumed to be legitimate was not applicable.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

★Hearing denied by Supreme Court.

Action by Almeda Mathews against William Hornbeck, to compel support of illegitimate minor child. From a judgment for plaintiff, defendant appeals. Affirmed.

Robert A. Morton, of Los Angeles, for appellant.

Cooper, Collings & Shreve, of Los Angeles, for respondent.

FINCH, P. J. Plaintiff brought this action to compel the defendant to support her illegitimate minor child. The court found that the defendant is the father of the child and rendered judgment requiring him to pay the plaintiff $25 a month, commencing with the day the complaint was filed, for the maintenance and support of the child. The defendant has appealed from the judgment.

[1] Both parties testified that they indulged in frequent acts of sexual intercourse during a period of several months. The defendant testified that such acts ceased June 13, 1922. The plaintiff testified that they continued until in September, 1922, and that she had not had sexual intercourse with any one but the defendant at any time after August, 1920, when she separated from her husband. The child was born May 31, 1923. The testimony of both parties was corroborated to some extent, and each introduced evidence tending to discredit the testimony of the other. There is a clear and substantial conflict in the evidence relating to the issues in question on this appeal, and therefore the findings of the trial court are conclusive.

[2] Appellant contends that the plaintiff is not authorized to maintain the action in her own name in behalf of her child. The courts of this state have held contrary to such contention. Fernandez v. Aburrea, 42 Cal. App. 131, 183 P. 366; McLain v. Meadows, 44 Cal. App. 402, 186 P. 411.

[3, 4] The action was commenced December 18, 1923, and judgment was rendered July 28, 1924. The judgment requires the defendant to pay the plaintiff $25 a month, "dating from the 18th day of December, 1923," for the support of the child. Appellant contends that the judgment is erroneous in the requirement that he pay for the child's support from the time the complaint was filed, citing Demartini v. Marini, 45 Cal. App. 418, 187 P. 985. That case merely holds that if the mother provides the child with support, no cause of action for reimbursement accrues against the father. The alleged expenditures were made before the action was commenced. In Fernandez v. Aburrea, supra, the judgment required payment of $115 "for the support of the child from the date of the filing of the action until the entry of judgment, and for the further sum of $15 per month thereafter." While the point here made was not discussed by the court in that case, the judgments in both cases are based upon what appears to be a reasonable interpretation of the provisions of section 196(a) of the Civil Code, making the father as well as the mother of an illegitimate child liable for its support and education.

As a general rule, a judgment must be based upon the respective rights of the parties as they exist at the commencement of an action to enforce them. At the time this action was commenced, it was the legal duty of the defendant to support the child. Under such circumstances, a defendant ought not to be relieved from the discharge of a part of such duty by the delays incident to litigation. The mother's credit in the purchase of necessaries for the support of the child is greater by reason of the fact that the father may be compelled to contribute to the child's maintenance. The purpose of the statute is to provide for the child's support. In many cases this purpose would be defeated during the time when most needed, if it were held that the father can permanently escape his obligation during the months or years between the commencement of an action against him and the entry of final judgment therein. If appellant's' contention be upheld, then this case, which has been pending for more than three years, must be retried. If the appellant could keep the case in court long enough, final judgment would not be entered until the child had reached its majority, in which case appellant, if his contention be sound, would escape his obligation entirely.

[5] The defendant's counsel had due notice of the time at which the case would be called to be set for trial. At the time noticed, he failed to demand a jury trial and the case was set for trial by the court without a jury. Some time thereafter defendant employed other counsel, who presented to the court the affidavit of the defendant to the effect that, "without the knowledge of defendant and against his wish and desire," the attorney who represented him at the time the case was called to be set, "through inadvertence or neglect," failed to request a jury trial; that as soon as defendant learned that fact he discharged the attorney and employed other counsel. Affiant does not state that he informed his former attorney of his desire for a jury trial. Based on this affidavit, counsel so employed moved the court to reset the case for trial in a jury department. The court denied the motion. Section 631 of the Code of Civil Procedure provides that a trial by jury is waived "by failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice." It was not error to deny the request for a jury trial under the circumstances stated. Amos v. Superior Court, 196 Cal. 677, 680, 239 P. 317; City of Los Angeles v. Zeller, 176 Cal. 194, 196, 167 P. 849; Bennett v. Hillman, 37 Cal. App. 586, 589, 174 P. 362. The congestion in the court calendars of the populous counties of this state has become a matter of state-wide notice and concern, and to permit a litigant, after having waived a jury trial, to require

a jury by a subsequent demand would tend, in the language of the trial court, to "disrupt proceedings and would not be to the best interests of the trial court." Conceding that, as appellant contends, under the circumstances disclosed by the record, it was within the discretion of the trial court to grant the defendant's motion for a jury trial, no abuse of discretion is shown.

[6, 7] The child was produced in court for the purpose of showing its resemblance to defendant. This was not error. People v. Richardson, 161 Cal. 552, 561, 120 P. 20; In re Jessup, 81 Cal. 408, 418, 21 P. 976, 22 P. 742, 1028, 6 L. R. A. 594; Wigmore on Evidence, §§ 166 and 1154.

Appellant relies upon subdivision 5 of section 1962 of the Code of Civil Procedure, which provides:

> "The issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

The plaintiff was married to Ray McClure, in the state of Indiana, August 18, 1920. The marriage was annulled by a decree of the superior court of Los Angeles county, entered March 13, 1923. The plaintiff testified:

> "I last lived with Ray McClure along in October, about the middle of October, I think it was, in the year 1920—no; I don't think I lived with him that long; I don't think we lived together over ten days or so. * * * We didn't live together over just about ten days or so. * * * Having my recollection refreshed by having the complaint shown me, I will state that the date of the separation there, the 28th day of August, 1920, is correct, as the date when I last lived with him as man and wife."

In addition to this testimony, the defendant himself introduced in evidence the complaint in the annulment proceeding in which it is alleged that:

> "On * * * the 28th day of August, 1920, * * * defendant willfully and without cause deserted, and abandoned said plaintiff and ever since has and still continues to so willfully and without cause desert and abandon said plaintiff and to live separate and apart from her."

No evidence was introduced in this action which tends in any manner to contradict the foregoing testimony of the plaintiff. It is sufficient to show that the plaintiff was not cohabiting with her husband at any time material to the issues in this case, and therefore the presumption upon which appellant relies is not applicable.

The remainder of appellant's argument is devoted to the weight of the evidence, a question with which this court has nothing to do.

The judgment is affirmed.

We concur: PRESTON, Justice pro tem.; PLUMMER, J.

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80 Cal. App. 660

LINDGREN et al. v. WEAVER et al.
(Civ. 3113.)

(District Court of Appeal, Third District, California. Jan. 14, 1927.)

1. Appeal and error ⚷876—Court cannot consider sufficiency of evidence to sustain affirmance of consolidation and annexation of school districts on collateral attack (Code Civ. Proc. § 939).

Where time allowed by Code Civ. Proc. § 939, for appealing from judgment affirming consolidation and annexation of school districts and from order denying motion to vacate had elapsed, and appeal is from subsequent order refusing to vacate judgment, court cannot consider sufficiency of evidence, since sufficiency of evidence is not impeachable collaterally.

2. Appeal and error ⚷113(2)—Failure to exercise right to appeal from judgment within statutory time precludes appeal from order denying subsequent motion to set aside judgment (Code Civ. Proc. § 939).

Failure to exercise right to appeal from judgment affirming consolidation and annexation of school districts, or from order refusing to vacate judgment within time allowed by Code Civ. Proc. § 939, where court had jurisdiction of parties and subject-matter, precludes appeal from order denying subsequent motion to set aside judgment.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Petition for writ of review by Magnus E. Lindgren and others to review, set aside, and annul the action of C. S. Weaver, as County Superintendent of Schools of the County of Merced and others, separating and consolidating school districts. Judgment affirming defendants' acts, order denying motions to vacate judgment and for new trial, and plaintiffs appeal. Affirmed.

Griffin, Boone & Boone and Edward T. Taylor, all of Modesto, for appellants.

H. K. Landram and C. H. McCray, both of Merced, for respondents.

PLUMMER, J. On the 4th day of December, 1924, the plaintiffs filed their petition in the superior court of the county of Merced praying judgment of said court reviewing, setting aside, and annulling the actions of C. S. Weaver as county superintendent of schools of the county of Merced, the trustees of Livingston school district, the trustees of Raisin school district, and the board of supervisors of the county of Merced, which acts purported to lead to the union or merger of Livingston and Raisin school districts, thereafter to be known as Livingston school district, the subsequent exclusion of said Livingston school district also comprising the territory formerly included in the Raisin school district from the Hilmar colony union high school district and the annexation of said territory to the Merced union high school district.

The grounds upon which the merging, excluding, and uniting of said district are sought to be annulled consisted in allegations that proper notices were not given of the election, as required by the Political Code, of the proposed union or merger of the Livingston and Raisin school districts, thereafter to be known as the Livingston school district; that proper notices were not given of the election for the proposed exclusion of the Livingston school district from the Hilmar colony union high school district and the annexation of the Livingston school district to the Merced union high school district, and, further, that the exclusion of the Livingston school district, after having merged with it the territory formerly included in the Raisin school district from the Hilmar colony union high school district, left said Hilmar union high school district with an assessed valuation of property less than $5,000,000.

[1] Upon the filing of this petition, a writ of review was issued, directed to the defendants, requiring them to certify to the superior court, all and singular, the actions and proceedings relating to the matters involved, as just herein stated. Pursuant to this order, the defendants made full and complete returns of all and singular the proceedings taken and had, and notices given in the matter of the merging or uniting of said two school districts and the exclusion of the territory comprising what was thereafter known as the Livingston school district from the Hilmar union high school district and its union with the Merced high school district. Trial was had of the issues thus made up and on July 15, 1925, findings, conclusions of law, and judgment were filed by the trial court, and in which judgment it was further adjudged and decreed that the proceedings of each and all of the defendants referred to were valid, and the same were thereby affirmed.

On the 17th day of July, 1925, the plaintiffs served and filed a notice of intention to move for an order setting aside and vacating the judgment and decree herein referred to, and to enter another and different judgment —a judgment annulling and declaring void the proceedings herein referred to, and at the same time filed a notice of intention to move for a new trial and an order vacating and setting aside the decision and judgment theretofore entered in this cause. These motions were by stipulation submitted for decision on August 3, 1925. Both motions were denied by the trial court, and no appeal was ever taken by plaintiffs from the judgment, nor from the order denying the plaintiffs' motion to vacate the judgment, correct the findings, and enter a judgment in favor of the plaintiffs.

Under the provisions of section 939, Code of Civil Procedure, the time for appealing from the order and judgment expired on the 2d day of November, 1925. On the 27th day of January, 1926, the plaintiffs in this action served and filed upon the defendants a notice of motion to set aside the judgment entered herein upon the following ground, to wit: "That the judgment entered in the above-entitled action be vacated and set aside on the ground that it is void on its face." This motion was denied, and on the 16th day of February, 1926, an appeal was taken therefrom to this court.

From the recitals herein set forth, it is apparent that upon this appeal no inquiry can be made as to the sufficiency of the proof to show either the regularity or the legality of the acts of the inferior bodies involved in and leading up to the final annexation of the Livingston school district with the Merced union high school district. The record before us shows the filing of a petition in a court having jurisdiction to hear and determine all the questions involved. The order was regularly made directing the certifying to the superior court of all the proceedings necessary to be reviewed in order to reach a final determination. Proofs were introduced, findings were made, conclusions of law drawn, and judgment entered. The findings, conclusions of law, and judgment all appear to be included in one instrument. The argument presented by appellants is all directed to the allegations that the actions of the inferior bodies were taken without sufficient and adequate notices thereof being first given and had. All these were matters of proof to be presented to the trial court, and cannot be inquired into upon this appeal. As said in 15 California Jurisprudence, p. 83:

> "The fact that the findings are defective or insufficient to support the judgment, or are incorporated in the judgment itself, rather than in a separate instrument, does not make it impeachable collaterally. * * * It is obvious that a merely erroneous judgment cannot be collaterally impeached on that ground, even though the error is apparent on the face of the record. Where it is within the jurisdiction of the court to make an order, the order is not impeachable collaterally, however erroneously the court may have acted."

These propositions of law are abundantly supported by the authorities there cited.

[2] There is another principle involved in this proceeding, however, which precludes the prevailing of the plaintiffs upon this appeal. The appellants were all parties to the action in the trial court; they had their right of appeal from the order and judgment hereinbefore referred to. The question of the right to an appeal from an order refusing to vacate a judgment on the ground that it is void appears to have been squarely decided against the appellants in the Matter of the Estate of Baker, 170 Cal. 578,

150 P. 989, where a motion to dismiss an appeal was being considered. The court said, in considering the question as to whether an appeal would lie:

> "Cases to this effect are cited, which need not here even be mentioned, for such indeed is the general rule. Otherwise, the losing litigant would have the right to one appeal which the law expressly gives, and the time of which it limits, which appeal must be a direct appeal from the order or judgment, and likewise another appeal from an order of the court, made at some indefinite future time refusing a motion to vacate the judgment. And, as upon such second appeal the appellant has the right to have the judgment reviewed not only for excess of jurisdiction, but also for error (Elliott v. Supreme Court, 144 Cal. 501 [77 P. 1109, 103 Am. St. Rep. 102]), the manifest result of the sanction of such a general practice would be to declare that every unsuccessful litigant has two appeals, the time of one being fixed by law, the time of the other being fixed by his own convenience, after denial of his motion to vacate the judgment complained of. Hence the general rule and the reasons for it."

See, also, In re Yoder (Cal. Sup.) 251 P. 205.

Following this statement of the law, the exceptions to the rule are stated, which do not apply to this case. The exceptions there set forth relate to parties not having the right of appeal, and who have not allowed their right to appeal to lapse by inaction. As said in 2 California Jurisprudence, 164:

> "Where there is a right of appeal from a judgment or order, a party cannot ordinarily take an appeal from a subsequent order denying a motion to vacate the judgment or order complained of, under such circumstances that the motion merely calls upon the court to repeat or overrule the former ruling on the same facts. If the grounds upon which the party sought to have a judgment vacated existed before the entry of the judgment and would have been available on an appeal from the judgment, an appeal will not lie from an order refusing the motion. The party aggrieved by a judgment or order must take his appeal from such judgment or order itself, if an appeal therefrom is authorized by statute, and not from a subsequent order refusing to set it aside. The reason for denying an appeal in the latter case is not because the order on the motion to vacate is not within the terms of section 963 of the Code allowing appeals, for it may be, and indeed, an order refusing to vacate a final judgment is in its very nature a special order made after judgment, but because it would be virtually allowing two appeals from the same ruling, and would, in some cases, have the effect of extending the time for appealing contrary to the intent of the statute. A further reason is that the order on the motion is merely negative action of the court declining to disturb its first decision. The first decision being reviewable, the refusal to alter it any number of times will not make it less so."

The law, as stated in the above quotation, is amply supported by authorities cited on the pages from which the quotation is taken. In Bell v. Solomons, 162 Cal. 105, 121 P. 377, it is said:

> "An order refusing to vacate a prior order or judgment from which an appeal may be taken is not appealable unless there is a record which presents matters for consideration that could not be presented upon the appeal from the original order or judgment."

Without referring to the authorities which we have cited holding that an appeal will not lie, the appellants cite the case of People v. Harrison, 84 Cal. 607, 24 P. 311, and a number of authorities holding, in effect, that a judgment absolutely void may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. With these authorities we have no quarrel. The question before us is, not the manner in which a void judgment may be attacked, but simply whether a party to an action having a right to appeal and present all the questions that may in any wise affect either the correctness or legality of the judgment can sit idly by until the time for an appeal has expired, and then file and serve a notice of and make a motion to vacate the judgment, and then appeal therefrom, after having lost the right of appeal from the judgment. If this can be done, as in this case 86 days after the right to an appeal has been permitted to lapse, we see no reason why it cannot likewise be done 6 months, or any number of years thereafter. We think the authorities which we have cited clearly show that the right of appeal and the time therefor fixed in the codes cannot be extended in any such manner.

Under any view which we take of this case, the appellants cannot prevail, for it appears that the trial court had jurisdiction of the parties and the subject-matter, and its judgment, even though glaringly erroneous, would not render it void, nor would its interpretation of the requirements of the law relative to giving notices by the inferior bodies, whose actions it was reviewing, render the judgment void; and, secondly, the plaintiffs, being parties to the action with the right of appeal, where full relief could be awarded by the court, if their contentions are correct, cannot extend their right of appeal by motions to vacate.

The order is affirmed.

We concur: **FINCH, P. J.**; **BUCK**, Justice pro tem.

80 Cal. App. 687

LACKEY v. OLDS & STOLLER INTEREXCHANGE. (Civ. 4351.)★

(District Court of Appeal, Second District, Division 1, California. Jan. 18, 1927. Hearing Denied by Supreme Court March 17, 1927.)

Insurance ⟹435—Insurer held liable, where minor driver's application for license was signed by insured, notwithstanding driver's errand was personal at time of collision. (Motor Vehicle Act, § 24[a], amended by St. 1919, p. 223, § 14).

Insurer *held* liable on policy covering loss by reason of liability for injury caused by operation or use of automobile, where injury was sustained while car was driven on personal errand by insured's minor nephew, whose application for chauffeur's license had been signed by insured, since under Motor Vehicle Act (St. 1917, p. 407) § 24(a), amended by St. 1919, p. 223, § 14, he was jointly and severally liable with nephew.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action on insurance policy to cover liability for injury by automobile by Mrs. Louise Lackey, administratrix of the estate of August E. Buelke, deceased, against the Olds & Stoller Interexchange. Judgment for plaintiff, and defendant appeals. Affirmed.

Jennings & Belcher, of Los Angeles, for appellant.

Duke Stone and Perry F. Backus, both of Los Angeles, for respondent.

YORK, J. An automobile owned by Morris Levenstadt was being operated by Nat Levenstadt, his chauffeur, who happened to be his nephew, when, by the negligence of Nat Levenstadt in operating said automobile, August E. Buelke was killed. Nat Levenstadt, at the time of the accident, was alone in the automobile and on the way to purchase clothing for himself.

The defendant had issued a policy of insurance to Morris Levenstadt, and an action was brought against said Morris Levenstadt and Nat Levenstadt for damages for the death of Buelke, because of the negligence of Nat Levenstadt, and judgment was rendered for plaintiff against both defendants, for $5,166.97, and costs, and said judgment was not paid, and this action was against appellant upon the insurance policy for the amount of such judgment, alleging insolvency of defendants therein and nonpayment. The question before the court in the present action was, and the real question raised in this appeal is, as to whether by the terms of the insurance policy appellant is liable herein for the amount of such judgment. Appellant contends that a breach of the terms of the policy was made by policy holder by signing the application for a chauffeur's license for Nat Levenstadt. By the terms of the policy, Morris Levenstadt was insured by appellant "against actual loss by reason of the liability imposed by law, * * * on account of bodily injuries (including death resulting therefrom) accidently suffered * * * by reason of the operation or use of" the automobile described in the policy.

The Motor Vehicle Act, § 24 (a), being St. 1917, p. 407, amended by St. 1919, p. 223, § 14, which was construed in the case of Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, makes the person who signed the application jointly and severally liable with the minor. The signer of the application was therefore made liable as a matter of law for the negligent act of the minor in operating the car, whether he was on the business of the signer of the application or not. The Motor Vehicle Act, § 24 (a), expressly makes the negligence of the minor imputable to the person who signs his application; hence the liability is one expressly created and imposed by the statutory law. At the time of the accident Nat Levenstadt was operating the Ford automobile truck particularly described in the insurance policy. The judgment against Morris Levenstadt and Nat Levenstadt was one created by law "by reason of the operation and use of the automobile." It follows that, whether the accident resulting in the death of Buelke occurred when Nat Levenstadt was on his way to purchase a pair of pants for himself, or for Morris Levenstadt, in either event the appellant, under the Motor Vehicle Act, was liable under the terms of the policy. Inasmuch as Morris Levenstadt did not assume any liability after the issuance of the policy, or otherwise violate the terms of the policy, there was no breach of the conditions of the policy on his part. The evidence shows that both Morris Levenstadt and Nat Levenstadt were insolvent, and therefore the insurer became liable under the terms of clause H of the policy, wherein it provides that, if policy holder is insolvent, then the claimant shall be entitled to maintain an action against the insurer for the recovery of indemnity in all cases where the insured would have been otherwise liable.

Judgment affirmed.

We concur: CONREY, P. J.; HOUSER, J.

★Hearing denied by Supreme Court.

200 Cal. 235

OCEAN INDUSTRIES, Inc., v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SANTA CRUZ COUNTY, et al. (S. F. 12290.)

(Supreme Court of California. Jan. 11, 1927.)

1. Evidence 🔑11—Superior court may take judicial notice of political history of world in determining whether ship in Bay of Monterey is within state boundaries (Code Civ. Proc. § 1875, subd. 8).

In determining whether ship anchored in Bay of Monterey, more than 3½ miles from nearest low watermark of land, is within boundaries of state Supreme Court may, under Code Civ. Proc. § 1875, subd. 8, take judicial notice of political history of world.

2. States 🔑12(2)—Bay of Monterey, having headlands 18 miles apart and depth of 9 miles, held "bay."

Bay of Monterey, having headlands approximately 18 miles apart, with receding shores, giving total width of 22 miles inside headlands, and total depth of 9 miles, is a "bay," defined as body of water around which land forms curve or recess or inlet between capes or headlands.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bay.]

3. Constitutional law 🔑48—Statute defining county boundaries must be reconciled with Constitution determining state boundaries; ambiguities being resolved in harmony with Constitution (St. 1850, p. 58; Const. 1849, art. 12).

St. 1850, p. 58, intending to set off land and water area of state into political subdivisions, must be reconciled with Const. 1849, art. 12, including all islands and bays within boundaries of state, since it cannot be presumed that Legislature intended to exclude from jurisdiction of state any land or water embraced therein by Constitution, and ambiguities in act are to be resolved in harmony with organic law.

4. States 🔑12(2)—Entire Bay of Monterey within headlands and 3 nautical miles into ocean is within jurisdiction of state (Const. 1849, art. 12; St. 1850, p. 58, Pol. Code, §§ 3952, 3935).

Under Const. 1849, art. 12, including all bays within boundaries of state, and Stats. 1850, p. 58, Pol. Code, §§ 3952, 3935, entire Bay of Monterey within its headlands, and thence into ocean for 3 nautical miles, is within boundaries and jurisdiction of state and respective counties, and ship anchored in bay, though 3½ miles from low watermark of land, is within jurisdiction of superior court of county.

5. International law 🔑5—Jurisdiction over bays with headlands over 6 miles apart rests in undisputed jurisdiction of power possessing inclosing shoreline.

Territorial jurisdiction over bays, the headlands of which are more than 6 miles apart, rests in undisputed assertion of jurisdiction by power possessing inclosing shoreline of bay, there being no definite rule of international law governing matter.

In Bank.

Application for writ of prohibition by the Ocean Industries, Inc., to prevent the Superior Court of the State, in and for the county of Santa Cruz, and the Hon. H. C. Lucas, Judge thereof, from proceeding with the trial of an action. Writ denied.

Loucks & Phister, of San Pedro, and Cushing & Cushing, of San Francisco, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

RICHARDS, J. The petitioner herein applied for the issuance of a writ of prohibition whereby it sought to have the respondent superior court of the state of California, in and for the county of Santa Cruz, and the judge thereof, commanded to desist and refrain from any and all further proceedings in a certain action pending in said court entitled "People of the State of California, Plaintiff, v. Ocean Industries, Inc., a Corporation, et al., Defendants," and particularly from making or entering any preliminary or other injunction affecting said defendant in said action. In support of its said application the petitioner alleged that it was a corporation duly organized as such under the laws of the state of Nevada for the purpose of carrying on the business of catching, and cleaning fish and extracting the oil therefrom in the waters of the Pacific Ocean at divers places along the coast line of North America between the parallels of 25 degrees and 40 degrees north latitude; and that, in order to carry on its said business, the petitioner had during the month of September, 1926, purchased and registered a certain vessel named "Peralta," and had fitted out and equipped said vessel with the necessary machinery and equipment for the production of fish meal, and the extraction of oil from fish, and had thereafter, and during the month of October, 1926, moved the said vessel to, and anchored the same at, a point designated as 121 degrees 55 minutes 12 seconds west longitude, and 36 degrees 53 minutes 12 seconds north latitude, which said point of anchorage was and is more than 3½ miles distant from the nearest low watermark on the shores of the Pacific Ocean and of the mainland or of any island or islands adjacent thereto; and that said petitioner is engaged in, and proposes to carry on, its aforesaid business and operations thereat, using in the course thereof fish caught in the waters of the Pacific Ocean more than 3½ miles distant from the said coast line. The petitioner further alleges that on the 18th day of October, 1926, the people of the state of California, through its Attorney General and certain other of its officials, caused to be filed in the superior court in and for the said county of Santa Cruz a complaint for an injunction, a copy of which is attached to its said application, wherein the said plaintiff sought to have the petitioner herein enjoined from conducting or continuing its said operations upon said vessel at its said place of anchorage; that thereupon and on said last-named date the said court and the judge thereof made and entered its order directing the said defendant in said action, its officers and employees, to show cause at a designated time before said court why a preliminary injunction should not issue in said action as prayed for therein, and also in the meantime caused to be issued a temporary restraining order of like tenor and effect, both of which said orders are also attached as exhibits to petitioner's said application; that copies of said orders, together with a copy of the complaint and summons in said action, were served upon the defendant therein as provided by law; that said defendant, the petitioner herein, appeared in said court in response to said orders and process, and thereupon presented and filed a certain affidavit in denial of certain of the averments of said complaint, a copy of which affidavit is also attached as an exhibit to the petitioner's application herein, and from which it appears that the substantial allegations of the petition are set forth in said affidavit; that a hearing was thereafter and on the 26th day of October, 1926, had before said court upon the matters referred to in said complaint and orders and the defendants' return thereto, at the conclusion of which hearing the said superior court made and entered its order determining that the plaintiff in said action was entitled to a preliminary injunction restraining the defendant therein from further carrying on any operation or operations for the reduction of fish, or from using any fish of the variety known as "sardines" in the reduction plant upon said ship while situate at its said place of anchorage, and said court announced as a result of its said determination that it would make and enter a preliminary injunction accordingly, and that said court threatens, and will, unless prohibited therefrom by this court herein, make and enter and enforce such injunction. The petitioner further alleges that the issuance and enforcement of said preliminary injunction as proposed and threatened by said court is in excess of and beyond the jurisdiction of said court, for the reason that the said place of anchorage of said vessel and the place where the said plant of the petitioner herein is being and is proposed to be operated is outside of the state of California, and is outside of and beyond the jurisdiction of said court. Finally, the petitioner alleges that the effect of the operation and enforcement of said preliminary injunction would work irreparable injury to the petitioner herein in ways which are set forth with much of detail in its said application; wherefore it prays the issuance of the peremptory writ sought herein.

[1] To the foregoing petition the respondents have made their reply by way of both demurrer and answer, by the first of which pleadings they put in issue the main considerations presented to this court for its determination herein, and to these we will first direct our attention. The preliminary questions thus presented for our solution are, first, as to whether the ship Peralta, upon which the petitioner herein is engaged in conducting its aforesaid operations, and upon which it intends to continue the same, unless prevented from so doing by the preliminary injunction proposed to be issued by the respondents herein, is at its admitted place of anchorage, within or without the boundaries of the state of California; second, whether the aforesaid operations of said petitioner upon said vessel and at said point, if within the boundaries of the state of California, are in violation of its laws. The precise point in issue under the first of these propositions has been made very definite by the presentation on behalf of both of the parties hereto in their pleadings and upon the hearing hereon of certain maps and plats delineating the boundaries and dimensions of the Bay of Monterey, as well as the exact location of the ship Peralta within the headlands of said body of water, but more than three nautical miles from low-water mark along the shore line thereof. If it shall be found as a matter of law that the entire area of the Bay of Monterey, so-called, extends oceanward to a line drawn between the headlands thereof; and if it shall further be found that said entire area of said Bay of Monterey is to be held included within the territorial boundaries of the state of California, it would follow irresistibly that the ship Peralta at its designated place of anchorage is within said state, and is subject to its laws.

[2] Upon the solution of the problem thus presented, this court is entitled to bring to bear, in so far as it may be aided thereby, its judicial notice of the political history of the world (Code Civ. Proc. § 1875, subd. 8), when in the early years of the sixteenth century of our era Spain, through her voyagers, had discovered, and through her conquistadores established her dominion over, that region in the southwestern portion of North America which became known as "New

Spain," she began through her viceroys to send forth navigators to the northward along the western coast of the continent, with the twofold object of adding further territory to her domain and of discovering the fabled northwest passage. The first of these navigators to thus extend his voyages beyond what is now known as Lower California was Juan Cabrillo. This bold navigator, after a stormy voyage up an unknown coast, sighted the wooded headland to which he gave the name of Point Pinos, and sailed into the body of water behind it, to which, as recorded in his log, he also gave the name "Bahia de Los Pinos," the Bay of Pines. He was followed in 1602 by another navigator, Sebastian Vizcaino, who also found and entered the same incurved body of water upon the inner shores of which he landed, taking formal possession of its coasts in the name of his sovereign, and rechristening it "Bahia de Monterey" in honor of his patron the Count de Monterey, then viceroy of New Spain, which name it has ever since borne in the official records of Spain, of Mexico, the United States, and state of California. The Bay of Monterey, thus designated from its first discovery as a "bay," is a body of water having headlands approximately 18 miles apart, with receding shores, giving a total width of 22 miles inside the headlands, with a total depth of approximately 9 miles. It thus satisfies the definition of a "bay" given by the lexicographers as a body of water around which the land forms a curve; or a recess or inlet between capes or headlands. Webster, Title "Bay." It is needless to detail the history of the increasingly troubled effort of Spain and later of Mexico to assert and maintain the sovereignty of each in turn over the indefinite region known as California and its adjacent islands, inlets, and seas; but the interesting fact may be noted as having its bearing upon whatever question of international law is involved herein that the dispute between Spain and England in the year 1790 growing out of the northwest coast fur trade was for the time being settled by the so-called Nootka Convention, wherein as between these two powers, which were then the greatest maritime powers of the known world, it was agreed that the exclusive sovereignty of Spain should be recognized and respected over all parts of the northwest coast already occupied by subjects of Spain, and for a distance of 10 leagues into the ocean. The agreements of this convention were ratified by the contracting powers and the claims of Spain to exclusive sovereignty and jurisdiction over the coasts of what is now California and Oregon as far north as the mouth of the Columbia river on land and to a distance of 10 leagues into the ocean were conceded and confirmed. This jurisdiction over these coasts and seas and adjacent islands Spain and her successor Mexico thereafter asserted and insisted upon through rigid maritime regulations over the increasing coastal traffic during the half century or so following the date of said treaty, and down to the time of the occurrence of the war between the United States and Mexico and consequent seizure of California by the former, manifested by the raising of the American flag at Monterey on July 7, 1846, and by the subsequent events which marked the passing of the old dominion. By the terms of the treaty of Guadalupe Hidalgo, which was finally ratified at the city of Queretaro on May 30, 1848, Mexico ceded to the United States all territory lying to the northward of a line drawn from the mouth of the Rio Grande westerly to the Pacific Ocean. By virtue of this treaty the United States assumed that jurisdiction over the region thus ceded, both territorial and maritime, which Mexico had theretofore asserted, and which embraced all of the ports, harbors, bays, and inlets along the coast of California, and for a considerable, though perhaps indefinite, distance into the ocean, including dominion over the numerous islands lying therein adjacent to said coast. When in the course of events the duly constituted framers of the Constitution of California assembled at Monterey in the autumn of 1849, and proceeded to frame the first Constitution of California, they inserted in article 12 thereof a description of the boundaries of the state, which, in so far as the southerly and westerly lines thereof were concerned, read as follows:

> "Thence running west and along said boundary-line [the Mexican boundary] to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction, and following the direction of the Pacific coast, to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. *Also all the islands, harbors, and bays along and adjacent to the Pacific Coast.*"

This language in our first Constitution, particularly in view of the past political history of the region, would seem to be too clear to admit of any doubt as to its meaning, or that it was intended to embrace within the boundaries and jurisdiction of the state of California the entire area of all of those several bays and harbors which indent its coast. The petitioner, however, argues that the first Legislature of California placed a more limited interpretation upon the language of the Constitution in its act (St. 1850, p. 58), creating and defining the boundaries of the several counties of the newly formed state. We are referred to the description of the boundaries of the county of Santa Cruz (then named Branciforte) in said act, which reads as follows:

> "Beginning in the ocean three English miles from land, at a point due west of the head of San Francisquito Creek, and running due east to the summit of the Santa Cruz Mountains; thence in a southeasterly direction along the summit of

said mountains to the Pajaro River; thence down the middle of said river to the Bay of Monterey, and three English miles into the ocean; thence in a northwesterly direction parallel with the coast to the point of beginning." Section 7.

[3, 4] In interpreting this act, intended to set off the land and water area of California into appropriate political subdivisions, we are to do so in such a way as to reconcile its terms, if reasonably possible, with the language of the Constitution, since it would not be presumed to be the intent of the Legislature to do that which it would have no power to do, viz. to exclude from the jurisdiction of the state of California or its political subdivisions any of its land or water areas which had been embraced therein by the express terms of its Constitution. This being so, if there are any ambiguities in the act in question, they are to be resolved in harmony with the text of the organic law. Thus it is that, when we find in the above-quoted description the following course and distance: "Thence down the middle of said river to the Bay of Monterey and three English miles *into the ocean*," we are to assume that the framers of the act did not mean by the above-emphasized phrase *"into the bay,"* since so to construe it would be not only to do violence to its words, but to exclude the larger portion of Monterey bay from the boundaries and jurisdiction of the state of California, despite the very plain inclusion therein of the entire bay according to the Constitution. The petitioner, however, lays especial emphasis upon the description reading: "Thence in a northwesterly direction *parallel to the coast* to the point of beginning." When, however, we read the act in its entirety, we find that the phrase "parallel to the coast" is repeatedly applied with reference to the general coast lines of every coast county described therein, regardless of the bays and inlets along said respective coast lines. Reasonably interpreted, this phrase may bear a meaning entirely consistent with the phrasing of the Constitution, which includes within the state boundaries "all islands, harbors and *bays* along and adjacent to the coast." When we come to consider the description of the county of Monterey as contained in the said act of 1850 the ambiguities of the act become still more apparent. Said description begins, "At the mouth of the Pajaro river, on the Bay of Monterey," and ends, "Thence parallel with the coast *to the* place of beginning." It is thus plain that the northern boundary of Monterey county as thus given does not close with the southern boundary of Branciforte or Santa Cruz county, even according to the petitioner's interpretation of the act. The state Legislature apparently had discovered this hiatus when it came to adopt the provisions of the Political Code in 1872, since, while it left the boundary of the county of Santa Cruz substantially unchanged on its oceanward side (Pol. Code, § 3952), it changed the boundary description of the county of Monterey so as to make it read: "Beginning *in the Pacific Ocean* at the southwest corner of Santa Cruz," etc., to the place of beginning. Pol. Code, § 3935. The entire Bay of Monterey within its headlands and thence into the ocean for a distance of 3 nautical miles was thus, we think, definitely placed within the sovereignty of the state of California, and within the boundaries and jurisdiction respectively of the counties of Santa Cruz and Monterey.

[5] The petitioner, however, insists that by the rules of international law the territorial jurisdiction of a maritime state does not extend beyond 3 miles from the shore line, and follows the indentations of the coast into all bays or gulfs, the headlands of which are more than 6 miles apart, and cites certain text-writers upon international law in support of that contention. These text-writers give as the reason for this rule the somewhat fantastic one that, while our modern international law was in the process of forming, the range of coast planted cannon did not exceed 3 miles. These text-writers, however, while suggesting such a rule based upon such a long-lost reason, admit that as to the stronger maritime powers of modern Europe the rule was more honored in the breach than in the observance. Britain, which has depended more upon its "Wooden Walls" than upon its coast ordnance, has always asserted its sovereignty, not only over the entire area of the bays, ports, harbors, friths, and other inlets along its much indented coast line, but also over the bays, gulfs, and inlets of its dependencies; such, for example, as the Bay of Conception in Newfoundland, which has a breadth of 15 miles. These text-writers also point out that France has always asserted sovereignty over the Bay of Cancale, which is 17 miles wide at its headlands, and that the United States asserts and has maintained its jurisdiction over the Bays of Delaware and Chesapeake, although the former has a headland width of 15, and the latter of 12 miles. In Moore's Digest of International Law, the basis of our assertion of jurisdiction over the entire area of Chesapeake bay is set forth in its reference to the decision of the commissioners of Alabama claims, wherein the extent of that jurisdiction was directly involved. The decision of the commission is illuminating in its bearing upon the instant proceeding. It reads:

> "Considering, therefore, the importance of the question, the configuration of Chesapeake Bay, the fact that its headlands are well marked, and but twelve miles apart, that it and its tributaries are wholly within our own territory, that the boundary lines of adjacent states encompass it; that from the earliest history of the county it has been claimed to be territorial waters, and that the claim has never been questioned; that it cannot become the pathway from one nation

to another; and remembering the doctrines of the recognized authorities upon international law, as well as the holdings of the English Courts as to the Bristol Channel and Conception Bay, and bearing in mind the matter of the brig Grange and the position taken by the government as to Delaware Bay, we are forced to the conclusion that Chesapeake Bay must be held to be wholly within the territorial jurisdiction and authority of the government of the United States."

While it is true that by treaties and conventions between the powers chiefly in arbitration cases the fixation of a 6-mile distance between headlands of certain bays and inlets have at times been agreed upon in the settlement of international disputes, it cannot be said that there is any rule of international law upon the subject; the whole matter resting in the undisputed assertion of jurisdiction by the power possessing the inclosing shore line of the bay or inlet in question. This being so, we arrived at the conclusion that the Bay of Monterey between its headlands and the ocean adjacent to a line drawn between these headlands for a distance of 3 nautical miles is within the boundaries of the state of California and of the counties respectively of Santa Cruz and Monterey. The particular location of the ship Peralta as given in the petitioner's application herein places it within the county of Santa Cruz, and hence within the jurisdiction of the superior court in and for said county of Santa Cruz. It is not seriously contended by the petitioner that the acts which it proposes to do upon and by the use of said vessel and its equipment at said point would not, if permitted, constitute a violation of the laws of the state of California regulating the taking and reduction of that species of marine fish known as "sardines." It follows that the superior court in and for the county of Santa Cruz has jurisdiction over offenses against these laws; and hence that the alternative writ issued herein should be discharged and the application of the petitioner for a permanent writ of prohibition denied.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.

200 Cal. 274

FOSTER v. FERNANDES et al. (Sac. 4015.)

(Supreme Court of California. Jan. 18, 1927.)

Appeal and error ⚷479(1)—Supersedeas may issue to prevent execution on judgment after refusal to permit sureties on appeal to justify because mistakenly appearing too late.

Where defendants after judgment for plaintiff in good faith gave notice of appeal and filed undertaking, supersedeas may issue to prevent execution on judgment after trial judge had refused to permit sureties to justify an appeal bond because of mistakenly appearing therefor one day too late.

In Bank.

Action by M. Elma Foster against J. V. Fernandes and others. Judgment for plaintiff, and defendants appeal. On application for supersedeas. Writ granted.

G. W. Zartman and Russell & Heid, all of Tulare, for appellants.

Feemster & Cleary, of Visalia, for respondent.

PER CURIAM. Upon submission of the cause in open court, the Chief Justice announced the decision of the court as follows:

In this action to recover certain cattle, or the value thereof, together with damages for their wrongful detention, judgment was entered for plaintiff. After motion for new trial made and denied, defendants gave notice of appeal, and, in due time, filed an undertaking on appeal in the sum of $15,000, properly conditioned to stay execution. Thereafter, the respondent having excepted to the sufficiency of the sureties, appellants served notice that the sureties would justify before the court on the 3d day of December, 1926, on which day they appeared in court with the sureties. After due examination, the trial court found the sureties were qualified to act as such, but refused to permit them to justify on the ground that they appeared one day too late, the delay being explained by the fact that the appellants erroneously believed they had until December 3, 1926, within which to have said sureties justify. Execution was thereupon issued on behalf of the plaintiff upon the judgment entered in the cause, and the appellants have applied to this court for writ of supersedeas.

Under the rule stated in Nonpareil Manufacturing Co. v. McCartney, 143 Cal. 1, 76 P. 653, and Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2, good faith having been shown by appellants, we deem it proper, in the exercise of sound discretion, to grant them the writ prayed for, upon such terms as will be just and will adequately protect the rights of the respondent, in order to preserve the status quo until the final determination of the action.

It is ordered that, upon the filing by petitioners with the clerk of this court, within 15 days, of a good and sufficient undertaking on appeal in the sum of $15,000 conditioned as required by law, and which shall have been first approved by a judge of the superior court in and for the county of Tulare, at a hearing upon 5 days' notice to respondent, a writ shall issue as prayed for herein.

It is further ordered that in the meantime, during said period of 15 days, the execution of the judgment referred to in the petition be stayed.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

200 Cal. 261

MUCHENBERGER et al. v. CITY OF SANTA MONICA et al. (L. A. 9258.)

(Supreme Court of California. Jan. 15, 1927.)

1. Appeal and error ⚿655(1)—Entire transcript held not subject to motion to strike out merely for absence of reporter, when supplemental portion was admitted in evidence (Code Civ. Proc. § 953[a]).

Entire transcript *held* not subject to motion to strike out, made on ground that no transcript could be settled, under alternative method provided in Code Civ. Proc. § 953(a), because supplemental portion had been received in evidence when no official reporter was present, absence of such reporter having been with knowledge and consent of all parties concerned and court having certified that portion objected to was true and correct.

2. Appeal and error ⚿655(1)—Portion of transcript objected to because containing evidence admitted in reporter's absence held severable, leaving valid transcript sufficient for decision on merits.

On motion to strike out entire transcript because containing supplemental portion received in evidence during absence of reporter, such portion, objected to, *held* severable from remainder of transcript, remainder of transcript, properly certified, being sufficient to enable decision on merits.

3. Appeal and error ⚿655(1)—Transcript containing report received in absence of reporter held not subject to motion to strike out in absence of injury.

Where respondents moved to strike out transcript because it contained engineer's report received in evidence during absence of official reporter, reviewing court would assume that such report beneficially affected them, because of moving parties' insistence on correctness of judgment, so, in absence of showing that they had been injuriously affected by trial court's certification of portion of transcript objected to, motion to strike out would not be granted, moving parties having tacitly consented to presentation and admission in evidence of report objected to.

4. Appeal and error ⚿655(1) — Reviewing court will presume that report in transcript, moved stricken, favored moving parties because of their insistence on correctness of judgment.

Where respondents moved to strike out transcript because it contained engineer's report received in evidence during absence of official reporter, reviewing court would presume that such report beneficially affected moving parties because of their insistence on correctness of judgment based thereon.

In Bank.

Action by Leo J. Muchenberger and another against the City of Santa Monica and others and the Santa Monica Land Company to compel defendant last named, as trustee, to perform terms of trust imposed by act of the Legislature with reference to tidelands. From an adverse judgment, plaintiffs appeal and defendants first named cross-appeal. On defendant's motion to strike out reporter's transcript. Motion denied.

Black, Hammack & Black and James Westervelt, all of Los Angeles, for appellants.

Chester L. Coffin, of Santa Monica, for respondents City of Santa Monica et al.

Newlin & Ashburn, of Los Angeles, for respondent Santa Monica Land Co.

RICHARDS, J. The respondent herein, the Santa Monica Land Company, has presented a motion to strike out the reporter's transcript on both appeals herein, upon the ground that as to a certain portion of said transcript the official reporter was not present during the presentation to the trial court of the matters embraced in that particular portion thereof. The record herein discloses that the action in which these appeals were taken was one wherein the plaintiffs sought to compel the city of Santa Monica, as trustee, to perform the terms of a trust contained in that certain act of the Legislature of the state of California, known as "An act granting certain tidelands and submerged lands of the state of California to the city of Santa Monica upon certain trusts and conditions," approved April 10, 1917, and for such other and appropriate orders and decrees as should be meet in the premises; that upon the issues joined therein the cause came on for trial in the early part of the year 1925, before the court sitting without a jury, and that the trial of said cause lasted several days, during which oral and documentary evidence was received, and also during which main trial of the cause the official reporter of said court was present and reported the same; that on the 4th day of March, 1925, the cause was submitted to the court for decision upon the evidence theretofore taken; that on the 12th day of May, 1925, the judge of said court filed an opinion wherein he indicated what his decision in said cause would be, and that, in the course of said opinion, he indicated that there was a certain incidental matter relating to the details of certain work which the court suggested should be agreed upon by the parties and with reference to which the court indicated that, in the event of the failure of the parties to so agree, it would appoint two engineers, one to be named by the plaintiffs and one by defendants, who, with the city engineer of the city of Santa Monica, should prepare and present to the court their recommendation as to the details of such work. The parties not having agreed, the court appointed said engineers, and also, and in order to receive their report, and evidently for that purpose alone, set aside the submission of the cause and continued the further hearing thereon for that particular purpose until such time as such report could be prepared and presented. The matter came on for hearing thereon on September 21, 1925, whereupon the report of said engineers, after being identified and verified by them, was presented and received in evidence by the court.

[1] At the time of the presentation thereof at said hearing the official reporter was not present, and the report of said engineers was received and filed without his presence, but with the knowledge of all parties concerned that he was not present at said time, and without either suggestion or objection on the part of any of them. Thereafter and on the 1st day of December, 1925, the court filed its findings of fact and conclusions of law in said cause and also caused to be made and entered its judgment therein. The plaintiffs appealed from the whole of said judgment, while the city of Santa Monica also filed its appeal from certain designated portions thereof. Both of these appellants united in the request to the official reporter for the preparation of the reporter's transcript on both appeals, and such transcript was accordingly prepared and certified by such reporter in so far as the same related to the main trial of said cause down to the date of the first submission thereof. The said transcript, as presented to the judge of the trial court for his approval and certification, also was made to contain the order of the court for the reopening of the cause for the special purpose of receiving the report of said engineers and the proceedings at the time of the reception in evidence of said report. When the matter of the settlement of said reporter's transcript came on for hearing before the trial court, the respondent Santa Monica Land Company objected to the settlement of the same, basing its objection upon the ground that, since no official reporter had been present when the written report of said engineers was identified and received in evidence, no transcript could be prepared or settled upon said appeal, under the alternative method provided in section 953(a) of the Code of Civil Procedure. The trial judge took the matter of the settlement of said transcript and the aforesaid objection thereto under advisement and thereafter, and on April 12, 1926, appended thereto the following certificate:

> "I hereby certify that the foregoing transcript, from pages 1 to 466, both inclusive, consisting of one volume, in the above proceedings, is true and correct; except that the case was reopened on the 21st day of September, 1925, for the sole purpose of receiving the reports of the engineers appointed under the order for reopening, and taking their evidence as to the correctness of the same. At said hearing on September 21, 1925, no evidence was taken from any witness save from said engineers, and that only as to the correctness of their reports. The order reopening the cause and the proceedings had thereon are incorporated in the foregoing transcript, at pages 467 to 481, inclusive."

The respondents herein renew their said objections to the reporter's transcript and the settlement thereof and to the use thereof upon these appeals by their said motion to strike said transcript and the whole thereof from the files. We are of the opinion that this motion should be denied. It is addressed to the reporter's transcript herein, as a whole. A reference to the foregoing certificate of the trial judge will show that he has duly certified to the correctness of said reporter's transcript as to the whole of that portion thereof which embraces the main trial of the cause and the proceedings had thereon, and that, as to the remainder of the certificate of said judge, it refers to and identifies the proceedings had upon the supplemental hearing ordered by said court for the limited purpose of receiving the report of its appointed engineers upon a merely incidental phase of said case arising after the trial and submission of the main cause. While it is probably true that the official reporter should have been present and have reported this supplemental proceeding, we are of the opinion that his absence therefrom, with the apparent knowledge and consent of all parties concerned, ought not to so far avail as to justify the granting of the respondents' motion to strike out the entire transcript herein, in view of the fact that that portion thereof which fully embraces the main proceedings during the trial of the cause was properly certified by the trial judge as being true and correct.

[2, 3] We are of the opinion that, as to the supplemental portion of said transcript which forms the basis of the respondents' assault upon the whole thereof, that portion thereof is so far severable from the remainder of said transcript as to be disregarded in determining whether there is a sufficiently certified transcript of the cause on file as to enable the court to decide these appeals upon their merits. In presenting this motion, the respondents have proffered no objection impugning the correctness of that portion of said transcript which embodies the proceedings had at the time of the receipt of the report of said engineers.

[4] Since the respondents herein are insisting upon the correctness of the judgment of said court in its entirety, it must be assumed that they have been beneficially affected by whatever portion of said judgment relates to or is based upon the report of said engineers, and this being so, and said respondents having tacitly consented to the presentation and admission in evidence of said engineers' report in the absence of the official reporter, we are of the opinion that they are not now in a position to press said motion without some showing that they have been injuriously affected by the action of the trial judge in making his foregoing certification of said transcript.

It is therefore ordered that the said motion be and the same is hereby denied.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

80 Cal. App. 658

PEOPLE v. TAYLOR. (Cr. 945.)

(District Court of Appeal, Third District, California. Jan. 14, 1927.)

Criminal law 🔑934—Grant of new trial, where court's advice to acquit for insufficiency of evidence was not followed, held not abuse of discretion.

In prosecution for driving automobile while habitual user of narcotic drugs, grant of new trial *held* not abuse of discretion, where court had advised jury to acquit because of insufficiency of evidence, but jury had not followed such advice, but had returned verdict of conviction.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Jesse E. Taylor was convicted of driving an automobile while habitual user of narcotic drugs. From an order granting a new trial, the People appeal. Affirmed.

See, also, 250 P. 105.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mark L. Burns and L. M. Shelley, both of Sacramento, for respondent.

FINCH, P. J. This appeal is from the order of the trial court granting defendant's motion for a new trial after the jury had found him guilty of the offense of driving an automobile upon a public highway while he was "an habitual user of narcotic drugs."

The information charges that the offense was committed March 27, 1926. Dixie Cunningham, an habitual user of narcotic drugs, employed by an inspector of the state board of pharmacy as an informer, testified that in the forenoon of the day mentioned in the information she and the defendant "both took a shot" of morphine; that she returned to the defendant's place of business in the afternoon, and that the defendant then took her in his automobile to various places, at one of which he procured four bindles of morphine; that they then returned to the defendant's place of business, where they used one of the bindles to give each of them a second "shot"; and that the defendant gave the witness two of the remaining bindles and kept the third. The inspector referred to testified that he arrested the defendant after the informer had left, and that he found various instruments of the kind used by narcotic addicts in the defendant's place of business, and that they showed evidence of having been used; that the defendant stated that he had been using narcotics this time "only three or four months, and that, if we would give him a week or ten days he would be entirely off, and would never use it any more"; that the defendant was "under the influence of narcotics" in both the forenoon and the afternoon of the day of his arrest; that the witness had seen the defendant three or four times prior to March 27, 1926, and that on each occasion the defendant was under the influence of narcotics. The witness was not asked, and did not state, how long prior to March 27, 1926, it was that he had seen the defendant. While there is some corroboration of parts of the foregoing testimony, no additional facts were proved by other witnesses.

Mr. Babcock, deputy district attorney, asked for a continuance, after the testimony referred to had been introduced, to enable him to procure the attendance of a witness who he stated was then ill. The request was denied, and Babcock thereupon moved the court to dismiss the case on the ground that the evidence was insufficient to convict. The trial judge stated that the court was without authority to dismiss the case, but was authorized to advise the jury to acquit. Counsel for defendant then said:

> "We will not offer any proof, and we are willing to submit this case without argument, as Mr. Babcock has stated * * * that the evidence is not sufficient to convict."

The court advised the jury to acquit. The jury did not follow such advice, but returned a verdict of conviction. The court granted a new trial, on motion of defendant, on the ground of insufficiency of the evidence, and the district attorney gave notice of appeal.

Appellant relies upon the cases of People v. Amer, 151 Cal. 303, 90 P. 698, and People v. Muhlner, 115 Cal. 303, 47 P. 128. In the former case the trial court had granted a new trial on a ground not authorized by section 1181 of the Penal Code. In the latter the jury had returned a verdict of manslaughter and the court granted a new trial on the ground that the evidence showed conclusively that the defendant was guilty of murder. Neither case, therefore, has any bearing upon the question presented here. In People v. Knutte, 111 Cal. 453, 455, 44 P. 166, it is said:

> "It has been so repeatedly held here as to become axiomatic that where a new trial is granted upon this ground [insufficiency of the evidence], or where it is one of various grounds upon which the trial court may have based the order, its action will not be disturbed, except in a case showing a manifest and unmistakable abuse of discretion. * * * Nor does it affect the question that the evidence in the case may have a *legal tendency* to prove all the material facts. Guilt is to be established beyond a reasonable doubt, and, while there may be some evidence to support each fact, this does not signify that it is necessarily such as to satisfy the conscience of the judge that a case is made which warrants conviction."

In People v. Canfield, 173 Cal. 309, 312, 159 P. 1046, 1048, it is said:

> "We can hardly manufacture in fancy a hypothetical situation in which a reviewing court would be justified in questioning the discretion

of a trial court who should grant a new trial in a case involving a criminal charge."

It certainly does not manifestly appear, under all the circumstances of this case, that the trial court abused its discretion in granting a new trial.

The order is affirmed.

We concur: PLUMMER, J.; GEORGE F. BUCK, Justice pro tem.

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80 Cal. App. 647

Ex parte O'CONNOR. (Cr. 1415.)

(District Court of Appeal, Second District, Division 2, California. Jan. 13, 1927.)

1. Fraud 🔑69—Count alleging accused knowingly disseminated circular asserting untrue fact concerning real property, with intent to mislead, held to charge offense (Pen. Code, § 654b).

Count alleging that circular was made and disseminated, asserting fact concerning ownership, title, or other characteristic of real property which was untrue, and known to publisher to be so, and that it was made and disseminated with intention of misleading, *held* sufficient to charge offense of false advertising concerning real property under Pen. Code, § 654b.

2. Criminal law 🔑200(1)—Conviction of false advertising concerning real property does not preclude conviction of larceny by trick and device, based on same transaction (Pen. Code, § 654b; Const. art. 1, § 13).

Offense of issuing circular containing untrue statement concerning real property with intention of misleading, set out in Pen. Code, § 654b, is not same offense as larceny by trick and device, which involves element of taking, so that conviction of former under one count of complaint and conviction of latter on subsequent count does not violate Const. art. 1, § 13, though based on same transaction.

3. Fraud 🔑68—Offense is complete when deceptive advertising concerning real property is circulated with criminal intent (Pen. Code, § 654b).

Offense of issuing circular containing untrue statement concerning real property, with intention of misleading, defined in Pen. Code, § 654b, is complete when deceptive advertising matter is circulated with criminal intent.

4. Criminal law 🔑196—Where single act constitutes two crimes, but each requires proof additional to that required by the other, prosecution for either does not put defendant in jeopardy for the other.

While single act may be offense against two statutes, and thus constitute two crimes, if each statute requires proof of facts additional to those involved in the other, acquittal or conviction of either does not result in defendant having been in jeopardy for the other.

5. Habeas corpus 🔑113(5½)—In habeas corpus proceeding, objection that testimony is not properly before appellate court cannot be made for first time in brief.

Objection that record of testimony in trial court is not properly before appellate court in habeas corpus proceeding cannot be made for first time in brief, where return did not deny allegation of petition that it contained all testimony.

6. Habeas corpus 🔑83—Habeas corpus petition is treated as traverse to return.

On filing of return to writ of habeas corpus, petition is treated as traverse thereto.

7. Habeas corpus 🔑83—In habeas corpus proceeding, facts alleged in petition and not denied in return must be taken as true.

In habeas corpus proceeding, where matters included in petition are not denied in return, they are considered as admitted and must be taken as true.

8. Criminal law 🔑200(3)—One transaction cannot be basis for conviction for both larceny by trick and device and obtaining money by false pretenses.

Defendant cannot be convicted of larceny by trick and device and of obtaining money by false pretenses, where only one transaction occurred between parties.

9. Habeas corpus 🔑31—Habeas corpus is proper remedy where convicted defendant claims former jeopardy.

Habeas corpus is proper remedy where it is claimed that prisoner has been placed in jeopardy for identical offense of which he was convicted, since such matter goes to continuance of jurisdiction of trial court for any purpose.

10. Criminal law 🔑564(5)—Evidence of street number of city held to show offenses within jurisdiction of municipal court.

Evidence *held* to show that offenses were committed within jurisdiction of municipal court, where there was testimony that transactions took place at certain street and number.

11. Criminal law 🔑737(2)—Venue is fact question.

Question of venue is one of fact.

12. Habeas corpus 🔑85(1)—Petitioner in habeas corpus proceeding held not to have sustained burden to show that verdict was void for uncertainty.

Petitioner in habeas corpus proceeding *held* not to have sustained burden to show that verdict was void for uncertainty, where petition did not show language thereof, in view of statement in commitment and presumption that official duty has been performed.

13. Habeas corpus 🔑85(1)—In habeas corpus proceeding, petitioner must prove claimed uncertainty of verdict.

In habeas corpus proceeding, petitioner has burden to show that verdict was void for uncertainty.

🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

14. Habeas corpus ⚷113(9)—In habeas corpus proceeding, judgment cannot be held not to support commitment, in absence of exhibit purporting to show correct judgment.

In habeas corpus proceeding, judgment of conviction cannot be said to be in such language as not to support commitment, on contention that commitment did not recite correct judgment, where exhibit purporting to show correct judgment was not appended to petition.

Application of Cyril J. O'Connor for a writ of habeas corpus, prayed to be directed to the Chief of Police of the City of Los Angeles to secure the release of petitioner from custody after conviction in municipal court for false advertising concerning real property. Writ discharged; petitioner remanded.

William J. Clark, of Los Angeles, for petitioner.

J. M. Friedlander, City Prosecutor, and A. T. Folsom and Vernon S. Gray, Deputy City Prosecutors, all of Los Angeles, for respondent.

CRAIG, J. Previously to application being made to this court for a writ of habeas corpus, a petition for the same relief had been made to the superior court of Los Angeles county, which was refused.

The petitioner was convicted in the municipal court of the city of Los Angeles on three counts of a complaint, and was sentenced upon each. The sentence for the offense charged in the first count was a fine of $1, which was paid. The claim upon which petitioner's release is now sought is based upon several contentions. We shall first consider the points urged as they especially concern the third count. This is predicated upon section 654b of the Penal Code. The attack made upon the sentence imposed following the conviction upon this count is divided into two parts. It is first said that no public offense is charged therein, and, secondly, it is charged that if an offense is charged it is the same as that set forth in count 1, and that the defendant having been tried, convicted, and sentenced under the last-named count, a further punishment under count 3 would be a violation of article 1, § 13, of our state Constitution.

[1] We are of the opinion that count 3 states facts sufficient to constitute a public offense. It attempts to charge the offense commonly known as false advertising concerning real property. Section 654b of the Penal Code reads, in part, as follows:

> "Any person, * * * who in a newspaper, circular, circular or form letter or other publication published or circulated in any language in this state, makes or disseminates any statement or assertion of fact, concerning the extent, location, ownership, title or other characteristic, quality or attribute of any real estate located in this state or elsewhere, which is known to him to be untrue and which is made or disseminated with the intention of misleading, is guilty of a misdemeanor. * * *"

The count in question charges that on the 11th day of January, 1926, the defendant O'Connor did "make, publish, designate and circulate and cause to be made, published, disseminated and circulated, and did then and there cause to be placed before the public in the city of Los Angeles, county of Los Angeles, state of California, a certain handbill, circular, notice and folder, such folder being an advertising medium, an advertisement regarding such real property and the title thereto, * * * which said advertisement did then and there contain statements, representations and assertions of facts concerning such real property, * * * which said statements, representations and assertions were then and there false and untrue and which were then and there deceptive and misleading and which were then and there known by said Cyril J. O'Connor * * * to be false and untrue, deceptive and misleading, the said circular * * * containing in words and figures the following"—following which allegations the complaint contains a copy of a portion of the alleged circular. Among other things, the complaint further alleges that this publication was made by the defendant "for the purpose of misleading and deceiving the public generally, and to fraudulently induce the public to enter into obligations relating to said property and to purchase certain interests in said mining claim."

The essential facts required and alleged, in so far as they pertain to such a case as that before us, were that the circular was made and disseminated, asserting a fact concerning the ownership, title, or other characteristic of real property which was untrue, and known to the publisher of such circular to be untrue, and which was made and disseminated with the intention of misleading. The pleading is therefore sufficient.

[2] Nor can we agree with the second argument advanced concerning count 3. It is true that this count relates to a phase of the same transaction as does count No. 1, but the offense charged in count 3 is of a different nature, and is not necessarily embraced within the other.

It is urged that the defendant having been tried, convicted and sentenced under count 1, there can be no prosecution upon count 3, because the facts constituting the bases of both charges are identical. We have here an entirely different situation than exists in the comparison of the prosecution under counts 1 and 4, which will be discussed later. The offense alleged by count 3 to have been committed is not necessarily included within that set forth in count 1. In a case where one is convicted of an offense necessarily included within another, and later is prosecuted for the greater, a plea of once in jeopardy will be sustained, for such conviction might have been had under the latter. The converse would also be true if the prosecution had begun with the greater offense, and there had been an acquittal, and subsequent prosecution attempted under the lesser charge. In such cases, and of course where the offenses charged are identical, there can be but one conviction and but one sentence. But where, as here, entirely separate and distinct offenses are charged in two counts, and one is not necessarily included within the other, a prosecution for one is no bar to a prosecution for the other, even though the same testimony may be applicable to both.

[3, 4] In brief, count 3 charges the offense known as false advertising of real property. This offense became complete when the deceptive advertising matter was circulated with criminal intent. It is obvious that this false advertising is a distinct offense from larceny by trick and device as charged in count 1. The mere fact that the false literature was used as a part of the device through which the larceny was accomplished does not argue against the fact that the offenses are nevertheless separate and distinct. The latter involves as an essential element the taking of personal property of another. As to the former, the taking of property is not involved. The outstanding element of the offense of falsely advertising real estate is the publication and circulation of deceptive matter. It is complete without regard to whether or not any one is deceived or damaged. The statute is intended to protect the public from a certain prevalent and pernicious form of trickery, but publication is not essential to larceny by trick and device. Other distinctions might be pointed out; but these are sufficient to indicate that the offenses are separate and distinct and that one is not necessarily included within the other. While a single act may be an offense against two statutes, and thus constitute two crimes, if each statute requires proof of a fact additional to those involved in the other, an acquittal or conviction of either does not result in the defendant having been in jeopardy for the other. Morey v. Comm., 108 Mass. 433.

[5-7] Objection is made that the record of the testimony in the trial court is not properly before this court. We think the respondent is precluded from urging this point for the first time in a brief. The petition alleges that the testimony included therein was given at the trial; that it was all of the testimony bearing upon the commission of any offense by the defendant. The return contains no denial of this assertion, and in no way challenges it. Upon the filing of the return to a writ of habeas corpus the petition is treated as a traverse thereto. If none of the matters included in the petition are denied, the facts set forth therein are considered as admitted, and must be taken as true. In re Smith, 143 Cal. 368, 77 P. 180. Hence, in this case, it is admitted that the only testimony adduced to show the defendant guilty of any offense was that of the witnesses Alice Ross and Anton Klein, and that their testimony was as alleged in the petition.

[8, 9] From this testimony it clearly appears that if the defendant was guilty, as the jury found him to be, of larceny by trick and device as charged in the first count, he cannot also be punished under the fourth count. But one transaction occurred between the parties in connection with the subject-matter which forms the basis of the prosecution upon these two counts. They not only relate to one and the same transaction, but the facts which constitute the larceny charge pleaded and established by the evidence are identical with those constituting the charge of obtaining money by false pretenses. Under such circumstances, the jurisdiction of the court was exhausted when it pronounced sentence upon the verdict returned on the first count, and habeas corpus is a proper remedy where it is claimed that the prisoner has been placed in jeopardy for the identical offense, because if such assertion be true it is not merely a matter of defense which if not properly sustained in the trial court would furnish ground for appeal, but goes to the continuance of jurisdiction of the trial court for any purpose. In re Harron, 191 Cal. 457, 217 P. 728, and cases therein cited.

[10, 11] The contention that there was no evidence introduced at the trial to show that the offenses were committed within the jurisdiction of the court cannot be sustained. There was testimony that the transactions in question took place at 1010 South Concord street, at which address the complaining witness said she resided. This, in the absence of evidence to the contrary, was sufficient. The question of venue is one of fact. As the cause in which the petitioner was convicted was tried in the municipal court of the city of Los Angeles, and as the jury was necessarily drawn from that vicinage, its members must have understood the complaining witness to refer to 1010 South Concord street in that city, and, therefore, in the county of Los Angeles. Considering all of the evidence, there could hardly be any reasonable doubt that the offenses were committed within the jurisdiction of the trial court, and this was sufficient. People v. McGregar, 88 Cal. 140, 26 P. 97; People v. Manning, 48 Cal. 335.

[12, 13] It is asserted that the verdict is deficient in that it is uncertain as to the offense of which the petitioner was found to be guilty. We are unable to determine from the statements contained in the petition of what language the verdict consisted. In the body of the petition it is asserted that the verdict was as follows:

> "State of California v. Cyril J. O'Connor, Defendant. We, the jury in the above-entitled matter find the defendant—On count No. 1 find the defendant guilty; count No. 2, the jury, find the defendant not guilty; count No. 3, we, the jury find the defendant guilty, and in count No. 4, we, the jury find the defendant guilty of the offense charged."

But in the commitment alleged to be held by the chief of police of the city of Los Angeles and set forth in hæc verba it is recited that:

> "Cyril J. O'Connor, was on the 26th day of March, 1926, convicted in the municipal court in and for the city of Los Angeles, state of California, in case No. 1209 on the criminal docket of said court of three public offenses, as charged in the complaint filed, in said cause, to wit: Under count No. 1 of the crime of petty larceny, by trick and device, a misdemeanor, and upon count No. 3 of the crime of false advertising, a misdemeanor, and upon count No. 4 of the crime of obtaining money by false pretenses, a misdemeanor, committed in said Los Angeles city on or about the 11th day of January, 1926."

This commitment is questioned only in that the recitation therein contained of the judgment is said to be incorrect. Such commitment apparently executed in due course of official routine thus produced by the petitioner supplies evidence that the verdict was other than as alleged elsewhere in the petition. In this state of uncertainty and giving proper weight to the presumption that official duty has been duly performed (which presumption was applied under quite similar circumstances in Re Williams, 183 Cal. 11, 190 P. 163), we cannot conclude that the petitioner has established his contention that the verdict was in such form as to be void for uncertainty. Of course, this burden is his in this habeas corpus proceeding.

[14] With respect to the judgment a similar situation exists. As we have said, after setting forth a purported copy of the commitment and vouching for its correctness as such copy, the petition alleges that the same is untrue in that the portion of it which purports to recite the judgment is said to be incorrect and it is asserted that the language contained in said recitation was not used by the court in pronouncing judgment. In that behalf the petition reads:

> "Nor does said judgment contain any of the said language, but that said judgment is in the words and figures as set forth in Exhibit 3 attached to this petition. * * *"

A careful perusal of the record discloses that no exhibit marked "Exhibit 3" is appended to the petition. Therefore, regardless of what the fact may be, we are unable to say that the judgment pronounced was not in such language as to support the commitment.

It is said in the brief of petitioner that the judgment was not entered as required by law in the judgment book. As to that matter the petition makes no showing. Certain other points are argued for the first time in the petitioner's reply brief. It is not necessary to consider them here, and we expressly refrain from doing so.

It appearing that at the time of the issuance of this writ the prisoner was in regular confinement serving the sentence upon conviction under the third count, it is ordered that the writ be discharged and the petitioner remanded.

We concur: WORKS, P. J.; THOMPSON, J.

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80 Cal. App. 609

YULE v. MILLER et al. (Civ. 5298.)

(District Court of Appeal, First District, Division 1, California. Jan. 11, 1927.)

1. Customs and usages 🔑15(1)—Vendor and purchaser 🔑46 — Unambiguous agreement for sale of realty does not require evidence of usage or implication of law for interpretation.

Unambiguous agreement for sale of realty does not require either evidence of usage nor implication of law to interpret it or carry it into effect.

2. Vendor and purchaser 🔑77—Payments on realty contract of "$35 or more per month, including interest," held to cover both principal and interest.

Contract for purchase of realty, requiring payment of balance of purchase price in installments "of $35 or more per month, including interest," buyer to "make monthly payments within first year of $500," *held* unambiguous, and $35 monthly payments covered both principal and interest and not principal alone.

3. Vendor and purchaser 🔑77—In suit to cancel agreement to sell realty, acts of parties held to indicate that monthly payment covered both principal and interest, not merely principal.

In vendor's suit for cancellation of agreement to sell, conduct of parties in making payment indicated that monthly payments required by contract covered both principal and interest and not merely principal.

4. Cancellation of instruments 🔑47—In vendor's suit to cancel agreement to sell realty, evidence held sufficient to show rescission of agreement by plaintiff.

In vendor's suit to cancel agreement for sale of realty, evidence *held* sufficient to show that vendor, by seizing property, rescinded contract.

5. Appeal and error 🔑1010(1) — Judgment should not be disturbed if evidence supports trial court's finding.

When there is evidence to support finding of trial court, judgment should not be disturbed.

6. Appeal and error 🔑931(1)—All intendments and conflicting rational inferences must be resolved in favor of trial court's judgment.

On appeal all intendments and conflicting rational inferences must be resolved in favor of judgment of trial court.

7. Trial 🔑105(1)—Incompetent evidence, not objected to, is sufficient to establish fact.

Incompetent evidence, admitted without objection, is to be regarded as sufficient to establish fact.

8. Appeal and error 🔑989—In reviewing sufficiency of evidence, technically incompetent evidence must be given as much weight as if competent.

Evidence technically incompetent, admitted without objection, must be given as much weight in reviewing court in passing on sufficiency of evidence as if it were competent.

9. Vendor and purchaser 🔑341(5)—Award of interest from time purchasers made payments under agreement instead of from time of vendor's rescission thereof held not error.

In vendor's suit to cancel agreement for sale of realty, awarding of interest on sum paid in under agreement from time of making payments under agreement, instead of from time when plaintiff rescinded such agreement, *held* not error.

10. Interest 🔑45—Interest is allowable from time sum involved in suit is due, if such sum may be ascertained with certainty.

Interest is allowable from time sum in suit becomes due, if such sum is certain or can be made certain by mere calculation.

11. Vendor and purchaser 🔑338—Action to recover purchase money paid on contract for sale of realty, after termination by vendor's fault, is one for money had and received.

Action to recover purchase money paid on contract for sale of real property, after termination of contract by fault of vendor, is in nature of one for money had and received, vendee having received no consideration because having been prevented from acquiring property under contract.

12. Pleading 🔑253(1) — In suit to cancel agreement to sell realty, entry of judgment in amount slightly in excess of that in cross-complaint held not error (Code Civ. Proc. § 470).

In suit to cancel agreement to sell realty, entry of judgment for amount in excess of sum set out in cross-complaint *held* not error, plaintiff's counsel having practically agreed to such correction in open court, and trial court being permitted, under Code of Civ. Proc. § 470, to make finding in accordance with evidence received not materially varying pleading, or to direct amendment of pleading to conform thereto.

13. Appeal and error 🔑1026—Error not injuring appellant should not cause reversal of judgment or order.

No error should cause reversal of judgment or order if it appears that appellant has not been and could not be injured thereby.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by W. A. C. Yule against Katie C. Miller and another for cancellation of an agreement to convey, in which defendants filed a cross-complaint. Judgment for plaintiff, and for defendants on their cross-complaint. From a judgment on the cross-complaint, plaintiff appeals. Affirmed.

See, also, 252 P. 737.

Clifford C. Pease, of San Diego, for appellant.

Jos. H. Egermayer and N. S. Hammack, both of San Diego, for respondents.

CAMPBELL, Justice pro tem. This appeal is from that portion of the judgment only which awards to respondents judgment on their cross-complaint in the amount of $976.23, together with interest and costs, and not from the judgment entered in favor of appellant quieting title to certain lands and canceling certain instruments of conveyance.

On the 15th day of June, 1921, respondent Katie C. Miller entered into a written contract with appellant, W. A. C. Yule, for the purchase and sale of lots 2 and 11 in block 121 of Middletown, being 50 by 200 feet, No. 3153 India street, San Diego, Cal. Respondent took possession of the property, furnished it, and up to the time of the acts of rescission set forth in the counterclaim and cross-complaint filed herein retained possession thereof. Until about June 24, 1922, the premises were occupied by a tenant of respondent. On June 24, 1922, the house upon the lots was nailed up by a carpenter employed by appellant, who refused to stop nailing it up when requested to do so by Richard L. Miller, husband of respondent. There was a sign posted on the property at the time upon which was printed: "Keep out. Trespassers will be prosecuted. Owner W. A. C. Yule." Thereafter, respondents' furniture was moved from the premises. On July 10, 1922, appellant wrote to respondents, notifying them that their furniture was placed in a storehouse for safe-keeping until claimed by them, and that appellant's letter would be an order to the transfer company to let respondents have their furniture.

The purchase price agreed upon in the agreement of sale for the property in question was $2,950. On June 15, 1921, the date of the agreement, $375 was paid, and within one year, or by May 27, 1922, further payments in the sum of $520 were made. The agreement executed by W. A. C. Yule and Josephine K. Yule, his wife, as parties of the first part, and Katie C. Miller, as party of the second part, provides that the first parties agree to sell and the second party agrees to buy the property in question for $2,950—$375 cash, receipt whereof is acknowledged, and the balance in monthly installments as follows: $35 or more per month, including interest at the rate of 7 per cent. per annum on deferred balances, interest to be deducted from each payment to date and balance applied on principal beginning July 15, 1921. The agreement further provides that the buyer shall make monthly payments within the first year of $500 and in each year thereafter until the balance due is reduced to $1,500, which shall be made into first mortgage for three years, with interest at 7 per cent., and deed shall then be delivered to the buyer.

Appellant, who was the plaintiff in the action, on June 26, 1922, brought suit praying judgment that by reason of the default of respondents in making payments in accordance with the terms of the agreement, the same be declared canceled and ordered delivered up. The answer denies the alleged default in payments, and by way of cross-complaint demands judgment for $1,192.33 as damages for sums alleged to have been paid out for improvements, taxes, street bond assessments, etc. The trial court, after allowing $300 as the rental value of the property, entered judgment in favor of respondents upon the cross-complaint for payments, taxes, assessments, repairs, interest, and costs in the sum of $976.23, canceled the agreement, and entered a decree in favor of appellant quieting his title to the premises against respondents, subject only to a lien against such property in favor of respondents for the amount of the judgment.

Appellant in the bill of exceptions urges five specifications wherein the trial court erred:

> Exception No. 1: "Error of the court in construing the contract of sale in question as to when payments required to be made, and in failing to find that the defendants were in default in the performance of said contract prior to the time of any question of retaking possession."
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> Exception No. 2: "Error of the court in finding that said defendants were not in default upon said contract and that said defendants had thereby first rescinded said contract."
>
> Exception No. 3: "Error of the court in finding that the plaintiff had rescinded said contract by seizing possession of said premises, there being no sufficiently competent evidence on which to base said finding."
>
> Exception No. 4: "Error of the court in finding and allowing interest from the time of the making of payments by said defendants instead of from the time when, by the cross-complaint, plaintiff is alleged to have rescinded said contract."
>
> Exception No. 5: "Error of the court in finding and allowing the sum of $895 as having been paid by defendants to plaintiff, whereas defendants' cross-complaint alleges and claims such sum to be in the amount of $885."

Respondents paid on the agreement $375 on June 15, 1921, when it was executed, and thereafter made the following payments: July 9, 1921, $15.03 interest and $19.97 on principal; July 13, 1921, $200 on principal; August 20, 1921, $50 on principal; September 6, 1921, $27.18 interest and $7.82 on principal; October 4, 1921, $13.41 interest and $21.59 on principal; November 16, 1921, $13.20 interest and $21.80 on principal; January 5, 1922, $13 interest and $57 on principal; May 6, 1922, $40 on principal; May 27, 1922, $12.82 interest and $7.18 on principal—making a total of $520 paid on the agreement before the expiration of the first year in addition to the $375 paid on the date of its execution, during which period $35 or more was required to be paid monthly, including interest, and which total payments for such period should aggregate $500.

While it is true that respondents made no payment during the month of December, 1921, nor during February, March, or April, 1922, in none of these months were respondents in arrears in the amounts due nor in default, unless under the contract $35 or more was required to be paid each month, even though advance payments had been made covering the amounts due monthly. Appellant, however, contends that the clause in the contract, "$35 or more per month, including interest at the rate of 7 per cent. per annum, payable on deferred balances, interest to be deducted from each payment to date and balance applied on principal, * * * the buyer shall make monthly payments within the first year of $500," really ment to provide, as shown by the manner of the first several payments that there should be during the year enough more than $35 per month paid to amount to $500 on principal; that they omitted to use the words "on principal," but that the words "on principal" are necessarily implied. The interpretation of this clause of the contract presents the main question on appeal and is determinative of the objections raised in "Exception No. 1" and "Exception No. 2."

The trial court found:

> "That the sum of $375, the first payment under the terms of the contract, and the sum of $520, making a total sum of $895, was paid during the first year, and during the life of said contract, in compliance with, and in accordance with, the terms of said contract and agreement of sale, which amount was credited on said contract; that there was no default in the payment of the sum and sums so due and payable as provided and stipulated in the said contract at any time during the first year and when said contract was in full force and effect; that there was no default in any manner or form under the terms of the contract at the time of the commencement of the action."

[1] In other words, the court held—and we think correctly so—that the contract is not ambiguous nor uncertain. The contract as concluded is a complete, workable, and unambiguous instrument and therefore does not require the addition of any terms to enable

it to be carried out according to the express declaration of the parties, and therefore does not require either evidence of usage or implication of law to interpret it or carry it into effect (Gero v. Richey, 38 Cal. App. 27, 175 P. 91).

[2, 3] It would require a strained construction and a violation of the express terms of the contract to hold that more than $35 per month was required to be paid to cover both the principal and interest, and that when advance payments had been made sufficient to cover the payments due on subsequent months that payments were required to be paid during these months covered by such advance payments. A simple addition of the amounts paid shows that respondents were not in default on the date the suit was brought. If, however, it could be said that there exists any ambiguity as to whether or not the monthly payments of not less than $35 per month provided in the contract were intended to be a payment on the principal, and that an additional payment should be made to cover the interest, or that the $35 payment should be applied in payment of both principal and interest, the construction placed upon this clause of the contract by the parties themselves removes any question of doubt. Payments made and credited on the contract range from $20 to $200. In the months of July, September, October, and November, 1921, but $35 was paid during each of these months, and these payments were accepted and credited first on the interest and the balance remaining on the principal. It is therefore clear that the parties to the contract understood and intended exactly what they stated in the contract—"thirty-five ($35.00) dollars or more per month, including interest at the rate of 7 per cent. per annum, payable on deferred balances, interest to be deducted from each payment to date and balance applied on principal." As was said by this court in Retsloff, Trustee, v. Smith, 249 P. 889: "If the meaning of the language of an instrument can be considered doubtful, the court will call in the aid of the acts done under it as a clue to the intention of the parties [citing cases]." When this rule is applied in the instant case it is obvious that the parties to the agreement understood the clause under consideration to mean that an amount equal to $35 a month on both principal and interest should be paid and as much more as the purchaser desired or felt she was about to pay.

[4-6] As to appellant's exception No. 3, that there is no sufficient competent evidence on which to base a finding that the plaintiff by seizing the property rescinded the contract, it may be said that there is evidence to support the finding of the trial court, and that when there is evidence to support such finding the judgment should not be disturbed. Leal v. Martin, 59 Cal. App. 760, 211 P. 853. All intendments and conflicting rational inferences must be resolved in favor of the judgment of the trial court. Resetar v. Leonnardi, 61 Cal. App. 768, 216 P. 71.

[7, 8] The witness Richard L. Miller, the husband of Katie C. Miller, and also a defendant in the action, testified relative to the facts occurring at the time the house was nailed up. He said he went there and had to pull a board off to get in; that he wanted to see how their furniture was and what had happened to it; that there was a sign on the property at the time which said, "Trespassers keep out would be prosecuted by W. A. C. Yule;" that he tried to stop the carpenter from nailing it up. The carpenter refused to stop and said he had orders from the man next door; that while there he took a photograph of the premises. The photograph was taken on June 24, 1922. On the day the furniture was moved from 3153 India street he got there just after they had the furniture loaded. It was moved by the Pioneer Transfer Company. The witness further testified that he asked the man whose authority he had to move the furniture; that the driver had a small card with W. A. C. Yule written on it. This testimony, admitted without objection, coupled with the fact that appellant wrote a letter to respondents notifying them that their furniture had been delivered by the Pacific Transfer Van & Truck Company to their warehouse for safe-keeping and that the letter, which was signed by appellant, would be an order for the furniture, together with the fact that on June 26, 1922, two days after the house was nailed up by the carpenter, who said he had his orders from the man next door, appellant filed his suit praying for a cancellation of the contract, and that the letter with respect to the furniture was written from 3167 India street—Mr. Yule's home adjoining 3153 India street—is ample evidence to support the finding complained of. While some evidence was received that might have been subject to an objection, no objection was made, and it is well settled that incompetent evidence admitted without objection is to be regarded as sufficient to establish the fact. Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 466, 168 P. 1037. Evidence technically incompetent admitted without objection must be given as much weight in the reviewing court in reviewing the sufficiency of the evidence as if it were competent. Parsons v. Easton, 184 Cal. 769, 195 P. 419; Janson v. Brooks, 29 Cal. 223; Curiac v. Packard, 29 Cal. 197; McCloud v. O'Neall, 16 Cal. 397; Williams v. Hawley, 144 Cal. 102, 77 P. 762.

[9-11] Appellant's exception to the court's finding that respondents are entitled to interest from the time of making payments instead of from the time when appellant is alleged to have rescinded the contract is not well taken. The general rule is that interest is allowable from the time the sum in suit becomes due, if the same is certain or

can be made certain by mere calculation. Gray v. Bekins, 186 Cal. 399, 199 P. 767; Hind v. Uchida Trading Co., 55 Cal. App. 263, 203 P. 1028. In an action to recover the purchase money paid upon a contract for sale of real property, when the contract is terminated by the fault of the vendor and by reason of such fault the vendee is prevented from acquiring the property under the contract, the action for the money paid is in the nature of one for money had and received, namely, money paid to the vendor for which, in view of the termination of the contract, the vendee has received no consideration. Lemle v. Barry, 181 Cal. 1, 183 P. 150.

[12] Appellant contends in his exception No. 5 that the court erred in entering judgment in favor of respondents for $895, when in the cross-complaint they only allege and claim $885. During the progress of the trial Mr. Pease, attorney for appellant, called the attention of Mr. Egermayer, attorney for respondents, to a discrepancy between the allegations and the proof as follows:

> "Mr. Pease: There is a discrepancy in the amount alleged in the cross-complaint of defendants and the amount as shown to have been paid and indorsed on the contract.
>
> "Mr. Egermayer: That was an error in computation. The amount shown by the cross-complaint is that $885 had been paid, while the contract, which is a part of the cross-complaint, shows that there was paid and indorsed thereon $895.
>
> "Mr. Pease: Yes; that is evidently an error."

[13] The statement of counsel, "Yes; that is evidently an error," is practically a correction agreed to in open court, but, if not, it falls within the rule laid down in Firebaugh v. Burbank, 121 Cal. 193, 53 P. 562, in which the court says:

> "The defendants have the right to present by their answer any matter which would constitute a defense to the cause of action set forth in the complaint, and the court was authorized to permit them to plead such matter by amending their answer, even after the trial had commenced. If, without such amendment, evidence was received at the trial which did not constitute a material variance, the court could either find the fact in accordance with the evidence, or it could direct the pleadings to be amended to conform thereto. Code Civ. Proc. § 470. When this evidence was offered the plaintiff did not claim that he was misled by its introduction, or in any way prevented from maintaining his cause of action upon its merits. * * * The evidence thus introduced and the findings made thereon are therefore to be regarded as if the defendants had amended their answer so as to present these issues prior to entering upon the trial, or even prior to the introduction of any testimony."
>
> "No error should suffice to reverse a judgment or order, if it appears that the appellant has not been and could not be injured thereby." Peters v. Peters, 156 Cal. 37, 103 P. 221, 23 L. R. A. (N. S.) 699.

This disposes of the errors assigned by appellant in his bill of exceptions; and from what has been said it follows that there is no merit in the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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80 Cal. App. 618

MILLER et al. v. YULE et al. (Civ. 5349.)

(District Court of Appeal, First District, Division 1, California. Jan. 11, 1927.)

1. Appeal and error 🔑544(2) — Review on judgment roll alone is confined to facts presented by findings and admitted by pleadings.

Where appeal is before court for review on judgment roll alone, review is confined to facts presented by findings and admitted by pleadings, only questions for consideration being whether complaint states cause of action, whether findings are within issues and support judgment, and whether reversible error concerning matter of law appears upon face of record.

2. Appeal and error 🔑544(2)—On review on judgment roll alone, no question as to sufficiency of evidence to sustain averments and findings arises.

Where appeal is before court for review on judgment roll alone, no question arises as to sufficiency of evidence to sustain averments and findings.

3. Appeal and error 🔑907(3)—Absent bill of exceptions, evidence will be presumed competent to establish facts alleged, sufficient to sustain fact findings, and to have been received without objection.

In absence of bill of exceptions, it must be assumed that evidence presented in support of findings was competent to establish facts alleged, was received without objection, and was sufficient to sustain each of facts found.

4. Vendor and purchaser 🔑334(4)—In action to recover money paid under purchase contract, vendor held to have rescinded contract notwithstanding deed to another.

In purchasers' action for money had and received on contract to purchase realty, contention that vendor could not rescind contract because of having deeded property to another defendant *held* without merit, court having found that both vendor and such other defendant had rescinded contract.

5. Vendor and purchaser 🔑338—Action to recover money paid under contract to purchase held available to purchaser on rescission, though tort action was also available.

Plaintiff, occupying property under contract to purchase, on boarding up of doors and windows by one of vendors, could sue for money had and received on vendor's implied con-

tract, to repay payments on contract if vendor was unable to transfer title, or if through vendor's wrongful acts purchaser was prevented from acquiring property, though tort action for trespass was also available.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

Action by Richard Miller and another against W. A. C. Yule, Josephine K. Yule, and another. From the judgment for plaintiffs, defendants named appeal. Affirmed.

See, also, 252 P. 733.

C. C. Pease, of San Diego, for appellants. Jos. H. Egermayer and Notley S. Hammack, both of San Diego, for respondents.

CAMPBELL, Justice pro tem. This appeal is from the judgment made and entered in favor of plaintiffs and against defendants W. A. C. Yule and Josephine K. Yule. The defendant M. M. Cory did not appeal. The judgment roll only is before the court.

On February 28, 1921, respondents entered into a contract with appellants for the purchase and sale of lots 3 and 10 in block 121 of Middletown, situated at No. 3141 India street, in San Diego, Cal.; the purchase price being $2,950. The respondents, who were the purchasers under the contract, made an initial payment when they executed the contract of $500 in the form of a promissory note. The contract provides that the balance of $2,450 be paid at the rate of $35 or more per month, including interest at the rate of 7 per cent. per annum, payable on deferred balances, and that the buyer shall make monthly payments within the first year of $500 and each year thereafter until the balance due is reduced to $1,500, which shall be made into a mortgage, etc. Respondents made payments on the contract of more than the $500 required to be paid during the first year, but made no payments in the month of May, 1921, nor in the months of February or March, 1922, but made payments in April, 1922, and had made payments in months prior to the months in which no payments were made in amounts sufficient to cover the amounts due during those months at the rate of $35 per month, including interest.

The trial court found that on April 6, 1922, W. A. C. Yule and Josephine K. Yule sold and assigned the contract in question to defendant M. M. Cory and also made and delivered to defendant Cory a deed of conveyance conveying to him the property described in the contract of purchase and sale, and at the same time executed and delivered to M. M. Cory a deed of trust for and to lots 1 and 12 in block 121, guaranteeing or securing the payments on the contract of purchase and sale entered into by appellants and respondents.

Appellants urge two points in support of their appeal: That the court erred in finding that respondents were not in default in their payments on the contract, and that defendant Yule had no power to rescind the contract. Appellants contend that, as the contract calls for monthly payments, payments must be made monthly even though payments have been made in prior months sufficient to cover payments due in subsequent months, and that as defendant Cory was the owner of the property at the time of the rescission of the contract, the acts of appellants were those of trespassers and could not operate to rescind the contract.

The contract in this case contains the same provisions as does a contract made between the same parties in W. A. C. Yule v. Katie C. Miller and Richard L. Miller, No. 5298 (Cal. App.) 252 P. 733, this day decided, in which case the contract affected adjoining property. The same points are made in the briefs and the same authorities cited as to the interpretation of the contract, and on the authority of that case the judgment as against the objection that the court erred in finding that the respondents were not in default in their payments must be affirmed.

As to the other objection urged that appellant Yule had no power to rescind the contract, the finding of the court as to the acts constituting the rescission is that, while plaintiffs were not in default in their payments under the agreement of sale or in any of their undertakings under the agreement of sale, the defendants, and each and every one of them, rescinded the written agreement of sale by retaking possession of the premises during the temporary absence of the plaintiffs therefrom without the consent and contrary to the desire and wish of the plaintiffs; that they posted notices upon the dwelling house situate on the premises warning all persons and particularly these plaintiffs to "Keep out—Trespassers will be prosecuted," and upon which notice the name, "M. M. Cory, Owner," was printed, and boarded up the doors and windows; that Brooks, the person in charge, and who performed the acts, did such acts under the direct instruction of W. A. C. Yule; that Yule had previously discussed the matter of taking possession of the property with M. M. Cory, and that he had notified Cory that he had taken possession of the property and had boarded up the doors and windows thereof and had placed a sign with the name of defendant Cory on the property warning all persons to keep out; that said M. M. Cory, the assignee of the vendor under said agreement of sale, grantee in said grant deed and beneficiary under said deed of trust, with full and prior actual knowledge of the contemplated acts of re-entry and taking forcible possession and ousting plaintiffs from possession and rescinding of said agreement of sale, acquiesced in and permitted the said forcible re-entry and taking possession of said dwelling and premises, and concludes therefrom that the defendants, W. A. C. Yule, Josephine K. Yule, and M. M. Cory, wrongfully, willfully and without authority of law or fact took forcible possession of the land and premises and the dwelling thereon and rescinded the agreement of sale.

[1-3] Where an appeal is before the court for review upon the judgment roll alone, the review is confined to facts presented by the findings and admitted by the pleadings. MacFarland v. Walker, 40 Cal. App. 511, 181 P. 248. The only questions for consideration are whether the complaint states a cause of action, whether the findings are within the issues and support the judgment, and whether reversible error concerning a matter of law appears on the face of the record (Norton v. Newerf, 45 Cal. App. 13, 187 P. 57), and no question arises as to the sufficiency of the evidence to sustain the averments and findings (Ensele v. Jolley, 188 Cal. 297, 204 P. 1085; Pence v. Martin, 43 Cal. App. 626, 185 P. 503). In the absence of any bill of exceptions it must be assumed that the evidence presented in support of the findings was competent to establish the facts alleged, was received without objection, and was sufficient to sustain each of the facts found. LaFetra v. Richardson, 44 Cal. App. 302, 186 P. 396; Cutting Packing Co. v. Canty, 141 Cal. 692, 75 P. 564; Damon v. Quinn, 143 Cal. 75, 76 P. 818.

[4, 5] As to appellant Yule having deeded the property to defendant Cory and therefore no longer able to rescind the contract, it is sufficient to say that the court found the fact to be that each and all of the defendants, W. A. C. Yule, Josephine K. Yule, and M. M. Cory, rescinded the contract. While it is true that respondents might have construed the acts of appellant Yule in boarding up the doors and windows of the house on the premises as a trespass and sought damages in tort, yet they were also privileged to bring suit for money had and received on the implied contract of the vendor in the agreement of sale to repay the payments made on the contract, if the vendor was unable to transfer title or if through the wrongful acts of the vendor the vendee was prevented from acquiring the property. Lemle v. Barry, 181 Cal. 1, 183 P. 150; Thomas v. Pacific Beach Co., 115 Cal. 141, 46 P. 899. It would be a queer rule that would permit a vendor, as in this case, who had received $1,169.90 on a contract of purchase, to be relieved from liability on a suit for money had and received because he had deeded the property and payments of $48.90 had been made to his grantee. If this were the rule a person could contract to sell property which he did not own, or for some reason could not convey a good and sufficient title to, and just prior to the time the last payment became due deed the property to some irresponsible person and thus prevent the recovery of the purchase price payments made by the vendee.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 590

NICHOLS et ux. v. NELSON. (Civ. 5200.)★

(District Court of Appeal, First District, Division 1, California. Jan. 10, 1927. Hearing Denied by Supreme Court March 10, 1927.)

1. Municipal corporations 🔑706(5)—Automobilist's negligent failure to observe pedestrian in time held shown.

In action for injuries to pedestrian struck by automobile, evidence *held* to show defendant's negligence in not observing plaintiff in time to avoid striking her by stopping or altering course.

2. Municipal corporations 🔑706(5)—Contributory negligence of pedestrian crossing street when struck by automobile held not shown.

Evidence *held* not to show contributory negligence of pedestrian struck by automobile in crossing street in slightly diagonal direction after observing car approaching over 200 feet away.

3. Municipal corporations 🔑705(1)—Automobile driver should see persons on road.

It is the duty of an automobile driver, whose view is unobstructed, to see persons on the road in front of the machine.

4. Municipal corporations 🔑705(2)—Pedestrians and automobile drivers have equal rights, and must both exercise care demanded.

Pedestrians and automobile drivers have equal rights in public highway, and must both exercise that degree of care and prudence which the case demands.

5. Trial 🔑108½—Questions as to juror's membership in club insuring automobilist sued for injuries, and counsel's statement that case looked more like club's than defendant's, held not prejudicial error warranting dismissal.

In action for injuries to pedestrian struck by automobile, questions to prospective jurors as to their membership in automobile club in which defendant was insured, and statement of plaintiff's counsel in opening address to jury that case looked like it was more the automobile club's than defendant's, *held* not prejudicial error warranting dismissal and continuance despite instruction to disregard statements.

6. Trial 🔑108½—Questions asked solely to get before jury fact that defendant is insured are improper, but not questions as to prospective juror's membership in club carrying insurance.

While evidence that defendant in action for damages is insured against loss is inadmissible, and it is improper for counsel to try to get such fact before the jury by questions designed solely for that purpose, question asked prospective juror as to whether he is a member of a club insuring defendant is proper.

★Hearing denied by Supreme Court.

7. Appeal and error 🔑1060(1)—Counsel's statement that case looked more like insurer's than defendant's held not prejudicial, in view of evidence.

Where evidence showed that automobilist, sued for injuries to pedestrian, admitted that he was insured in certain club, and that latter paid expenses of certain witnesses, and was much concerned with outcome of litigation, statement of plaintiff's counsel to jury that case looked like it was more that of such club than defendant's was not prejudicial, being a mere reference to proven fact.

8. Municipal corporations 🔑706(8)—Instruction that automobilist is bound to anticipate meeting persons, and must keep proper lookout, held not too broad.

Instruction that automobilist is bound to anticipate that he may meet persons at any point on the street, and must keep a proper lookout for them to avoid charge of negligence, *held* not erroneous, as requiring more than ordinary or reasonable care.

9. Municipal corporations 🔑705(1)—Automobilist must exercise care of prudent man under circumstances.

Automobilist must exercise that degree of care for safety of persons on street which a prudent man should use under like circumstances.

10. Municipal corporations 🔑706(8)—Instruction that proper care depends on circumstances held not erroneous, as requiring more than ordinary care by driver of automobile striking pedestrian.

Instruction that whether automobile driver has taken proper care to avoid a collision depends on all the circumstances of the case *held* not erroneous, in action for injuries to pedestrian, as requiring more than ordinary care.

11. Trial 🔑296(3)—Charge to find for pedestrian or vehicle driver, if proper care was not exercised, after properly instructing jury as to relative rights and duties of each, is not prejudicial error.

Where court has properly instructed jury as to relative rights and duties of pedestrians and vehicle drivers on public highway, subsequent charge to find for one or the other, if proper care was not exercised, is not prejudicial error.

12. Trial 🔑296(12)—Instruction using words or phrases in customary, conventional sense is not objectionable, especially where other instructions fully advise jury of meaning.

Instruction using words or phrases in their customary or conventional sense cannot be complained of, especially where other instructions fully advise jury as to just what is meant; the jury being presumed to possess ordinary intelligence and to understand the meaning and use of words in their common and ordinary application.

13. Trial 🔑228(3)—Court should use well-established words in instructions.

Generally, trial courts should adhere strictly to use of well-established words in instructions.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by David G. Nichols and wife against K. B. Nelson. Judgment for plaintiffs, and defendant appeals. Affirmed.

Culver & Nourse and Paul Nourse, all of Los Angeles, for appellant.

Albert Nelson, of San Luis Obispo, for respondents.

TYLER, P. J. Action to recover damages for personal injuries sustained by plaintiffs through the alleged negligence of defendant in the operation of an automobile. Defendant denied any negligence on his part and as a separate defense pleaded contributory negligence on the part of plaintiff Mary E. Nichols. Trial was had by jury. Plaintiffs recovered judgment for the sum of $8,000, together with costs amounting to the further sum of $343.45.

[1, 2] Various grounds are urged for a reversal of the judgment. It is first claimed that the verdict is unsupported by the evidence, in that it fails to show negligence on the part of the defendant, but, on the contrary, shows without conflict that plaintiff Mary E. Nichols was guilty of negligence approximately contributing to the injuries complained of. The accident occurred upon the state highway within the limits of the city of San Luis Obispo on what is known as Monterey road as it runs north from the said city at a point between Toro street at the south end of the block and Essex street at the north end thereof. There is evidence to show that plaintiff Mary E. Nichols resided with her husband on the east side of Monterey road in the upper floor of a building located about in the middle of the block. On the day of the accident she visited a neighbor who lived on the opposite side of the road to the north at the corner of Essex street. She left her neighbor's residence to return to her home, walking southerly along the sidewalk on the westerly side of Monterey road. The highway at this point is approximately 70 feet in width, and in the center there is a paved strip some 18 feet wide; the rest of the road consisting of a dirt pavement. Along the westerly side of the road and next to the curb line there is a drainage ditch which at the point about opposite plaintiff's residence is crossed by a private bridge erected by one Gist to enable him to drive his automobile onto his property from the highway. Sidewalks were maintained on the west side of Monterey road and most of the people in the neighborhood for this reason used this side of the street in traveling along the road, and when they had occasion to visit the premises occupied by plaintiff and others on the east side they usually made use of the Gist bridge to pass over the drainage ditch. As the plaintiff approached this

bridge she proceeded to cross it to reach her home. At this time there was parked at the end of the bridge a Ford sedan headed in a southerly direction. She stepped around the machine into the dirt portion of the highway and looked up and down the road in both directions. She observed an automobile approaching from the north and she also observed defendant's automobile approaching from the south at the intersection of Toro and Monterey road, a distance of over 200 feet. She waited for the automobile approaching from the north to pass, and, again looking up and down the road and still observing defendant's car at about the point named, she proceeded to cross the paved portion of the highway in a slightly diagonal direction so as to reach the entrance leading into her apartment. When she reached a point at almost the easterly edge of the pavement, she was struck by the right front side of the defendant's car and thrown to the pavement, receiving serious and permanent injuries. She was removed to her home and subsequently to a hospital, where she remained some eight weeks. Her injuries consisted of a fracture of the left hip, contusions on her right shoulder and right ankle, and other bruises. The injuries resulted in the shortening of one of her limbs about four inches, and there is medical testimony to show that in all probability she will never be able to walk again without crutches. In addition thereto it appears that plaintiff has suffered and continues to suffer great pain. At the time of the accident defendant was accompanied by his sister-in-law. It was raining and she from time to time operated a windshield wiper attached to the machine in order that plaintiff's vision of the road might not be obscured. At about the time plaintiff was struck down, defendant admitted to her son that he had not seen his mother and that he was to blame for the accident. This fact was not disputed at the trial. He agreed to take care of all the expenses and volunteered the information that he was insured in the Automobile Club of Southern California and would make a report to the insurance carrier immediately. The speed of the automobile that defendant was driving was variously estimated at from 12 to 25 miles an hour at about the time of the accident; defendant testifying that he was traveling 12 miles an hour.

[3, 4] It is clearly apparent from the facts as above recited that there is no merit in defendant's contention that the evidence fails to show negligence on the part of defendant or that it shows plaintiff Mary E. Nichols to have been guilty of contributory negligence. On the contrary, it clearly shows that plaintiff was in no manner negligent and that defendant could have avoided the accident had he been exercising that degree of care required of him in operating his automobile. Conceding defendant to have been traveling at the rate he testified to, he had ample time to avoid striking plaintiff. He could have stopped or altered his course. Aside from the testimony of the plaintiff as to the distance of defendant's machine from the point of the accident when she proceeded to cross the pavement, one of defendant's own witnesses testified that his machine was 50 or 60 feet down the road at the time plaintiff stepped on the concrete portion of the highway. There is evidence to show that at this time defendant's view was in no manner obstructed. Whether his failure to observe plaintiff was due to the moisture on his windshield, or from other causes, is a matter of no consequence so far as plaintiff is concerned. It is the duty of a driver of an automobile, where the view is unobstructed, to see persons on the road in front of the machine. Warner v. Bertholf, 40 Cal. App. 776, 181 P. 808. Plaintiff was where she had a right to be and there is evidence to show that she was exercising all the care required of her in watching for the approach of vehicles while she was crossing the highway. Foot passengers and those driving vehicles have equal rights in the public highway and both are required to exercise that degree of care and prudence which the case demands. The duty cast upon both pedestrian and driver of a vehicle is reciprocal and equal, and neither of them has a right superior to the other. Mayer v. Anderson, 36 Cal. App. 740, 173 P. 174.

[5, 6] We conclude, therefore, upon this question that there is ample evidence in the record to show negligence on the part of the defendant. Appellant next complains of the action of counsel for plaintiff in interrogating certain prospective jurors concerning their membership in the Automobile Club of Southern California. In his opening address to the jury counsel for plaintiff again referred to the matter by making the statement that—

> "This case looks like it is more the case of the Automobile Club of Southern California than it is the defendant's."

These acts were assigned as error and counsel for appellant in both instances asked that the jury be dismissed and the case continued until a new jury could be drawn. The court denied the motion and instructed the jury to disregard the statements. It is here claimed that there is a close question as to the negligence of the defendant, for which reason the conduct of plaintiffs' counsel resulted prejudicially to the defendant. Aside from the fact that we do not think the case presents any close question with reference to defendant's negligence, we are of the opinion that the claimed error did not affect the substantial rights of the defendant. While it is true that evidence that a defendant in an action for damages is insured against loss is inadmissible and it is improper for counsel to endeavor to get such a fact before the jury by questions designed solely for that purpose, under the facts as here presented it cannot be said to constitute error. The question asked the juror was for the purpose of ascertaining whether or not he was a member of the automobile club which was the insurance carrier. Such questions have been held to be proper. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646; Baldarachi v. Leach, 44 Cal. App. 603, 186 P. 1060; Arnold v. Cal. Portland C. Co., 41 Cal. App. 420, 183 P. 171.

[7] Even conceding it to have been improper, it was not prejudicial where, as here, the court instructed the jurors to disregard it. Then, too, the fact of defendant's insurance was a matter properly before the jury. It appeared in evidence that defendant had made the admission on the occasion when he acknowledged his responsibility for the accident. It also appeared that the club paid the expenses of certain witnesses and that it caused tests to be made concerning defendant's ability to stop his machine within certain distances. Numerous other acts on its part were in evidence, showing conclusively that the club was very much concerned with the outcome of the litigation. Under such circumstances the statement made by counsel cannot be said to have been prejudicial. Conceding it to have been ill-advised, it was a mere reference to a proven fact in the case. There is no merit in the objection.

[8-10] Appellant further complains of the giving of certain instructions relating to the relative rights and duties of the drivers of vehicles and of pedestrians upon the public highway. At the request of plaintiff the court instructed the jury as follows:

> "I charge you that, even though the rate of speed at which an automobile is being operated does not exceed the limit of speed fixed by law, such rate of speed may, nevertheless, be held, under some circumstances, to be negligent; that is to say, the operator of an automobile is not necessarily exempt from liability for injury to other persons occurring in a public street by showing simply at the time of the accident he was running at a rate of speed allowed by law. He *still remains bound to anticipate* that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, *keep a proper lookout* for them and keep his machine under such control as will enable him to avoid collision with other persons using proper care and caution, and, if the situation requires it, he must slow up and stop."

The jury was further instructed that—

> "One using a public street is charged with the duty of observing approaching vehicles. This rule is qualified and explained, however, by the equally general rule that, except in the cases where the law fixes a standard of care, negligence is always relative and to be determined in view of all the circumstances of the particular case. The driver of a vehicle should proceed carefully and be on the alert lest he collide with others. It is the duty of the driver of a vehicle who is suddenly confronted with danger, though arising from the fault of another, to seek to avoid a collision. *Whether he has taken the proper care depends upon all the circumstances of the case.* Every person using the public streets and highways for the purpose for which they are established and maintained has the right to assume that other persons using such streets and highways for the same purpose will, when so using them, obey the law regulating their use by pedestrians and drivers of vehicles of any kind."

It is contended under the first instruction quoted above the court placed a higher duty on the defendant than that of using ordinary care; that under the instruction given the jury was in effect told that in addition to the use of ordinary care the defendant was "*bound to anticipate*" that he might meet other persons on the highway, and, further, that he must, in order to avoid a charge of negligence, not only use reasonable care in keeping a lookout, but must keep a *proper* lookout, which implies no error, irrespective of whether a pedestrian was seen or not; that under the second instruction the use of the phrase, "Whether he has taken the proper course depends upon all the circumstances of the case," is misleading, as it implies that the driver of a motor vehicle when suddenly confronted with danger, is bound to use a course free from error or the jury is at liberty to find against him. We do not think there is any merit in these objections. With reference to the first instruction, the employment of the word "proper" to indicate the care required of defendant means only the exercise of that degree of care which a prudent man should use under like circumstances, which is the degree of care which the law imposes. Ramsbottom v. Atlantic Coast Line R. Co., 138 N. C. 38, 50 S. E. 448; Missouri, K. & T. R. Co. v. Flood, 35 Tex. Civ. App. 197, 79 S. W. 1106. Nor did the use of the phrase, "bound to anticipate," have the effect, as claimed, of enlarging the degree of care required of defendant. The same may be said of the phrase, "Whether he has taken the proper course depends upon all the circumstances of the case."

[11] The court fully and fairly in numerous instructions advised the jury concerning the relative rights and duties of pedestrians and the drivers of vehicles upon the public highway. The jury were instructed that one walking or driving in a public street is bound to use reasonable care to look and listen as she or he goes, so as to be able to avoid collision with others exercising the common privilege of using the street; that this duty rests alike upon every person upon the street, and each person in crossing a street must use reasonable care for his or her own protection, as well as for the protection of others upon the highway; that the reasonable

care which is required must be measured by all the surrounding circumstances and conditions; and that the rights and obligations of all persons using a public street are reciprocal, and each may rightfully expect that the other will, at the proper time, discharge his proper duty toward others, but that he cannot rely wholly on the care of others, nor on that account neglect to use the precaution which the particular situation demands of him or her. Where a court has thus properly charged a jury a subsequent charge to find for one or the other if proper care had not been exercised is not prejudicially erroneous. St. Louis S. W. R. v. Parks, 40 Tex. Civ. App. 480, 90 S. W. 343.

[12, 13] Where a court has used words or phrases in their customary and conventional sense, no complaint can be made, and especially where other instructions fully advise the jury just what is meant. The jury are presumed to possess ordinary intelligence and to understand the meaning and use of words in their common and ordinary application. Hutson v. Southern Cal. Ry., 150 Cal. 701, 89 P. 1093. In general, however, it is well for trial courts to adhere strictly to the use of well-established words. Departure from the beaten path always leads to doubt and uncertainty and imposes useless work upon appellate courts. We do not deem further discussion of the instructions or the case necessary. The evidence fully supports the verdict, and no claim is made that the judgment is excessive, and there has been no miscarriage of justice.

The judgment is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

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80 Cal. App. 733

JACKSON v. FIRST NAT. BANK OF EL CENTRO. (Civ. 4558.)

(District Court of Appeal, Second District, Division 1, California. Jan. 20, 1927.)

1. Banks and banking ⚷171(1)—Ordinarily, bank may take security for debt owing it by person against whom it holds claim for collection.

In the ordinary course of business, without special agreement to the contrary, a bank may take security for a debt owing it by one against whom it also holds a claim for collection, though it may work an injury or damage to one intrusting it with collections.

2. Banks and banking ⚷171(1)—Bank, agreeing to collect rents without compensation, held not liable to lessor for loss from taking crop mortgage from tenants to protect its own claim.

Bank, agreeing to collect rents without compensation, *held* not liable to lessor for loss caused by its taking a crop mortgage from tenants as security for their prior indebtedness to it on ground that it took advantage of its position as agent and used lessor's property for its own benefit.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Alie Jackson, as executrix of the last will and testament of Chris Jackson, deceased, against the First National Bank of El Centro. Judgment for defendant, and plaintiff appeals. Affirmed.

Chas. L. Childers, of El Centro, for appellant.

Hickcox, Crenshaw & Trude, of El Centro, for respondent.

HOUSER, J. This is an appeal from a judgment in favor of the defendant, rendered by a jury in accordance with the instructions of the trial judge. As is stated in appellant's brief, the action—

"was brought by the plaintiff to recover from the bank, defendant, the sum of $1,500 on the theory that the bank, as agent of the plaintiff, took advantage of its position as agent and used the plaintiff's property for its own benefit, and the plaintiff was thereby damaged in that amount."

It appears that plaintiff was the owner of some land which she had leased to some Japanese for a cash rental. Thereafter plaintiff desired to leave the state of California to be gone for several months, and during such absence she wished to have her rents collected by the defendant. With reference to her negotiations and conversation with one of the officers of the defendant bank, she testified, in part:

"I told him I was going back East; that I had come out to renew some of my leases and to look after my business interests out here; that I had renewed this lease with these two particular Japanese, and how much I was renting the land for per acre, when the payments were due, and that I took the Japanese into the bank; also that any payments were to be paid there to the bank while I was away. My leases I was leaving in the bank and I was also going to make a memorandum of my rents, when they were due, each month, and they were to be paid to the bank, and I wanted the bank to notify me directly—I gave them my address—when these rents were paid, and also give the tenants a deposit slip so that they could mail me this duplicate as to when the rents were paid, and in case the rents were not paid I was leaving this memorandum to put on file along with my leases to notify the tenants that their rent was due and at the same time notify me when the rents weren't paid."

On cross-examination plaintiff stated that her tenants were present when she had the conversation with the officer of the defendant bank. She further testified:

"Q. And did you take them to Mr. Holt and tell Mr. Holt *these men were to come in to pay* *the money?* A. Yes, sir; I told him I had renewed the lease for these boys and I considered them *good.* I said I had been dealing with them six or seven years and I had been renting land to them and I was renewing my lease and what the rents amounted to and when the rents were due and tried to make it plain because I was going away, and just how we stood.

"Q. At the time you considered the tenants were *good and you would have no trouble about them paying the rents to the bank?* A. I did."

It is further disclosed by the evidence that the rent on plaintiff's property became due on October 10th; that some time in the month of August the tenants asked plaintiff for an extension of time within which to make the October payment, and that shortly thereafter plaintiff wrote a letter to defendant (to quote her language) and "told them that I had received a letter asking for time and I said, 'I understand that they are not living at my place, but on Mr. McGrew's place; make an investigation and find out, and let me know how they stand, how they are getting along, what kind of a crop they have,'" etc.; also that the payment of $1,500 was due on October 10th.

It further appears by the evidence that, antedating by several months the arrangement between the parties, the defendant bank had taken a chattel mortgage on certain personal property belonging to the tenants of plaintiff as security for an indebtedness then owing by such tenants to the bank; that on September 20th, which was several days after the date of plaintiff's letter to the defendant, the bank took a new mortgage from the tenants and included therein the crop grown by them on plaintiff's property as further security for the indebtedness then owing to the bank, as well as for future advances to be made by it to the tenants in harvesting the crop, etc.

On or about November 20th plaintiff returned to California, and, on learning that the rent of her land had not been paid, and after having discovered that the defendant had taken a new mortgage from the tenants, which included the crop grown on plaintiff's land, she secured from her tenants a second or junior mortgage on the said crops, etc., as security for the payment of the rent then owing to her.

Payment not having been made, the defendant bank foreclosed its mortgage, but was unable to fully satisfy its claim from the entire security held by it; and the rent not having been paid, plaintiff brought this action against the defendant on the theory, as hereinbefore set forth, that—

"The bank, as agent of the plaintiff, took advantage of its position as agent and used plaintiff's property for its own benefit."

[1] No authority has been cited by appellant which would indicate a rule that would prevent a bank situated as to facts as was the defendant herein from taking security for a debt owing to it from a person against whom the bank also holds a claim for collection. It may readily be understood how the enforcement of a principle such as that for which appellant contends might work disastrous results to the collection branch of the banking industry, although this would not necessarily be a defense to an action of this character. Its effect would be that no bank could safely undertake the collection of any bills, or notes, or negotiable instruments of any description against any person who was indebted to the bank, if at the same time, or at any time before making such collection, the officers of the bank contemplated the necessity of requiring either original or additional security from such debtor. On the other hand, authorities are not lacking which attest the rule that in the ordinary course of business and without special agreement to the contrary, where a bank receives obligations for collection, it is not forbidden or prevented from taking such action as may be desirable or advisable to protect its own interests as against the persons from whom such collections are proposed to be made, even though by so doing it may work an injury or damage to the person intrusting the bank with such collections.

In the case of Freeman v. Citizens' National Bank, 78 Iowa, 150, 42 N. W. 632, 4 L. R. A. 422, it appears that some drafts were drawn by the plaintiff on a man by the name of Price and that such drafts were deposited with the defendant bank for collection—following which the defendant brought an action against Price on a prior indebtedness owed by him to the bank and in such action attached property belonging to Price. In a subsequent action brought by the plaintiff against the defendant bank practically the same point was urged as is here presented by appellant. The Supreme Court of Iowa said:

"It is argued that defendant had no right to enforce its claim against Price, so as to gain priority over plaintiffs; and that, inasmuch as plaintiffs, had they known defendant held a claim against Price, would not have sent to it the drafts, it in effect practiced a fraud upon plaintiffs; and it should not be permitted to take advantage of its priority thus gained. But defendant undertook no other duty than the collection of the drafts, and to obey instructions pertaining thereto. It was not the guarantor for Price. It did not undertake to report as to his responsibility or solvency. In short, its duty was that of a bank receiving paper for collection. It cannot be admitted, as is contended by counsel, that the indebtedness of Price to defendant forbade it to enforce its claim, so as to gain priority over plaintiffs. Surely a bank may discount paper, and retain the right to hold collections against the maker of the paper without surrendering its rights of priority gained by diligence. As a matter of fact many of the business men of the country, against whom collections are sent to banks, are customers of such banks, depositing money and discounting their own paper as the necessities of their business demand. It has never been supposed that banks must concede priority to paper sent them for collection as to their own claims against the maker of such paper under such a state of facts as we have in this case."

In the case of United States National Bank of Omaha v. Westervelt, 55 Neb. 424, 75 N. W. 857, where the same principle was involved, the court directed attention to an earlier case (Dern v. Kellogg, 54 Neb. 560, 74 N. W. 844), decided by it, in which it was said:

> " 'We by no means intend to hold that a bank holding paper for collection merely may not, as a general rule, obtain a preference for a debt owing to itself.' "

And, among other things, the court added the following:

> "It would prevent a bank's undertaking collections. So long as the collecting agent assumes no other duty than the due presentment of paper, and so long as it discharges that duty, and is guilty of no misrepresentation or fraudulent concealment, it is not forbidden to in good faith obtain security for a claim it holds in its own behalf against the debtor"—citing Freeman v. Bank, 78 Iowa, 150, 42 N. W. 632, 4 L. R. A. 422; Bank v. Naill, 52 Kan. 211, 34 P. 797.

In a third case in which a bank was charged with bad faith in the matter of an alleged agency which in many respects was similar to the facts in the instant case, a conclusion in principle like that indicated in the last preceding authority was reached by the United States Circuit Court of Appeals. Carpenter v. National Bank of Shawmut, 187 F. 1.

[2] From the evidence in the instant case it is apparent that there was no express duty resting on the defendant to make the collections. The arrangement between the plaintiff and defendant was purely one of convenience and accommodation to the plaintiff, without any compensation to be paid to the bank therefor. With reference to the collections, the bank had no duty to perform other than to receive the money from the tenants in the event that they wished to pay it. If the rents were paid, the bank was to notify plaintiff of such fact; if not paid, the bank was "to notify the tenants that their rent was due, and at the same time notify me (plaintiff) when the rents weren't paid." The action herein does not count on defendant's negligence, if any, in failing either in its duty to notify the tenants that the rent was due, or to notify plaintiff that the rents were unpaid, or, in fact, to take any other positive or affirmative action in plaintiff's behalf. The action as brought rests entirely upon a violation of an alleged duty of an agent to protect the rights of his principal at all hazards, going even to the extent of not only requiring the agent to jeopardize his own interests, but, in case of necessity, to incur their total loss.

From the authorities cited herein it would seem clear that, in the circumstances of the instant case, the verdict in favor of the defendant was in accordance with well-established principles of law. The judgment rendered in consequence of such verdict cannot be disturbed.

It is ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

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80 Cal. App. 672

In re PEAIRS. (Application 503.)

(District Court of Appeal, Second District, Division 2, California. Jan. 17, 1927.)

1. Attorney and client 🔑53(1)—Application for revocation of respondent judge's license to practice would be denied; certificate from highest court of another state being presented.

Where, upon application for order revoking respondent judge's license to practice as attorney, made upon ground that attorney had fraudulently secured admission through claiming to have been admitted by highest court of another state, certificate of Supreme Court of another state was presented showing respondent's admission two years before application for admission sought to be revoked, application to revoke would be denied.

2. Attorney and client 🔑32—Attorneys seeking revocation of judge's admission to bar violated duty by failing to dismiss after having information indicating respondent's right to practice (Code Civ. Proc. § 282).

Attorneys applying for revocation of respondent judge's license to practice as attorney, claimed obtained through fraud, *held* to have violated "duty of maintaining respect due court and judicial officers" required by Code Civ. Proc. § 282, application not having been dismissed though applicants had information more than three weeks before hearing of order to show cause why application should not be granted, which, if followed up, would have satisfied them that respondent possessed requisite certificate of admission.

Application for order revoking order admitting Howard A. Peairs to the bar. Application denied.

Samuel Sanborn, of Los Angeles, and T. F. Allen, of Bakersfield, for petitioners.

Rowen Irwin, Alfred Siemon, F. E. Borton, C. V. Anderson, J. K. Lilly and Glen Aldrich, all of Bakersfield, for respondent.

WORKS, P. J. [1] Respondent, Howard A. Peairs, is a judge of the superior court of the state of California in and for the county of

Kern. He has held that position since 1913, first under appointment by the Governor and afterward by successive elections by the people of the county. Judge Peairs, by appropriate order of a competent court was, in 1908, licensed to practice law in all the courts of the state. The order was made upon a written statement of two members of the bar to the effect that respondent had been admitted by the highest court of Kansas to practice law in all the courts of that state. Petitioners allege that respondent never was admitted to the bar by the highest court of Kansas, that he procured the statement to that effect to be made, knowing it to be false, with the fraudulent intent to deceive and mislead the tribunal to which was made his application for admission to the bar of California, and that the court was thereby misled into making the order admitting him. Petitioners allege that they "now are and for a period of more than 20 years last past have been attorneys and counsellors at law, * * * duly admitted to practice in all the courts of this state, and make this petition as such attorneys."

The matter came on for hearing upon the petition and upon the answer of respondent thereto. Counsel for respondent stated that they had with them a certificate of the Supreme Court of Kansas, the highest court of the state showing that respondent had been admitted to the bar there, whereupon petitioners stated that they had no evidence to offer in support of the petition. Upon the invitation of the court the certificate showing respondent's admission to the bar of Kansas was then offered for our inspection. The document was under the seal of the court, was in due form, and certified respondent's admission to the bar of Kansas in 1906—two years before his application was made for admission to the bar of California.

[2] As part of a discussion which occurred in open court during the hearing, petitioners admitted that, four days before we issued our order requiring respondent to show cause why the prayer of the petition should not be granted, and more than three weeks before the hearing pursuant to the order to show cause, they had in their possession certain information which, if it did not actually show the fact, must have satisfied them, if followed up, that respondent was possessed of the certificate of admission issued to him by the Kansas court. This information was not pursued by petitioners, nor did they take steps to dismiss their petition or to halt proceedings under it.

The conduct of petitioners in these matters is inexplicable and reprehensible. They knew more than three weeks before the hearing of their petition, or had the means of ascertaining, that their charge of fraud against respondent was utterly baseless, yet they permitted the charge to stand. Such a course of conduct, under a charge of fraud against any man and regarding any subject-matter, would deserve the severest censure. Under the circumstances which here exist such conduct deserves a particular notice. The petition involves more than a mere attack upon respondent. He occupies a high judicial office and has been a trusted servant of the people for many years. The charge of fraud was not only unjust as to him, but it tended to impair the confidence of the public in one of the three great branches of government. Under the law and under the oaths of petitioners as attorneys, they are charged with the duty of maintaining "the respect due to the courts of justice and judicial officers." Code Civ. Proc. § 282. This duty they have violated.

Under the control which we may justly exercise over the conduct of attorneys, and which we ought to exercise whenever proper occasion for it arises, we are bound to condemn in no measured terms the conduct of petitioners. As an evidence of such condemnation we now administer to petitioners the stern reprimand of this court.

The petition is denied.

We concur: CRAIG, J.; THOMPSON, J.

80 Cal. App. 629

Ex parte RUPPE et al. (Cr. 1334.)

(District Court of Appeal, Second District, Division 2, California. Jan. 12, 1927.)

1. Municipal corporations ⚷611—Ordinance prohibiting undertaking establishments outside zone held valid, where facts did not negative possible reasonable tendency to promote public health or convenience.

Ordinance of the city of Los Angeles No. 31746 (new series), limiting undertaking establishments to particular district, *held* not invalid in proceeding for habeas corpus by persons operating undertaking establishment outside district, though population of city had materially increased since enactment of ordinance, and though district in which mortuaries were allowed was largely in congested portion of city, where automobile parking was limited, such ordinance not being void as discriminatory, oppressive, or against public policy, as facts did not warrant court in holding ordinance had no reasonable tendency to promote public health or convenience.

2. Municipal corporations ⚷611—Mortuaries are proper subjects for exercise of police power.

Mortuaries are among lawful and useful businesses which are proper subjects of regulation and control within exercise of state's police power.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

3. Municipal corporations 🔑611—Power to regulate mortuaries includes right to confine them within territorial limits.

Police power of state to regulate and control mortuaries includes right to confine such businesses within certain territorial limits.

4. Constitutional law 🔑48—Legislation, under police power, will not be set aside as unnecessary, unjust, or unreasonable, except on clear showing.

Though acts of Legislature under police power are not conclusive, and are subject to review as to question of whether they are within scope of police power, such regulations will not be set aside as unnecessary, unjust, or unreasonable, unless clearly shown to be invalid.

5. Constitutional law 🔑48—Where opinions may differ on propriety of legislation under police power, legislative discretion will be upheld.

Where circumstances with regard to legislation in exercise of police power are such as to give rise to difference of opinion, legislative discretion and decision will be upheld.

6. Municipal corporations 🔑626—Ordinance is not unreasonable and discriminatory because property where mortuaries are allowed is similarly situated to property outside zone.

Fact that property situated similarly to that where mortuaries are forbidden is permitted to be used for operation of undertaking establishments does not justify court in holding zoning ordinance unreasonable and discriminatory.

7. Constitutional law 🔑42—Question of constitutionality of law is decided on basis of application to complaining individuals.

Where constitutionality of law is attacked by individuals, application of law is considered as to complaining individuals, and not as to public in general.

8. Municipal corporations 🔑611—Ordinance limiting mortuaries to particular zone held not unconstitutional as applied to outside establishment, where inadequacy of present conditions was not shown.

In proceedings for habeas corpus by undertakers arrested for operating establishment outside permitted zone, in violation of ordinance of city of Los Angeles No. 31746 (new series), ordinance *held* not void in application to petitioners despite increase in population since passage of ordinance and congested conditions and parking limitations in district where mortuaries were allowed, in absence of showing approximate number and length of funeral services in district would render district inadequate.

9. Municipal corporations 🔑626—Ordinance limiting mortuaries to particular district held not discriminatory as against outside residents, in absence of showing needs were not supplied.

Ordinance of city of Los Angeles No. 31746 (new series), prohibiting undertaking establishments outside particular district, *held* not discriminatory as against people of neighborhood, one and one-half miles from nearest legalized mortuary, where needs of district were not shown, nor proof offered that needs were not supplied.

10. Municipal corporations 🔑601—Constitutionality of zoning ordinance depends on reasonable tendency to promote health or convenience.

In attacking zoning ordinance as void, question of constitutionality depends on whether ordinance has any reasonable tendency to promote public health or convenience.

11. Municipal corporations 🔑611—Undertakers operating mortuary in prohibited zone could not attack ordinance as confiscatory, where notified of illegality before erecting building.

Undertakers who built mortuary in prohibited zone could not attack zoning ordinance of city of Los Angeles No. 31746 (new series), which limited mortuaries to particular district, as confiscating their property, where, though city gave permit for building, notice signed by property owners was given, informing builders undertaking establishment could not be lawfully conducted in proposed building.

12. Municipal corporations 🔑621—Building department by allowing erection had no authority to sanction use of structure as mortuary, contrary to ordinance.

Building department which authorized erection of building had no authority to sanction use as undertaking establishment in zone prohibited by ordinance of city of Los Angeles No. 31746 (new series).

13. Municipal corporations 🔑116—Ordinance establishing zone for mortuaries held not to repeal ordinance creating district for undertaking establishments.

General zoning ordinance of city of Los Angeles No. 42666 (new series), establishing zone in which undertaking establishments were permitted, did not repeal Ordinance No. 31746 (new series), creating zone for undertaking establishments, in view of expressed intent of ordinance last passed in section 10 not to repeal former ordinances.

14. Municipal corporations 🔑611—Increase of city's population did not necessarily render ordinance zoning mortuaries inadequate.

Fact that population of city of Los Angeles had increased almost half a million since passage of Ordinance No. 31746 (new series), limiting mortuaries to specified district, did not necessarily render ordinance inadequate, as city council may have intended ordinance to apply to changing conditions.

15. Municipal corporations 🔑611—"Necessities of city" as provided for in ordinance include prohibition of mortuaries from specified portions of city.

"Necessities of city," as referred to in ordinance zoning undertaking establishments in city of Los Angeles, No. 31746 (new series), include, not merely consideration of area required for regulated business, but also exclusion of such businesses from localities where their presence would be obnoxious to public health and convenience.

16. Municipal corporations ⚷611—Ordinance regulating mortuaries held not invalid because of risk involved in carrying bodies of persons dying from contagious diseases through streets.

Fact that, under ordinance of city of Los Angeles No. 31746 (new series), a certain risk was involved in transporting dead bodies of persons who had died of contagious diseases through streets of city, *held* insufficient to justify court in holding ordinance, which restricted mortuaries to particular district, invalid, where extent of risk was not shown, and risk could be decreased by sanitary methods of handling; such considerations being within scope of Legislature.

17. Municipal corporations ⚷626—Mortuaries may be classified separately from hospitals and sanitariums.

Conditions necessarily existing in and about mortuaries *held* sufficiently different from those of hospitals and sanitariums to permit of separate classification.

18. Municipal corporations ⚷626—Ordinances held not discriminatory because permitting hospitals and sanitariums in district forbidden to mortuaries.

Fact that ordinances of city of Los Angeles No. 31746 (new series) and No. 44666 (new series) permit hospitals and sanitariums where undertaking establishments are not permitted does not render prohibitions of first-named ordinance unconstitutional on ground of discrimination between hospitals and mortuaries; classification being separate.

Application by Louis E. Ruppe and another for a writ of habeas corpus, prayed to be directed to the Chief of Police of the City of Los Angeles, to secure a release of petitioners from custody under a commitment for maintaining undertaking parlors outside of the legalized district in the City of Los Angeles. Writ discharged, and petitioners remanded.

W. T. Kendrick and W. T. Kendrick, Jr., both of Los Angeles, for petitioners.

J. M. Friedlander, City Prosecutor, of Los Angeles (Ray E. Nimmo and E. E. Leighton, both of Los Angeles, of counsel), for respondent.

CRAIG, J. The petitioners, by this proceeding in habeas corpus, seek their discharge from the custody of the chief of police of the city of Los Angeles, by whom they are alleged to have been detained under a commitment issued out of the police court of said city upon conviction of having violated Ordinance No. 31746 (new series) of said municipality, and particularly that provision thereof regulating districts within which undertaking establishments may be maintained. A referee was appointed by this court to take testimony and make findings upon certain issues of fact.

It is contended that the ordinance under which the petitioners were prosecuted and convicted is class legislation, discriminatory, oppressive, and against public policy; that it is ancient and insufficient in its territorial limitation to meet the present reasonable necessities of a growing metropolis, and for these reasons we are asked to declare it unconstitutional and void.

It is conceded that the petitioners established, conducted, and maintained a chapel and undertaking establishment outside of any district created by the municipal legislative body of the city. The essence of the petitioners' complaint is that no new undertaking district has been created, or existing district so extended, as to include the area occupied by their chapel and establishment, and that the city council arbitrarily refuses to enact remedial legislation, notwithstanding the demands of constantly increasing commercial and residential growth in that vicinity.

[1] At the time Brown v. City of Los Angeles, 183 Cal. 783, 192 P. 716, was decided in October, 1920, the ordinance here in question was upheld against attack upon the same general constitutional grounds as are relied upon by the petitioners here. Under the authority of that decision this petition must be denied unless conditions within the city of Los Angeles are shown to have been vitally altered since it was rendered, or unless these petitioners' undertaking establishment is so differently situated from that involved in the Brown Case as to render the ordinance in question arbitrary, unreasonable, and discriminatory as to the establishment of these petitioners' business, although it was not so as to that of Brown.

Comparing the facts as they are found to be in our referee's report with those described in that decision, it may fairly be said that the conditions then and now differ materially only in the following particulars: The population of Los Angeles is nearly 100 per cent. greater now than in 1920, and hence it may be assumed that the need for mortuaries has been about doubled since then. There is in effect another ordinance of the city which prohibits the parking of automobiles for more than 45 minutes upon streets in the business district, of which about 40 per cent. of district No. 1 is a portion. The petitioners' establishment is in an outlying section one and one-half miles from any district where mortuaries are permitted, whereas the Brown undertaking parlors were only about 150 feet from the southern boundary line of district No. 1.

[2, 3] Certain legal principles well established and applicable to the issues here presented are: That mortuaries are among those lawful and useful businesses which are proper subjects of regulation and control within the exercise of the police power of the state, and this includes the right to confine

such businesses within certain territorial limits. Brown v. City of Los Angeles, supra.

[4] While acts of the Legislature regulating useful businesses and occupations through the exercise of the police power are not conclusive, and the courts may always review them and inquire as to whether or not such enactments have any reasonable tendency to promote the proper objects for which the police power may be lawfully used, still, such regulations, made by a competent legislative authority, will not be set aside as unnecessary, unjust, or unreasonable, unless they be clearly so. In re Miller, 162 Cal. 687, 124 P. 427; Stockton v. Stockton, 41 Cal. 147; Ex parte Tuttle, 91 Cal. 589, 27 P. 933; In re Spencer, 149 Cal. 396, 86 P. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; In re King, 157 Cal. 161, 106 P. 578; Jardine v. City of Pasadena (Cal. Sup.) 248 P. 225.

[5] In such case, where the circumstances are such that there may have been a reasonable difference of opinion, the legislative discretion and decision will be upheld. Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248; Miller v. Board of Public Works, 195 Cal. 497, 234 P. 381, 38 A. L. R. 1479.

[6, 7] The fact that other property situated similarly to that where mortuaries are prohibited is permitted to be used for their maintenance will not justify the court in holding a zoning ordinance unreasonable and discriminatory. Brown v. City of Los Angeles, supra. By the same decision it is also declared that the fact that "spot zones" are illegally established by the ordinance in question furnishes no ground for attack upon the prohibitory provisions of the ordinance establishing a district of considerable area and limiting funeral establishments thereto, if the ordinance is not otherwise unreasonable and discriminatory. Also that the constitutionality or unconstitutionality of a law upon the grounds on which petitioners predicate their claim for release is decidedly a question of its application, not to the public in general, but to them, circumstanced as they are, and related as they have caused themselves to be to society and its fair public regulations.

The referee found that, by Ordinance No. 31746 (new series) of the city of Los Angeles, the maintenance of any "undertaking chapel, morgue or undertaking establishment" is prohibited outside of undertaking districts designated in said ordinance; that the principal district therein designated permitting such establishments is named district No. 1, and the total amount of street frontage in that district is 250,000 feet; that there are thirty-five undertaking establishments within district No. 1, whose combined frontage is 2,625 feet; that this district is centrally located with respect to the main cemeteries in and around the city of Los Angeles; that said undertaking district comprises about two-fifths of one per cent. of the total area of the city; also that more than forty-five minutes is required to properly conduct a funeral service; and that by ordinance No. 50515 (new series) the parking of vehicles is limited to forty-five minutes within certain districts, which last-named ordinance is applicable to about 100,000 feet of the frontage in district No. 1. We are not informed as to the availability of spaces other than such as are occupied by the public streets for parking purposes, nor as to even an approximation of the number of funeral services that are required to be conducted within the city of Los Angeles daily, nor the time that is needed for such services, except that more than forty-five minutes is required for each.

[8] Under these circumstances we are unable to say that the use of the public streets is demanded, as a matter of public convenience, for the parking of vehicles while funeral services are being conducted. We cannot hold that either upon the property of the undertaking establishments or lots established as public automobile parks, or both, there is not ample space for such vehicles to stand. However plausible may be petitioners' argument that two-fifths of one per cent. of the area of the city is insufficient for the maintenance of undertaking establishments, if this be a fact, it is not so manifest and indisputable that without the information above mentioned as being absent from the record we can rule that reasonable minds might not differ and entertain an opposite view to that maintained by the petitioners. Therefore, we are not authorized to declare the ordinance void as applied to them as they conduct their undertaking business. It may be added that it seems apparent that the showing upon the point just mentioned would of necessity need to be extreme and the conditions established unusual to warrant a judicial declaration that the business of the undertaker is of such a nature as to entitle it to the exclusive use of the public streets for a considerable portion of the day, or that the area here allotted to such businesses, being approximately 2 square miles, and 150,000 feet of street frontage (as to which the forty-five minute parking limit does not apply), is not adequate for the funeral needs of a city of the present population of the city of Los Angeles.

[9, 10] What has been said applies equally in principle to petitioners' claim that, since the section of the city in which their establishment is located is one and a half miles from the nearest legalized mortuary in a spot zone, and a greater distance from district No. 1, a public need exists for the petitioners' undertaking parlors, and that to prevent its maintenance is an unjust discrimination against the people of that neighborhood. Neither the need of this district nor the truth of the assertion that such need as

exists is not supplied is clearly apparent from the facts found by the referee, or otherwise known or established. As was said in Miller v. Board of Public Works, supra, we are required to determine whether the zoning ordinance here in question has "any reasonable tendency" to promote public health, etc. While we may doubt that the provision made for the maintenance of such businesses as that of the petitioners is the most desirable that could be devised, or that the same may not be subject to possible criticism as to its complete efficacy in accomplishing its apparent and asserted purposes, still we are unable to say that it has no "reasonable tendency" to promote those objects, which are within the undoubted realm of the police power.

As pointed out, the referee found that there is no material difference between the locality in which petitioners maintain their establishment and a number of districts or "spot zones" designated by Ordinance No. 31746 (new series) as territory in which such business may lawfully be maintained; but, as we have seen, from this fact it cannot be said that the prohibition of the ordinance of which complaint is made is unconstitutional.

[11] It appears from the record, and the referee found, that petitioners made application to the building department for a permit to construct an undertaking establishment at the corner of Forty-Fifth street and Western avenue, and that such permit was granted; and, further, that they did so erect a building and fit it for undertaking. Petitioners allege, and the referee also found, that they expended a sum in excess of $35,000 in constructing and equipping said building for the business contemplated, and that such establishment constitutes the property involved in this proceeding.

It is asserted by the petitioners that, since the city authorities thus acquiesced in the creation of such business, and the expenditure of a large sum of money therefor, to now prohibit its peaceful operation is equivalent to a change of attitude resulting in the confiscation of their property. To the respondent's return herein, however, is appended as an exhibit an alleged full, true, and correct copy of a notice signed by various property owners, which the respondent avers was served upon petitioners prior to the commencement of their building operations. By such notice it appears that the prospective builders were informed that an undertaking establishment could not lawfully be conducted at the site mentioned, and that "this notice will also serve to preclude the possibility of any assertion by you hereafter that your property interests are invaded, impaired, or destroyed by the operation of the ordinance." In this notice it was further stated that previously to its service "a petition, signed by approximately 100 per cent. of the frontage affected, was delivered to the city council, asking that the council refrain from creating a zone within which such business could be maintained in the locality mentioned." None of these allegations or findings are disputed.

[12] It cannot successfully be urged that the building department had authority to do more than sanction the erection of petitioners' building. The city council were never petitioned for the extension of an existing district, or the creation of a new one, embracing the corner in controversy, whereas the owners of nearly all of the property affected protested against such action. Hence we think the petitioners are not in a position to say that the municipal legislative body acquiesced in the institution of an unlawful enterprise, or that the petitioners were lulled into the investment of their capital, and by a change of front were deprived of property without compensation.

[13] It appears that subsequently to the adoption of Ordinance No. 31746 (new series) there was enacted Ordinance No. 42666 (new series), known as the general zoning ordinance, which established a district designated as zone C, in which, among other businesses permitted, are undertaking establishments. Petitioners seriously argue that Ordinance No. 31746 (new series) has been repealed as far as it may conflict with the regulations of the provisions of the other ordinance in their relation to zone C. Because of the plain declarations contained in Ordinance No. 42666 (new series) to the contrary, we are unable to agree with this contention. From an inspection of the last-named ordinance we think it clear that it was not intended to repeal or modify other ordinances dealing with the subjects regulated by it, except in certain instances by further restricting the businesses or occupations involved. Section 10 of the general zoning ordinance provides as follows:

> "Except as hereinafter specifically provided, it is not intended by this ordinance to modify, abrogate or repeal, any ordinances, rules, regulations or permits previously adopted or issued pursuant to law, relating to the use, management or conduct of buildings, structures, improvements or premises; provided, however, that where this ordinance imposes a greater restriction upon the erection, establishment, alteration or enlargement of buildings than is imposed or required by such ordinances, rules, regulations or permits, the provisions of this ordinance shall control."

Section 15, entitled "Interpretation—Purpose," is a declaration practically in the same language as that just qouted from section 10.

[14] It does not result from the mere fact that almost a half million more people reside in the city of Los Angeles today than did when Ordinance No. 31746 (new series) was enacted that the provision made by it for undertaking establishments is now inadequate. This court cannot say, because we have no evidence before us to prove such a statement,

that the city council did not foresee the city's growth and make ample provision for the additional population that has come. It may fairly be assumed that future increase in the number of people living within the municipality was anticipated by the legislators, and provision intentionally made for the same. Further, therefore, it does not follow, as argued by the petitioners, that if the spot zones attempted to be provided for undertaking establishments be subtracted from the total area in which such businesses are allowed, on the assumption that such zones are unlawful, the mortuary requirements of the city would be insufficient.

[15] It is said that the statements contained in the general zoning ordinances to the effect that at that time the city planning commission had not been able to make a comprehensive survey of all portions of the city, and that the portions covered by that ordinance and the maps thereto attached were then subject to regulation, because "the necessity therefor in these particular districts is most urgent," amount to a confession that the ordinance was even then insufficient to meet the necessities of the city. We do not so construe this language. "The necessities of the city," as the matter must be regarded by those performing the task of zoning, involves not merely consideration of the area required for each regulated business, but also the exclusion of such businesses from those localities where their presence would be obnoxious to public health, convenience, etc. It may well be that a given business might be permitted in a much larger territory than that required to accommodate the community in so far as supplying it with the advantages derived from that business is concerned. It is quite probable that the necessity to which reference is made in the ordinance which is said to be urgent is, not that the neighborhood may not be deprived of such supply, but, rather, that the portions of the city to which the businesses in question would prove detrimental should be protected therefrom.

[16] Our attention is called to a finding of the referee that "there is a certain risk involved in transporting the bodies of parties who have died of contagious diseases through the streets of the city, commensurate to the greater or less distances over which such bodies are transported. * * * But that such danger is decreased by sanitary methods of handling." It is asserted that this finding clearly shows that the ordinance is against the public welfare. It seems apparent that this court, having no more definite information than that "a certain risk" results from the transportation of bodies of deceased persons, is in no position to review the judgment of the legislators whose members are presumed to have had full opportunity for complete knowledge upon the subject. Of how great a risk is such "certain risk"? And just how much of a "certain risk" remains when it has been "decreased by sanitary methods of handling"? It seems obvious that any decision of this court in the premises would be random guesswork, based upon speculation, and nothing more. Such considerations are peculiarly within the scope of the lawmaking branch of the government.

[17, 18] Finally, we are of the opinion that the conditions necessarily existing in and about mortuaries, as well as their character, are intrinsically sufficiently different from those of hospitals and sanitariums as to permit of their separate classification. Hence the fact, if it be one, that Ordinance No. 31746 (new series) and Ordinance No. 42666 (new series), together permit the latter businesses in zone C even outside of the districts zoned, for undertaking establishments, does not render the inhibitions of the former ordinance unconstitutional on the ground of discrimination as between these businesses and funeral establishments.

The facts of the instant proceeding do not bring it within the class of cases illustrated by In re Dart, 172 Cal. 47, 155 P. 63, L. R. A. 1916D, 900, Ann. Cas. 1917D, 1127, where ordinances have been held void because, while assuming to regulate businesses, they have in fact suppressed them. Nor is this situation comparable to those where enactments clearly appear to have been discriminatory in their inception and design, as was the case in Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169. In this proceeding a very considerable area is designated in which undertaking establishments may be conducted, and it is not even suggested that the ordinances here in question are tainted with inceptive intentional discrimination.

The writ is discharged and the petitioners remanded.

We concur: WORKS, P. J.; THOMPSON, J.

80 Cal. App. 589

Ex parte STALEY. (Cr. 1466.)

(District Court of Appeal, Second District, Division 1, California. Jan. 7, 1927.)

Habeas corpus 🔑85(1)—Evidence in trial before recorder's court could not be considered to prove allegations of habeas corpus petition.

Where petitioner had been committed on convictions of misdemeanor, evidence received in trial before recorder's court could not be considered to prove allegations of habeas corpus petition to secure his release.

Application of John E. Staley, on behalf of Wallentz Craniczny, for writ of habeas corpus to be directed to the Sheriff of Los Angeles County, to secure release of petitioner after commitment on two convictions of misdemeanor. Writ denied.

C. A. Stice, of Los Angeles, for petitioner.

PER CURIAM. This application is not materially different from Criminal No. 1464, (no written opinion), wherein C. A. Stice made a similar application on behalf of Craniczny. The additional matters set forth in the petition herein could not be proved, without referring to the evidence received in the trial before the recorder's court. But such evidence may not be considered in this proceeding. In re Kaster, 52 Cal. App. 454, 198 P. 1029; In re Kaster, 185 Cal. 647, 198 P. 1031. The application for a writ is denied.

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80 Cal. App. 415

FRY et al. v. BALTIMORE HOTEL CO. et al.★ (Civ. 3130.)

(District Court of Appeal, Third District, California. Dec. 23, 1926. Rehearing Denied with Modifications Jan. 22, 1927. Hearing Denied by Supreme Court Feb. 21, 1927.)

1. Corporations 🔑243(1)—Stockholder's liability for debts of corporation is determined by amount of stock owned when debt is incurred (Const. art. 12, § 3; Civ. Code, § 322).

Liability of stockholder for such proportion of corporation's debts as par value of his shares bears to its subscribed capital stock under Const. art. 12, § 3 (Civ. Code, § 322), is determined by amount of stock owned by stockholder at time debt is incurred; such liability not being released by subsequent transfer of stock.

2. Corporations 🔑252—Liability of stockholder is primary and independent of corporation's liability (Const. art. 12, § 3; Civ. Code, § 322).

Stockholder's liability is created by law under Const. art. 12, § 3 (Civ. Code, § 322), and is primary and independent of liability of corporation; it not being necessary for creditor to first exhaust corporation's assets before maintaining an action for stockholder's liability.

3. Corporations 🔑247—Accepting corporation's mortgage or recovering judgment against corporation does not affect creditor's right against stockholder individually (Const. art. 12, § 3; Civ. Code, § 322).

Creditor's right to proceed against stockholder individually under Const. art. 12, § 3 (Civ. Code, § 322), is not impaired by accepting corporation's mortgage as security for debt of corporation or by recovering judgment against corporation.

4. Corporations 🔑264—Statute of limitations against stockholder's liability on corporation's debts is not extended by their renewal by corporation (Code Civ. Proc. § 359).

Where written evidence of indebtedness is given, renewal of obligation by corporation will not extend three-year statute of limitations against stockholder provided by Code Civ. Proc. § 359, as statute runs from date of original indebtedness.

5. Corporations 🔑237—Breach of lease by corporation rendering corporation liable creates stockholder's liability (Const. art. 12, § 3; Civ. Code, § 322).

Liability of corporation for breach of covenants of lease by damaging freehold, holding over after termination, or failure to pay rent becomes stockholder's liability, under Const. art. 12, § 3 (Civ. Code, § 322).

6. Corporations 🔑264—Limitation on stockholder's liability for corporation's breach of lease runs from date of execution of lease (Code Civ. Proc. § 359).

Statute of limitations (Code Civ. Proc. § 359), on stockholder's liability for corporation's breach of lease, runs from date of execution of lease, and not from date of breach of covenant therein.

7. Corporations 🔑237—New agreement made by corporation for valuable consideration, though incorporating old contract, creates new stockholder's liability (Const. art. 12, § 3; Civ. Code, § 322).

Though stockholder is not liable for corporation's renewal of original obligation evidenced by writing, where corporation makes new agreement based upon new and valuable consideration, new obligation is created on part of both corporation and stockholders under Const. art. 12, § 3, Civ. Code, § 322, though new agreement may contain provisions of former contract or incorporate part of old contract.

8. Corporations 🔑237—Agreement of corporation leasing hotel, executed in consideration for lessor's releasing chattel mortgage on furniture which corporation desired to sell, held new obligation creating stockholder's liability (Const. art. 12, § 3; Civ. Code, § 322).

Where corporation having lease of hotel and desiring to sell its furniture therein entered into contract with lessor by which lessor released furniture from lien of chattel mortgage on president's and stockholder's giving undertaking to pay damages resulting from auction, contract was not mere renewal of lease, but con-

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★Hearing denied by Supreme Court.

stituted new obligation binding both corporation and stockholders, under Const. art. 12, § 3 (Civ. Code, § 322).

9. Corporations 🔑253—In suit for breach of contract against stockholder who signed undertaking for corporation, admitting default judgment against corporation before expiration of time for appeal thereon held error.

Admitting in evidence default judgment against corporation before expiration of time for appeal thereon *held* error, in suit against stockholder for damages for breach of undertaking on which stockholder was personally liable, which had been severed from action against corporation at stockholder's request.

10. Judgment 🔑652—Default judgment held inadmissible in evidence to prove facts therein recited before expiration of time of appeal thereon (Code Civ. Proc. § 1049).

Though default judgment may be used to prove former adjudication of rights between parties with same effect as evidence as if entered upon trial of an issue, such judgment is not admissible to prove facts recited therein as evidence before time for appeal therefrom has expired, in view of Code Civ. Proc. § 1049, though sole question which may be presented on appeal from default judgment is whether averments of complaint are sufficient to support judgment.

11. Appeal and error 🔑1170(7)—Judgment against stockholder for damages on undertaking in behalf of corporation held reversible, where based solely on incompetent evidence of judgment against corporation (Const. art. 6, § 4½).

In action against stockholder for breach of undertaking signed by him in behalf of corporation, judgment entered solely on evidence of damages as recited in default judgment against corporation before time for appeal from latter judgment expired should be reversed, notwithstanding Const. art. 6, § 4½, providing no judgment shall be set aside on ground of improper admission of evidence, unless justice miscarried as result, as such provision does not apply where elimination of incompetent evidence leaves no evidence supporting material issue in case.

12. Appeal and error 🔑1170(7)—Provision against reversing judgments for improper admission of evidence does not apply, where there is absence of material evidence as to necessary issue (Const. art. 6, § 4½).

Const. art. 6, § 4½, providing no judgment shall be set aside for improper admission of evidence unless miscarriage of justice has resulted, *held* not to apply where there is entire absence of material evidence as to necessary issue after eliminating part improperly admitted, such statute applying only where elimination of evidence erroneously admitted still leaves substantial evidence upon which to support judgment.

Appeal from Superior Court, Los Angeles County; Daniel C. Deasy, Judge.

Action by T. Ashton Fry and another against the Baltimore Hotel Company, W. J. Colopy, and another. Judgment for plaintiffs, and defendant W. J. Colopy appeals. Reversed with directions.

Hocker & Austin and John N. Helmick, all of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles (Harry W. Hanson, and Timon E. Owens, both of Los Angeles, of counsel), for respondents.

Frank Rouse, of Los Angeles, for defendant Baltimore Hotel Co.

THOMPSON, Justice pro tem. This is an appeal by the defendant Colopy from a judgment for damages based upon a stockholder's liability for the debts of a corporation for breach of contract.

Two reasons are assigned by the defendant upon which he relies for a reversal of the judgment: First, that the agreement upon which the judgment is founded was a mere renewal of a former lease, for the breach of which a stockholder's liability was barred by the limitations prescribed in section 359, Code of Civil Procedure. Second, that a former judgment against the corporation, which furnished the only evidence of the amount or character of the damages, was not a final judgment from which the time for appeal had expired, and that the judgment was therefore not competent as evidence of indebtedness of the corporation.

Plaintiffs were the owners of hotel property in Los Angeles. May 26, 1911, they executed a ten-year lease of this property to the Baltimore Hotel Company, a corporation, in consideration of $326,000, payable in equal monthly installments. Defendant was then a stockholder in the hotel corporation. This lease provided for the execution of a chattel mortgage on the hotel furniture to be held by plaintiffs to secure the payment of rent and the performance of the covenants of the lease. This mortgage was duly executed and held by plaintiffs until the modification of the lease by a subsequent agreement between the parties, dated December 14, 1921, which forms the basis for the indebtedness for which the judgment in this case was rendered. The original lease expired December 31, 1921. The Baltimore Hotel Company did not intend to renew their lease. In anticipation of the termination of this lease plaintiffs had executed a 25-year lease of the hotel property to J. E. Seamore for $40,000 per year, agreeing to deliver possession of the property to him on January 1, 1922. Defendant Colopy and the Baltimore Hotel Company were anxious to dispose of their hotel furniture before the expiration of the lease and desired to hold a public auction of the furniture in the hotel building. Before the furniture could be sold it was necessary for plaintiffs to release their chattel mortgage. For this purpose plaintiffs and the hotel company executed a written agreement, dated December 14, 1921, which did not purport to renew the original lease nor extend the term of its expiration. By the terms of this new agreement plaintiffs consented to the use of the hotel building for the purpose of conducting said public auction, providing in detail for the manner of carrying on the sale and for displaying certain signs advertising the auction; that the hotel company should remove all dirt and rubbish occasioned thereby and repair all damage resulting from the sale, and agreeing to cancel the chattel mortgage, upon condition that, in lieu of said mortgage security, this defendant Colopy and Ernest H. Hess, the president of the hotel corporation, should execute and deliver to plaintiffs a good and sufficient undertaking in the sum of $5,000 to secure plaintiffs against any damages resulting from said auction sale and assuring the payment of rent and the fulfillment of the terms of the lease. This undertaking was duly executed and delivered, and plaintiffs thereupon canceled the chattel mortgage and thereby forfeited their mortgage security. The language of this contract of December 14, 1921, in this respect was as follows:

> "First parties agree, upon the execution of this contract, and attached undertaking, to release of record the lien of a certain chattel mortgage existing in their favor as security for the performance of the covenants of the lease aforesaid, and which said chattel mortgage is a lien upon the furniture, furnishings and equipment of said hotel * * * as soon as said party shall have complied with the terms of this agreement, and the said indenture of lease, and shall have repaired or paid first parties for all damage, if any, done to the demised premises during the occupancy thereof by said second party, then and in that case this written undertaking in the amount of $5,000, shall be canceled."

The language of the accompanying undertaking was as follows:

> "In consideration of the execution of the foregoing agreement, the undersigned do hereby jointly and severally undertake and bind themselves, * * * up to but not exceeding the amount of $5,000 to save and hold first parties named in the above agreement free and harmless from any and all damages arising from the sale and removal from the said Baltimore Hotel, of the furniture, furnishings, and fixtures therein belonging to said second party in said agreement.
>
> "This undertaking shall remain in full force and virtue until all such damages shall have been repaired, or until first parties named in said agreement shall have been paid the amount of such damage, and thereupon this undertaking shall become void and of no effect.
>
> "Dated at Los Angeles, December 14th, 1921.
>
> "[Signed] Ernest H. Hess.
> "W. J. Colopy."

Pursuant to this agreement the auction sale of furniture was held. The hotel company failed to deliver possession of the property until 18 days after the expiration of the lease, to wit, January 18, 1922. Suit was thereupon brought by plaintiffs against the Baltimore Hotel Company and the stockholders for damages for breach of the covenants of the original lease and for breach of the terms of this subsequent agreement of December 14, 1921, the chief items of which claim for damages included the loss of $1,888 rent and $5,000 alleged damages for holding possession of the premises beyond the specified term of the lease.

This case came on regularly for trial on May 14, 1924. On motion of defendant Colopy the case was severed as to him and his case was set for trial in the afternoon of that same day. The cause was then ordered to proceed against the remaining defendants. The attorneys appearing in behalf of the corporation then announced that "they had no defense to offer, and that the cause might be considered as going by default against the Baltimore Hotel Company." Whereupon these attorneys abandoned the case and left the courtroom. The trial, however, proceeded, and upon evidence adduced the court rendered judgment against the corporation for damages in the sum of $7,025, which judgment was immediately entered and docketed.

At 2 o'clock in the afternoon of the same day the cause came on for trial against the defendant Colopy. The judgment against the hotel company, which had been procured in the forenoon, was offered and received in evidence over the objection of defendant Colopy. This was the only evidence adduced against him to prove the actual damages sustained for breach of the lease, or for violation of the terms of the subsequent agreement of December 14, 1921. Most of the evidence at this trial was directed toward the question as to the liability of the defendant Colopy, as a stockholder, he claiming that the action upon the original obligation incurred by the execution of the lease was barred by the provisions of section 359, Code of Civil Procedure, and that he had disposed of his stock before the execution of the new contract of December 14, 1921. The court, however, found against him and held that a valid judgment for damages existed against the corporation, and that defendant Colopy was liable as a stockholder to the extent of $3,512.95, and rendered judgment accordingly. From this judgment the defendant has appealed.

[1-4] A stockholder is individually and severally liable for such proportion of the debts of the corporation during the time he is a stockholder as the par value of his shares bears to the entire subscribed capital stock. Const. Cal. art. 12, § 3 (Civ. Code, § 322). The liability of each stockholder is determined by the amount of stock owned by him

at the time the debt is incurred. Finch v. Finch, 68 Cal. App. 72, 228 P. 553; Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am. St. Rep. 87. And such liability is not released by any subsequent transfer of stock. Civ. Code, § 322. A stockholder's liability is created by law and is primary and independent of the liability of the corporation itself. Chambers v. Farnham, 182 Cal. 191, 187 P. 732. Since the obligation constitutes a primary liability against the stockholder it is not necessary for a creditor to first bring suit against the corporation and exhaust its assets before he can maintain an action for stockholder's liability. Fletcher's Enc. of Corp. 7245, § 4180; Eva v. Andersen, 166 Cal. 420, 137 P. 16. Neither accepting the corporation's mortgage as security for the debt, nor first recovering a judgment against the corporation, will impair the creditor's right to proceed against the stockholder individually. 6 Fletcher, supra, 7240 and 7246, § 4180; Sonoma Valley Bank v. Hill, 59 Cal. 107; Knowles v. Sandercock, 107 Cal. 629, 40 P. 1047. The statute of limitations runs against a stockholder's liability in three years from the time the obligation or indebtedness is incurred. Code Civ. Proc. sec. 359; Chambers v. Farnham, supra. Where notes or other written evidence of indebtedness are given, the mere renewal of such an obligation of a corporation will not extend the statute of limitations against the stockholder, but in spite of such renewal of the evidence of debt, the statute continues to run uninterruptedly from the date of the original indebtedness. 7 R. C. L. 414, § 401; London & S. F. Bank v. Parrott, 125 Cal. 472, 58 P. 164, 73 Am. St. Rep. 64; Goodall v. Jack, 127 Cal. 258, 59 P. 575; S. R. Nat. Bank v. Barnett, 125 Cal. 407, 58 P. 85.

[5, 6] Undoubtedly an action for the breach of a lease, whether it be for damages to the freehold, for failure to pay rent, or for holding over after the termination of the tenure, founded upon the original contract, creates a stockholder's liability, commencing at the date of the execution of the lease and not from the date of the breach of covenant.

In the case of Chambers v. Farnham, supra, suit was brought against the stockholders of Belmore Land & Water Company, a corporation, for damages for breach of the covenant of a lease to construct irrigation ditches and build headgates at certain specified points along the way. The breach complained of was the failure to place the headgates at the designated places. It was there contended that the obligation did not accrue until the breach occurred, which was more than three years after the execution of the lease. Mr. Chief Justice Angellotti in that case said:

> "The narrow question remaining here is whether such a liability on the part of the corporation is incurred at the time of the execution of the contract or at the time of the breach, or possibly at the time the damage is suffered. In the light of the views announced in the leading case of Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am. St. Rep. 87, and the long line of cases following and approving the doctrine there enunciated, culminating in the comparatively recent case of Coulter Dry Goods Co. v. Wentworth, 171 Cal. 500, 153 P. 939, where the cases were reviewed and the matter exhaustively considered, we deem this question no longer open to discussion. The liability of the corporation to respond in damages for any failure to perform the covenants contained in its contract was necessarily created or incurred by the execution of the contract, notwithstanding that no right of action could accrue until a breach [occurred]."

Quoting approvingly from this same case of Hunt v. Ward, the learned Chief Justice further says:

> "Of course, there is a clear and wide distinction between the creation of a liability and the accruing of a cause of action thereon; and section 359 ex industria, emphasizes that distinction. A liability may be absolute or contingent; it may be unconditional or limited; it may be presently enforceable by action, or there may be time given for its performance; but whatever its character, it is created by the consummation of the contract, act, or omission by which the liability is incurred."

[7] However, where an entirely new, different, and distinct agreement is subsequently made, based upon a new and valuable consideration, even though some of the provisions of the former document are incorporated, or referred to and made a part of the new contract, where it is apparent that the purpose of the parties was not to renew or extend the former one, but rather to completely change and alter certain covenants therein contained, it is apparent that the execution of the latter document will create a new obligation on the part of both the corporation and the stockholders, from the date of which their liability will begin to run.

[8] In the instant case the agreement of December 14, 1921, which forms the basis of the judgment in this case, did not purport to renew or extend the covenants of the lease which was executed in 1911. The date of the termination of the lease was not changed. An entirely new and distinct contract was therefore made, by the terms of which added benefits were granted to the corporation and its stockholders, to wit, the privilege of using the hotel building as an auction house; the displaying of auction signs on the exterior of the building and the release of a chattel mortgage on the furniture, which was held by the plaintiffs to secure the performance of the covenants of the lease. By the terms of this new contract all these benefits accrued to the corporation and its stockholders in consideration of the execution of the $5,000 undertaking. There was ample consideration for this agreement, and it created a new ob-

ligation which bound both the corporation and the stockholders independently of the former liability created by the original lease. Concannon v. Smith, 134 Cal. 14, 66 P. 40; Union Oil Co. v. Purissima Hills Oil Co., 181 Cal. 479, 185 P. 381; Searles v. Gonzalez, 191 Cal. 426, 216 P. 1003, 28 A. L. R. 78.

[9] But, regardless of whether the execution of the agreement of December 14, 1921, together with the accompanying undertaking, created a personal liability, or a new stockholder's liability against the defendant Colopy, there was absolutely no evidence of the character or amount of damages which accrued by virtue of the breach of contract, except the judgment which had been procured against the corporation in the forenoon. That judgment was not final so as to constitute competent evidence to be adduced in another proceeding. The time for appeal had not expired. In contemplation of law, that proceeding was still pending. Section 1049, Code of Civil Procedure, provides:

> "An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

[10] It has been definitely determined by our courts that:

> "A judgment, in order to be admissible in evidence for the purpose of proving facts therein recited, must be a final judgment in the cause, and if the action in which the judgment is rendered is still pending, necessarily a judgment is not final. Chambers v. Farnham, 39 Cal. App. 17, 179 P. 423; In re Blythe, 99 Cal. 472, 34 P. 108; Naftzger v. Gregg, 99 Cal. 83, 33 P. 757, 37 Am. St. Rep. 23; 7 Enc. of Evidence, 814; Cook v. Ceas, 143 Cal. 221, 77 P. 65; Story v. Story, 100 Cal. 41, 34 P. 675; Murray v. Green, 64 Cal. 363, 28 P. 118; Woodbury v. Bowman, 13 Cal. 634; Jones on Evidence, 932, § 596.

[11] Nor is the rule different with respect to the admissibility of a judgment by default to serve as evidence in another proceeding. In 7 Encyclopedia of Evidence, 795, it is said:

> "A judgment by default has the same effect upon the rights of the parties as one rendered upon a joinder of issues between them, and therefore it may be used as a former adjudication with the same effect as evidence as if it had been entered upon trial of an issue formulated upon the pleadings."

Except that upon appeal it has been held that the sole question which may be presented is whether the averments of the complaint are sufficient to support the judgment. San Gabriel Valley Bank v. Lake View Town Co., 4 Cal. App. 630, 89 P. 360. It necessarily follows that so long as there is an appeal from a default judgment on any ground whatsoever, the action is considered as "still pending," until the time for appeal has elapsed. According to the authorities heretofore cited, a judgment is not final so long as the action is still pending, and no judgment, save a final judgment is competent evidence in another proceeding.

[12] It cannot be said that article 6, § 4½, of the Constitution, will cure the error of admitting incompetent evidence, when the elimination of that incompetent evidence leaves the record entirely devoid of any evidence to support a material issue in the case. In the case of J. I. Case Threshing Machine Co. v. Copren Bros., 32 Cal. App. 194, 162 P. 647, Mr. Justice Chipman said, with relation to the application of this section of the Constitution to a complaint which lacked material allegations, and where material proof of essential facts was also lacking:

> "We think it would be giving to section 4½ of article 6 unwarranted scope to permit its application to such a state of facts as we have here. To do so we must, in effect, say that it is not necessary to state facts sufficient to constitute a cause of action, or, having stated a cause of action, that it need not be supported by sufficient evidence. The section was not intended to abrogate or dispense with rules of procedure and evidence. It would, in our opinion, effect a miscarriage of justice to sustain the ruling of the trial court upon the record before us." People v. Schiaffino (Cal. App.) 238 P. 725.

The language of the Constitution to the effect that "no judgment shall be set aside, * * * in any case, on the ground * * * of the improper admission or rejection of evidence, * * * unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice," certainly cannot be construed to mean that a judgment may be affirmed when there is an entire absence of material evidence as to a necessary element of the cause of action. This construction would be converting the Constitution into an engine for the perpetration of a miscarriage of justice. We are of the opinion that the constitutional provision should be construed to mean that an error of the trial court in the introduction of evidence may be disregarded to prevent a miscarriage of justice, provided the elimination of the evidence thus erroneously admitted still leaves substantial evidence upon which to support the judgment.

The judgment is therefore reversed and the trial court is directed to try and determine the issue only as to the amount of the liability of the defendant hotel company under the contract dated December 14, 1921, and the proportion thereof for which the defendant Colopy is liable pursuant to Const. art. 12, § 3, and section 322, Civ. Code, and enter judgment accordingly.

The petition for a rehearing is denied.

We concur: FINCH, P. J.; PLUMMER, J.

80 Cal. App. 729

WILSON v. COLE. (Civ. 5586.)★

(District Court of Appeal, First District, Division 2, California. Jan. 20, 1927. Rehearing Denied Feb. 19, 1927.)

1. Trusts 🔑371(2)—Complaint purporting to plead constructive trust in realty and breach thereof, and alleging sufficient facts, though some were insufficiently pleaded, held sufficient.

A complaint disclosing at least an attempt to plead a constructive trust in realty and a breach thereof, and alleging sufficient facts, though some were insufficiently pleaded, *held* sufficient.

2. Trusts 🔑110 — Chancellor's finding for plaintiff, in action to declare trust in realty, held warranted.

Evidence *held* to warrant the chancellor's finding for plaintiff, in an action to declare a trust in an undivided half interest in certain realty.

3. Appeal and error 🔑1009(1) — Finding of chancellor as to existence of constructive trust will not be disturbed, in absence of abuse of discretion.

The rule that the evidence should be clear, satisfactory, and convincing to establish a constructive trust in realty is addressed primarily to the chancellor, whose finding will not be disturbed, in absence of abuse of discretion.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Mary M. Wilson against Rosalie James Cole. Judgment for plaintiff, and defendant appeals. Affirmed.

Salisbury & McNeil, Verne E. Robinson, and W. Sumner Holbrook, Jr., all of Los Angeles, for appellant.

William L. Morrison and Adam Thompson, both of San Diego, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a judgment declaring that the defendant held the title of the plaintiff in trust as to an undivided one-half interest in certain property located in the city of San Diego. The defendant appeared and answered and a trial was had before the court sitting without a jury. The trial court made findings in favor of the plaintiff and from a judgment entered thereon the defendant has appealed under section 953a of the Code of Civil Procedure.

Edwin and Mary E. James were husband and wife. Down to the date of the death of Mr. James they resided at Guatemala. To them were born two daughters, Mary M., who afterwards married and is now Mrs. Mary M. Wilson, the plaintiff in this case. The other daughter, Rosalie, afterwards married, and she is the defendant Rosalie James Cole. At the time Mr. James died he had accumulated, and was the owner of, certain parcels of real estate in Guatemala, and other parcels in New Orleans. He left a will by the terms of which one-half of his estate went to his widow and one-quarter thereof to each of his daughters. At first the management of the properties rested with the widow. Her management was unsatisfactory, and family disputes arose. At this time she had already acquired the real estate located at San Diego. In the interest of harmony the title was transferred to the Southern Title Guaranty Company to hold the title for the widow and her two daughters. That arrangement existed until July 9, 1909. On that date the widow and her daughter Mary signed a document directing the Southern Title Guaranty Company to convey the entire title to the defendant. The title company did so on December 14, 1909. This action was commenced on August 23, 1922. The theory of the plaintiff's case is that the transfer made on December 14, 1909, was but one step in the transaction, and that the entire arrangement was to the effect that the mother, having remarried, and having gone to reside at Seattle, was willing to waive all of her claims in favor of her two daughters, and that it was agreed among the three, the widow and the two daughters, that the title should be taken by the defendant, and that she would hold the title for herself and her sister share and share alike; whereas it was the contention of the defendant that the transfer was made to her as settlement in full for all of her claims arising out of the estate of her father, and that her sister, the plaintiff, was to be compensated, and at that time was willing to take the chances of being compensated, out of certain moneys which the heirs expected to collect from sales of properties in Guatemala.

The hearing before the trial court ran afield in many respects. The opening brief of the appellant dwells on many propositions that were not controverted by the respondent when she filed her brief. On filing her reply brief the appellant states her contentions as follows: (1) The judgment setting aside a deed absolute will be reversed on appeal, unless supported by clear, convincing, and conclusive evidence; (2) the evidence does not justify a finding that there was an express trust; (3) the evidence does not justify a finding that there was a constructive trust; (4) the evidence is insufficient to support a judgment for the plaintiff upon any theory. However, in summarizing she claims that "the issues are therefore limited to the question whether the judgment rendered below is supported on a constructive trust theory by the pleadings and by evidence of a clear, convincing and conclusive nature." In other words, the appellant makes two points. She contends that the pleadings are insufficient to show a construc-

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★Rehearing denied.

tive trust, and that the evidence is insufficient.

[1] In the trial court the appellant did not contend that the complaint was insufficient. She interposed a general demurrer, but she submitted it without argument, took an order overruling it, and at the end of a week filed an answer in which she specifically denied the allegations contained in the complaint, and went to trial on issues so framed. A most cursory reading of the complaint discloses the theory of the pleader to be that it is at least an attempt to plead a constructive trust and a breach thereof. The appellant argues that it is insufficient. To support that argument she cites Robbins v. Law, 48 Cal. App. 555, 192 P. 118. The case contains nothing that even purports to sustain the claim of the appellant. It seems to us that the most that can be truly said is that the amended complaint contains facts sufficient, but some of those facts are insufficiently pleaded.

[2, 3] As recited above, two inconsistent theories were presented to the trial court. The evidence was full of conflicts. The plaintiff took the stand as a witness, and testified to facts tending to support her theory. Mrs. Jenkins, the mother, took the stand, and gave testimony similar to the testimony given by the plaintiff. Several disinterested witnesses came forward and testified to certain statements made by the defendant which tended to corroborate the case made by the plaintiff. Many pieces of documentary evidence were introduced which were exhibited to the trial court but which have not been certified up. That court saw the witnesses, had an opportunity to determine which witness so testified as to produce the strongest impression as to his veracity and as to his recollection of the facts which he testified had occurred many years before. Among other things, that evidence disclosed that the actual ownership of the San Diego property prior to July 9, 1909, rested in the mother and her two daughters; that it was at least the claim of the appellant that the mother was a person without business judgment; that the appellant, although at that time a girl in her teens, assumed to transact business for the family, and was allowed to do so; that, excepting the disputes regarding the management of the property, the relations existing between the sisters and between the mother and the daughters were at all times cordial and confidential; that, after the second marriage of the mother, the sisters lived together as partners; that, when the agreement of July 9, 1909, was drawn up, at least the mother and the respondent did not have any legal advice, nor the advice of any other business counselor, but acted solely on the statements made to them by the appellant; that there was no consideration for the conveyance, except as we have recited; and that the relation of personal confidence assumed between the appellant on the one side and her mother and sister on the other was assumed voluntarily. We are not at all inclined to disturb the finding made by the trial court under these circumstances. True it is that there are many decisions to the effect that in cases of this kind, in order to support such an attack as is made in this case, the evidence should "be clear, satisfactory, and convincing." Of course, that rule is primarily addressed to the chancellor. A reading of the record in the instant case discloses that the trial judge was cautious and painstaking in the attempt to ascertain what were the exact facts. By no means may we say that he abused his discretion.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

80 Cal. App. 675

PEOPLE v. SIMON. (Cr. 926.)

(District Court of Appeal, Third District, California. Jan. 17, 1927.)

1. Criminal law ⟹1037(2)—Generally assignment of misconduct and request that court admonish jury to disregard district attorney's objectionable argument are necessary as foundation for complaint in appellate court.

General rule is that an assignment of misconduct and a request that court admonish jury to disregard objectionable argument or remarks of district attorney are necessary as foundation for complaint of misconduct in appellate court.

2. Criminal law ⟹1037(2)—Defendant need not assign misconduct of counsel and request instruction to disregard it to raise point in appellate court, where instruction could not obviate effect.

Where examination of entire record shows that misconduct of counsel is of such character as to have produced effect which it is reasonably probable could not have been obviated by instructions to jury, absence of assignment of misconduct and request that court admonish jury to disregard objectionable argument of district attorney will not preclude defendant from raising point in appellate court.

3. Criminal law ⟹723(5), 1171(1)—District attorney's reference to Jewish nationality of arson defendant held misconduct and to require reversal.

In prosecution for arson, in which defendant was a Jew, remarks of district attorney with reference to fires caused by Jews *held* misconduct, influencing jury in arriving at verdict of guilty, resulting in miscarriage of justice requiring reversal.

4. Criminal law ⟹723(5)—Duty of district attorney is to see that defendant has fair and impartial trial, and he must refrain from appeals to prejudice.

Duty of district attorney is to see that defendant has fair and impartial trial and that he be not convicted except upon competent and legitimate evidence, and he should not use official position to obtain verdict by appeal to race or religion.

5. Criminal law ⚷308—That one is accused of crime should not be taken as evidence of guilt, since every presumption is in favor of innocence.

Every presumption is in favor of innocence of one charged with crime, and fact that one is accused of crime should not be taken as any evidence of guilt.

6. Criminal law ⚷560—Jury must be satisfied of guilt to moral certainty and beyond reasonable doubt from evidence alone.

Before a defendant can be convicted of a criminal offense, jury must be satisfied to moral certainty and beyond reasonable doubt of his guilt from evidence alone.

7. Criminal law ⚷726—Comments of district attorney, not warranted by evidence, were not justified by fact that defendant's counsel or others had committed like impropriety.

Where comments of district attorney regarding nationality of defendant were not warranted by evidence, such comments were not justified by fact that defendant's counsel or witness or any one else had already committed like impropriety.

8. Criminal law ⚷723(5)—That defendant's counsel asked prosepective jurors, upon voir dire, whether fact that defendant was Jew would prejudice them, did not justify improper remarks by district attorney.

That prospective jurors upon their voir dire were asked by defendant's counsel, in arson prosecution, whether fact that defendant was Jewish would prejudice them against defendant did not justify remarks of district attorney regarding nationality of defendant, since it was proper for defendant to ask this question upon voir dire.

9. Criminal law ⚷1171(1)—Where it clearly appears that substantial rights of defendant have been invaded and fair trial denied him because of misconduct of trial court or district attorney, judgment will be reversed (Const. art. 6, § 4½).

Where it clearly appears that substantial rights of defendant have been invaded and a fair trial denied him because of misconduct of trial court or district attorney, appellate court will not hesitate to reverse judgment so obtained, in view of Const. art. 6, § 4½.

10. Arson ⚷15—Defendant charged with burning property with intent to defraud insurers could be convicted if he conspired with others to burn property (Pen. Code, §§ 31, 548).

Where defendant was charged with burning property with intent to defraud insurers, under Pen. Code, § 548, he could be convicted if he entered into conspiracy with others to burn property with intent to defraud insurers, even though he did not do actual burning, in view of section 31.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Ernest Simon was convicted of arson, and he appeals. Reversed.

Milton Marks, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PRESTON, Justice pro tem. An indictment was returned by the grand jury of the county of Stanislaus on December 17, 1925, charging the defendant, Ernest Simon, and his sister, Rose Bloom, with willfully burning, injuring, and destroying insured property with intent to defraud the insurers. The indictment was drawn under section 548 of the Penal Code of the state of California. The jury found the defendant, Ernest Simon, guilty and disagreed as to his sister, Rose Bloom.

From the judgment following the verdict of guilty and from an order denying his motion for a new trial the defendant, Ernest Simon, prosecutes this appeal. The record in this case is very voluminous; the transcript contains 1898 pages, together with scores of photographic exhibits and documents.

Defendant seeks a reversal of the judgment and order upon two grounds: First, misconduct of the district attorney, which the defendant complains of bitterly, and characterizes as being of a "highly aggravated and unprecedented character"; the second contention being that the court erred in giving certain instructions to the jury.

In the course of the opening argument of the district attorney he used this language:

> "There has, of course, grown up a suspicion in this country with reference to fires whenever a Jew has anything to do with it. You swore that you people would try these people just exactly as if they were not Jews, as if they were some other nationality, and that is your duty to do that, but that does not change the fact that there has grown up a suspicion with reference to that kind of thing, and that is the reason they were asking you that question, was because of the fact that there has been so many fires where the Jew lived in the house, in order to obtain the money."

Also, in the course of the closing argument of the district attorney, he used this language:

> "What interest have I? What interest have I in the insurance company? They say that he ought not to bring any prejudice in this case because these people are Jews. I did not make them Jews. I am not responsible for the fact that they are Jews. I did not make this fire out there that night. I am not responsible for the fact that there was a fire. I am not responsible for the fact that these people are here being tried today; it is a circumstance with which I have nothing to do."

Also, at another place in the closing argument, the district attorney used this language:

"Mr. Carlson said that there ought not to be anything said about the Jews, and yet he talked here to you about how it was no use having insurance unless you expected to have a fight with the insurance company, that they would not do this and they would not do that and would not do the other thing. * * * Then, of course, if this apartment had been burned, and Mr. Carlson said, why, these Jews, as they were, with their experience, would not have fixed a thing like that in their own house. The Jews with their experience and with the help of Fordson oil expected the thing to go up and burn up, and that there would not be anything left of it, there would not be anything but ashes to tell the story. That is what they expected to find."

[1] Complaint is also made of other remarks of the district attorney, but the foregoing extracts are enough to show the character of the remarks made. These remarks of the district attorney were not expected to or assigned as prejudicial misconduct at the time, and the court was not then, or at any time, requested to specially instruct the jury to disregard the remarks of the district attorney; in fact, the matter was not called to the attention of the trial court at all, and the objection is raised for the first time in this court. It is a well-established general rule in California that an assignment of misconduct and a request that the court admonish the jury to disregard the objectionable argument or remarks of the district attorney are necessary as a foundation for complaint of misconduct in this court (People v. Ye Foo, 4 Cal. App. 730, 89 P. 450; People v. Amer, 8 Cal. App. 143, 96 P. 401; People v. Osborn, 12 Cal. App. 148, 106 P. 891; People v. Walker, 15 Cal. App. 400, 114 P. 1009; People v. Vickroy, 41 Cal. App. 275, 182 P. 764; People v. Adkins, 49 Cal. App. 531, 193 P. 800; People v. Ross, 60 Cal. App. 168, 212 P. 627; People v. George, 72 Cal. App. 124, 131, 236 P. 934; People v. Shem Ah Fook, 64 Cal. 381, 1 P. 347; People v. Beaver, 83 Cal. 419, 23 P. 321; People v. Lane, 101 Cal. 513, 36 P. 16; People v. Frigerio, 107 Cal. 151, 40 P. 107; People v. Louie Foo, 112 Cal. 17, 26, 44 P. 453; People v. Kramer, 117 Cal. 647, 49 P. 842; People v. Shears, 133 Cal. 154, 65 P. 295; People v. Babcock, 160 Cal. 545, 117 P. 549; Grossetti v. Sweasey, 176 Cal. 793, 169 P. 687; People v. Miller, 177 Cal. 408, 170 P. 817; Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007; People v. Routh, 182 Cal. 561, 189 P. 436; People v. Nakis, 184 Cal. 113, 193 P. 92); the reason for this rule being, as stated in a number of these cases, that the trial court should be given an opportunity to correct the abuse and thus, if possible, prevent by suitable instructions the harmful effect upon the minds of the jury.

[2] There is, however, a well-recognized exception to this general rule, and the exception is simply this: Where an examination of the entire record fairly shows that the acts complained of are of such a character as to have produced an effect which, as a reasonable probability, could not have been obviated by any instructions to the jury, then the absence of such assignment and request will not preclude the defendant from raising the point in this court. People v. McDonald, 167 Cal. 551, 140 P. 256; People v. Edgar, 34 Cal. App. 459, 167 P. 891; People v. George, supra; People v. Frank, 71 Cal. App. 575, 585, 236 P. 189.

[3] There can be no question but that the remarks of the district attorney were highly improper and constituted misconduct on his part. The question, however, that we are called upon to determine is whether from an examination of the entire record, including the evidence, we can say that the misconduct of the district attorney was of such a character that the harmful result therefrom could probably have been entirely obliterated from the minds of the jury if an opportunity had been given the trial judge and he had made timely and proper instructions to the jury. If this were reasonably possible, then the defendant cannot remain silent and take the chance of a favorable verdict and, losing, urge as grounds for a reversal an error which, but for his silence, might have been entirely corrected. If, however, where it fairly appears, as we think it does in the case at bar, all of the record, including the evidence, considered, that the remarks of the district attorney were a factor in influencing the jury in arriving at their verdict of guilty, such result is a miscarriage of justice, and the judgment and order should be reversed. It might be added at this point that the remarks of the district attorney were, in our opinion, of such a character that any attempted correction thereof by the trial court might well have had the effect of further imbedding in the minds of the jury prejudice against the Jewish people when they are accused of burning insured property.

[4] We see no escape from the conclusion that the remarks complained of were calculated to, and no doubt did, inflame and prejudice the minds of the jurors against the defendant because he happened to be a Jew. Such remarks should never be made in a court of justice by any one and, especially, should they not be made by a sworn officer of the law, whose duty it is to see that the defendant has a fair and impartial trial and that he be not convicted except upon competent and legitimate evidence. A district attorney should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by appeal to race or religious prejudices, or any other unfair means, is to bring his office and the courts into distrust. If, indeed, the defendant be a Jew, it is no disgrace and should not be referred to at all. It should make absolutely no difference in a court of justice whether the defendant is a Jew, an Englishman, a

Frenchman, a German, a Chinaman, a negro, or an American; neither should it make any difference whether he be a millionaire or a pauper. All are equal before the law, and the verdict of the jury should be predicated upon the testimony produced at the trial alone, free from all racial and religious prejudices.

Our attention has not been called to any case in California, and our research has discovered none, where the precise or similar remarks here under consideration were made. The closest approach to the remarks of the district attorney in the case at bar is found in the case of People v. Jeans (Cal. App.) 249 P. 1089. In that case the defendant was a negro and was accused of murdering a white man, and found guilty by the jury of the crime of manslaughter. There the district attorney, in the course of his argument to the jury, said, "It will not be safe if you permit a defendant, a negro, to come in and slaughter a white man"; and this court said with reference thereto: "The remarks, standing alone, would appear to be an appeal to race prejudice." However, almost immediately thereafter the district attorney withdrew the remarks. This statement was bordering closely upon prejudicial misconduct, but this court held in that case that it was not prejudicial misconduct for the reason that the court in each instance, when the objection was made to the remarks of the district attorney, admonished the jury to disregard the remarks, and also admonished the district attorney to refrain from further statements of the character used, and the guilt of the defendant being very clearly established, and being charged with murder and only convicted of manslaughter, it could not therefore be said that the language used there resulted in a miscarriage of justice.

Many of the higher courts in other jurisdictions have had occasion to consider the effect of remarks made for the purpose of appealing to race or religious prejudices by prosecuting officers and other attorneys, and have uniformly condemned such conduct and in almost every case reversed the judgment for that reason alone.

In the case of Cluett v. Rosenthal, 100 Mich. 193, 58 N. W. 1009, 43 Am. St. Rep. 446, the Supreme Court of Michigan said:

"One other assignment of error remains to be noticed. In the closing address to the jury, counsel for plaintiff used the following language: 'These men from Jerusalem, that have got the evidence in their possession as to the truth or falsity of this claim, their mouths are sealed, and a padlock upon each one.' Counsel for defendant interposed, saying: 'We take an exception to the statement of counsel. There is nothing in this case to show any such thing.' Plaintiff's counsel replied: 'I presume very likely that you deny your nationality. I haven't any doubt of it.' 'The Court: I don't think you should have used that language at all.' 'Plaintiff's Counsel: Men from Jerusalem?' 'The Court: I don't think you should have used it. * * * 'Plaintiff's Counsel: Take it back then. Suppose they came from Podunk instead of Jerusalem. I don't care where they came from.' Further on, plaintiff's counsel proceeded: 'I would like to have before you the conversation between the Rosenthals, Gates L. Rosenthal, Rosen Bros., and the men that drew the mortgage in this case. * * *' It is apparent that the only purpose of this line of argument was to impress the jury with the belief that the nationality of the defendants should be taken as evidence against them. This is certainly not the policy of the law. The courts are open to aliens and citizens alike; and any attempt, by arousing the prejudice of jurors, to curtail this right, is a departure from the proper privilege of counsel, and, when carried to the extent indicated by the language quoted, is sufficient to justify a reversal of the case. * * *"

In the case of Moss v. Sanger, 75 Tex. 321, 12 S. W. 619, the Supreme Court of Texas said:

"In the closing address to the jury, counsel for appellees used the following * * *: 'This entire business is a concocted scheme from beginning to end; a deliberate scheme to swindle and defraud, gotton up by a Jew, a Dutchman, and a lawyer. Who are the parties in interest? A. Moss; his wife, Rose Moss; his mother, Mary Moss; his clerk, D. Golden; and then, B. Frieberg, the old he-Jew of all, who, no doubt, planned the whole thing. All Jews, or Dutch Jews, and that is worse.' * * * It was an inflammatory appeal to a prejudice, no doubt, conceived by counsel who made it to exist, and intended to influence the jury. It was the arraignment of a race not on trial. Cases ought to be tried in a court of justice upon the facts proved; and whether a party be Jew or Gentile, white or black, is a matter of indifference. The course pursued in this case was one that no court of justice ought for a moment to tolerate; and it certainly must be true that the judge who tried this cause did not fully understand the language of counsel, or he would not have permitted it, would have rebuked it, and ought to have punished its author."

In the case of Freeman v. Dempsey, 41 Ill. App. 554, that court said:

"We are impressed that the verdict was the result of a prejudice worked up against the appellant. It is in the record that he was denounced by the attorney for appellee as 'a Jew, a Christ-killer, a murderer of our Savior.' If the appellee is a Jew, on account of his birth, or parentage, it was not his fault, neither is it a disgrace; if on account of his religion, it is not a cause of reproach. As to the other epithets applied to him, denunciatory as they are of the whole Jewish race, it is almost inconceivable that they should be either uttered or tolerated in the trial of a cause in a court of justice. No one, doubtless, would admit, on reflection, more readily than the attorney for appellee, the gross impropriety of their use, especially at such a place and on such an occasion. Judgment is reversed and the cause remanded."

In the case of Golden v. State, 214 P. 946, in ordering a reversal, the Criminal Court of Appeals of Oklahoma said:

"The county attorney, assuming probably from the appearance of the defendant that he belonged to the Hebrew race, in his argument to the jury said: 'We all know the way of Jews' dealings in business and having their business dealings. * * * These are God's chosen people, who the Bible says shall gather into their arms all the wealth of the world.' * * * The spirit of our law is opposed to any discrimination against an accused because of his race, religion, wealth, or social station, and we think it was highly improper for the county attorney to go outside the record and misquote the Scriptures in a manner calculated to inflame and prejudice the minds of the jurors against this defendant because he was a Jew. * * *"

In the case of Garritty et al. v. Rankin et al., 55 S. W. 367, the Court of Civil Appeals of the state of Texas said:

"Counsel for defendants in his argument to the jury made statements not warranted by the evidence, and indulged in remarks as to some of the parties being Jews, etc., which were calculated to prejudice the minds of the jury against plaintiffs' cause. The court admonished him to stay in the record, and told the jury it was not proper for them to consider the race of the parties or witnesses referred to, and defendants' counsel then said he withdrew the remarks about Jews. The court instructed the jury, in considering their verdict, they would only consider the evidence as testified to by the witnesses, and not consider any remarks of counsel not supported by the testimony. The argument of counsel in the respect alluded to was very improper, and tended to prejudice the minds of the jury."

See, also, Hyman v. Kirt, 153 Mich. 113, 116 N. W. 536; State v. Bessa, 115 La. 259, 38 So. 985; Tannehill v. State, 159 Ala. 51, 48 So. 662; Harris v. State, 96 Miss. 379, 50 So. 626; Hampton v. State, 88 Miss. 257, 40 So. 545, 117 Am. St. Rep. 740; Hardaway v. State, 99 Miss. 223, 54 So. 833, Ann. Cas. 1913D, 1166; State v. Lee, 130 La. 477, 58 So. 155; Simmons v. State, 14 Ala. App. 103, 71 So. 979; State v. Brown, 148 La. 357, 86 So. 912; Perdue v. State, 17 Ala. App. 500, 86 So. 158; Funches v. State, 125 Miss. 140; 87 So. 487; Bailum v. State, 17 Ala. App. 679, 88 So. 201; Tucker v. State, 96 Tex. Cr. R. 356, 257 S. W. 260; Roland v. State, 137 Tenn. 663, 194 S. W. 1097; State v. Thompson (Mo. Sup.) 238 S. W. 115; Arnold v. State, 96 Tex. Cr. R. 214, 256 S. W. 919; Thompson v. State, 27 Ga. App. 637, 109 S. E. 516.

The learned Deputy Attorney General seeks to avoid the prejudicial effect of the remarks of the district attorney upon two grounds: First, that no objection was made by the defendant, or his counsel, in the trial court. As we have already pointed out, it is not always essential that an exception and assignment of misconduct and request that the jury be instructed to disregard the improper remarks, in order to have such remarks reviewed by this court. It depends, as we have stated, upon the character of the remarks and the reasonable probability of prejudice arising therefrom in the minds of the jury. Second, it is contended by the respondent that the remarks of the district attorney were invited by certain testimony in the case, brought out by the defendant, and by the remarks of defendant's counsel. The testimony referred to by respondent was during the examination of the witness G. M. Roy, who was called as a witness for defendant, and being interrogated by defendant's counsel, testified as follows:

"Q. Do you know one L. R. or Louis Gallegos? A. I do.

"Q. State whether or not you were present at the home of L. R. Gallegos, Louis Gallegos, in the city of Modesto in the month of April, 1925, one evening, at which time you were there, Mr. Gallegos was there, Mrs. Bloom was there, and Ernest Simon was there, when Mr. L. R. Gallegos or Louis Gallegos said in referring to the smoke damage which occurred in the duplex apartments on or about April 21st, 1925, 'You are a fine bunch of Jews; why didn't you let it burn?' A. I was present when he said that, but there was also Mrs. Gallegos's brother present at the time.

"Q. I see. And he said that? A. He did."

[5-7] It seems too clear to admit of any doubt that this evidence would not justify the district attorney in arraigning the defendant before the jury as a Jew, and when a Jew is accused of burning insured property, as the defendant is in this case, this alone would give rise "to a well-grounded suspicion of his guilt," when the law expressly provides that the fact that a person is accused of a crime shall not be taken as any evidence of guilt, and such fact shall not weigh against him at all, but, on the contrary, every presumption is in favor of innocence, and before a defendant can be convicted of a criminal offense, the jury must be satisfied to a moral certainty and beyond a reasonable doubt of his guilt from the evidence alone. The testimony was merely a repetition of what the witness claimed that the witness L. R. Gallegos had told the defendant and other members of his family. Gallegos was one of the important witnesses for the plaintiff and was also the owner of a half interest in the apartment house in which the fire occurred. The argument of defendant's counsel, Mr. Carlson, is not contained in the record. However, if the comments of the district attorney were not warranted by the evidence, as we have shown they were not, such comments would not be justified by the fact that the defendant's counsel, or a witness, or any one else, had already committed a like impropriety. People v. Kramer, supra.

[8] It was also contended by the learned Deputy Attorney General, in his oral argu-

ment and in his brief, that by reason of the fact that the prospective jurors, upon their voir dire, were asked by defendant's counsel whether the fact that the defendant and his sister, Mrs. Bloom, are Jewish people would prejudice them against the defendants. This would certainly be no basis for the remarks of the district attorney. It is perfectly proper upon the voir dire for the defendant to have asked this question, and the purpose of it was to obtain a jury that would not be prejudiced against the defendants by reason of the fact that they were Jews, and to prevent the very prejudice in the minds of the jury that the remarks complained of were calculated to instill.

There can be no doubt but what the fire was of an incendiary origin. The evidence against the defendant and his sister was wholly circumstantial, and while it cannot be doubted that the evidence of the prosecution points to defendant's guilt, the evidence presented by defendant and several apparently respectable and disinterested witnesses would, if believed, have established defendant's innocence, and we cannot say that the evidence presented on the trial of the case was such that the guilt of the defendant was entirely manifest. If we could say that the evidence establishes defendant's guilt beyond any doubt, then under the saving grace of section 4½ of article 6 of the Constitution it might be held that there had been no miscarriage of justice.

[9] In concluding, as we do, that the judgment of conviction and order denying a new trial must be reversed, we are not unmindful of the strong disinclination of our courts to set aside convictions upon the ground of misconduct of the district attorneys, and put the state and its officers to the trouble and expense of a new trial; nevertheless, when it clearly appears, as we think it does in the case at bar, that the substantial rights of a defendant have been invaded and a fair trial denied him, because of the misconduct of the trial court or the district attorney, the appellate courts will not hesitate to reverse judgment so obtained. For the protection of the innocent who may be accused of crime, the law has very properly prescribed certain rules of practice in the trial of an action, which should be strictly observed as well in the case of the guilty as of the innocent, and in carrying out this humane and wise provision of our law, it is the duty of this court not to allow the fountains of justice to be poisoned by what, in the instant case, savors so strongly of race prejudice.

[10] The other contention of the defendant is that the trial court erred in instructing the jury that they might find defendant guilty as charged in the indictment if said defendant entered into a conspiracy with Rose Bloom or other persons to burn the property with intent to defraud the insurers, etc., even though defendant did not do the actual burning, etc. It seems to be the theory of defendant that, he and his sister having been charged with burning the property with intent to defraud the insurers, he could not be convicted under this indictment with entering into a conspiracy to burn the property, etc., as it would be a different offense than that charged in the indictment. There is no merit in this contention. Section 31 of the Penal Code provides in part:

> "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

For the reasons already stated, we are of the opinion that the judgment and order must be reversed; and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

81 Cal. App. 49

PEOPLE v. LEE. (Cr. 1335.)★

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1927. Hearing Denied by Supreme Court March 24, 1927.)

1. Abortion 🔑11—In prosecution for administering drug to produce miscarriage, evidence held to sufficiently corroborate prosecutrix (Pen. Code, §§ 274, 1108).

In prosecution for violating Pen. Code, § 274, by administering drug to pregnant woman to cause miscarriage, evidence *held* sufficient to meet requirements of section 1108, relating to corroboration.

2. Abortion 🔑11—Corroboration of victim of abortion as to some of material facts held sufficient (Pen. Code, §§ 274, 1108).

It is not essential, under Pen. Code, § 1108, that person on whom abortion was procured be corroborated in every respect and in regard to every material fact; corroboration as to some of material facts constituting necessary element of crime under section 274, causing abortion, being sufficient.

3. Abortion 🔑11—Evidence corroborating victim of abortion, if tending to connect defendant with crime, is sufficient (Pen. Code, § 1108).

Though more than mere suspicion is required by way of corroboration under Pen. Code, § 1108, evidence corroborating one upon whom abortion was procured is sufficient if, of itself, it tends to connect defendant with commission of offense, notwithstanding corroboration may be only slight and, of itself, entitled to but little consideration.

★Hearing denied by Supreme Court.

4. Criminal law ⚷404(4)—In prosecution for administering drug to produce abortion, surgical instruments found in defendant's possession held admissible to show intent in administering drug (Pen. Code, § 274).

In prosecution for violating Pen. Code, § 274, by administering drug to pregnant woman, surgical instruments found in defendant's possession *held* admissible for purpose of showing intent with which drug was administered.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Charles Lee was convicted of violating Penal Code, § 274, by administering a drug to a pregnant woman, causing miscarriage, and he appeals. Affirmed.

Austin W. Arnold and H. M. Anthony, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. Appellant was convicted of violating section 274 of the Penal Code, the charge being that he administered a drug to a pregnant woman with the intent to procure a miscarriage, and on this appeal presents two points, contending, first, that the testimony of the woman upon whom the crime is alleged to have been committed was not corroborated as required by section 1108 of said Code; and, secondly, that the court erred in admitting in evidence, over his objections, certain surgical instruments found in his apartment, wherein, it is claimed, the crime was consummated.

The following facts appear from the testimony of the woman upon whom the offense is alleged to have been committed: She was 22 years of age, unmarried, and on February 3, 1926, which was the date of the alleged commission of the crime, was from two to three months pregnant. On the morning of the day mentioned, having previously obtained appellant's name and address from a woman friend, she called on appellant at the address given for the purpose of having an abortion produced. Appellant, who admits that he is not a physician or surgeon, took her to a bedroom in the ten-room flat occupied by him, where she told him of her pregnant condition and asked him to give her "something." In reply appellant told her not to worry, that she was going to be all right after she had taken something; and thereupon, without the aid of instruments, he made a vaginal examination of her. She stayed in appellant's flat the remainder of the day, spending part of the time in bed, and about six o'clock that evening appellant gave her a capsule filled with white substance, which she swallowed. Remaining in the flat all night, she arose about noon the next day, and, while crying, asked appellant to allow her to go home, but he replied, "You can't go home now; you have to stay until you be all right." She then went back to bed, and appellant brought a hot-water bag which he placed on her abdomen. She again arose about 4 o'clock in the afternoon, and, while sitting in a chair reading, two police officers entered the room, and, upon asking her in appellant's presence what she was doing there, she "told them everything." Thereupon she was taken to the emergency hospital, remaining there all night, and the next day was removed to another hospital, where, about midnight, her miscarriage occurred.

She further testified that at no time prior to going to appellant's flat had she taken any medicine, nor had any instrument been used upon her, either by herself or any one else, for the purpose of procuring a miscarriage.

In corroboration of the foregoing testimony, the prosecution produced as a witness a woman who, after stating that with her husband and children she occupied two of the ten rooms in appellant's flat, testified as follows: That she rented the rooms in the flat for appellant, turning the rent over to him, and that some of the rooms were occupied by men; that she responded to the doorbell when the prosecuting witness arrived at the flat, and took her to appellant's apartments; that later, during the day, appellant told her that the prosecuting witness "was in a fix about three months," and that he "was going to help her get rid of it"; that the prosecuting witness stayed in the flat that night, but did not rent a room, nor was any rental collected from her.

Joseph M. Bruders, one of the police officers mentioned, gave testimony in further corroboration of the prosecutrix, stating that, with Corporal Shannon of the police department, he called at appellant's flat about 4:30 o'clock on the afternoon of February 4, 1926, and, after being admitted by a woman, went upstairs, where they saw appellant. They asked him if he was "Dr. Lee," and he replied that he was; that they then observed the prosecutrix sitting in the room, and in the presence of appellant, held a conversation with her. They first asked her why she was there, and she replied that she was pregnant and had come there to be treated. The officers then inquired if the doctor had "done anything," and she stated that he had given her "a couple of pills." Thereupon she told them about having suffered pains, about crying, and that appellant had given her the hot-water bag to quiet her; furthermore, that appellant told her that "everything would be all right, that she was to stay there, it would be a short time until he would be through with her."

The record does not disclose that appellant made any denial or reply to the statements thus made in his presence by the prosecutrix, nor does it appear that he was asked about any of them except that, when the prosecutrix stated that he "took up her clothes and examined her," the officers asked him why he had done so, and he replied, "to see if she was clean." The prosecutrix further stated during that conversation that appellant had not used any instruments.

The witness was thereupon allowed to identify certain surgical instruments found in appellant's apartments, and, subject to appellant's objections, they were received in evidence. Three of them, the evidence shows, were instruments used in making vaginal examinations, and another was made expressly to grasp the cervix of the uterus to bring it down into better view for examination.

In addition to the foregoing evidence, testimony was given by the hospital attendants to the effect that the age of the fœtus passed by the prosecutrix as the result of the miscarriage was about three months, and that one capsule full of croton oil administered to a pregnant woman would cause an abortion.

[1-3] We are of the opinion that the evidence above narrated, taken as a whole, is legally sufficient to meet the requirements of the statute relating to corroboration. Pen. Code, § 1108. Under the decisions it is not essential that the person on whom the abortion is procured be corroborated in respect to every fact and detail nor as to every material fact, but only as to some of the material facts which constitute a necessary element of the crime. People v. Watson, 21 Cal. App. 692, 132 P. 836. For illustration, an essential element in the crime here alleged is a criminal intent on the part of the accused to procure an abortion, and, therefore, any testimony in addition to that of the prosecutrix, tending to show intent, would be a sufficient corroboration of her testimony to bring the case within the statute, even though she be not corroborated as to the particular method employed to produce the abortion. People v. Josselyn, 39 Cal. 393. Furthermore, although more is required by way of corroboration than to raise a mere suspicion, yet the corroborating evidence is sufficient if it, of itself, tends to connect the defendant with the commission of the offense, notwithstanding the corroboration be slight and of itself entitled to but little consideration. People v. Watson, supra; People v. Thompson, 16 Cal. App. 748, 117 P. 1033.

The corroborating evidence here shows that beyond question the prosecutrix was pregnant; that on the day she entered appellant's apartments he stated to the woman in charge of his flat that the prosecutrix was "in a fix about three months," and that he was going "to help her get rid of it." The next day, while still in appellant's apartments, and in his presence, the prosecutrix stated, in substance, that the appellant had given her "a couple of pills" for the purpose of procuring an abortion, which had caused her to suffer pains; and, within 48 hours after having made these accusatory statements—which, so far as the record shows, the appellant did not deny—the prosecutrix suffered a miscarriage. In view of the legal rules hereinabove set forth we think the corroboration ample.

[4] The surgical instruments were admissible in evidence as bearing upon the question of the intent with which the medicine was administered. Moore v. State, 37 Tex. Cr. R. 552, 40 S. W. 287; State v. Barnes, 75 N. J. Law, 426, 68 A. 145. Said instruments were found in appellant's possession at the place where the crime is alleged to have been consummated; and, despite the admitted fact that the miscarriage of the prosecutrix was sought to be accomplished by administering medicine, it may be fairly inferred, from the testimony showing the nature of the instruments and the use to which they are put, that their use would have been probable in the subsequent treatment of the prosecutrix if she had continued to remain under appellant's care.

Finding no error in the record, the judgment is affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

80 Cal. App. 739

ROSE v. SUPERIOR COURT IN AND FOR IMPERIAL COUNTY et al. (Civ. 5426.)★

(District Court of Appeal, Second District, Division 2, California. Jan. 21, 1927. Rehearing Denied Feb. 19, 1927.)

1. Prohibition 🔑10(2)—Prohibition lies where accusation does not state facts constituting cause for removal of officer or confer jurisdiction to proceed therewith (Pen. Code, § 772).

The writ of prohibition is the proper remedy, where the accusation does not state facts sufficient to constitute a cause for removal of an officer or confer jurisdiction on the Superior Court under Pen. Code, § 772, to proceed with the accusation.

2. Prohibition 🔑1—Writ of prohibition is preventive, not corrective.

The function of the writ of prohibition is preventive and not corrective.

3. Prohibition 🔑30—Relief appropriate to writ of review cannot be granted in prohibition to review intermediate or interlocutory order of court at instance of individual respondent.

Relief appropriate to the writ of review cannot be granted in proceedings for a writ of prohibition, where it is asked for by an individual respondent, not the court, and the order sought to be reviewed is intermediate or interlocutory.

★Rehearing denied.

4. Officers 🔑74—Order striking parts of accusation in proceedings to remove officer is not appealable (Pen. Code, § 772).

An appeal does not lie from an order striking portions of the accusation in proceedings under Pen. Code, § 772, to remove a public officer; such order being intermediate and reviewable, if beyond the court's jurisdiction, by a writ of review at the appropriate time.

5. Officers 🔑74—Issues may be raised in proceedings to remove officer by demurrer or motion to strike parts of accusation (Pen. Code, § 772).

It is proper, under Pen. Code, § 772, to raise the issues of law, in proceedings for removal of public officers, by a demurrer to or motion to strike parts of the accusation.

6. Officers 🔑66—Overcharges collected from political subdivision by officer thereof is ground for removal (Pen. Code, § 772).

"Charging and collecting illegal fees for services rendered, or be rendered, in his office," stated in Pen. Code, § 772, as ground for removal of public officer, refers to overcharges collected from the political subdivision of which he is an official, as well as to collection of fees from third parties.

7. Waters and water courses 🔑227—Whether irrigation district director's salary is in lieu of mileage held immaterial (Irrigation District Act, § 57).

Whether the salary of directors of certain irrigation districts under Irrigation District Act, § 57 (St. 1897, p. 254), is in lieu of mileage, as well as per diems, need not be determined in proceedings to prohibit the trial of such an officer, under Pen. Code, § 772, for collecting money on false representations that it was for mileage and for collecting compensation in excess of such salary.

8. Officers 🔑98—"Fees," as used in statute prohibiting improper charges by public officials, are not limited to those collected for services to public (Pen. Code, § 772).

Pen. Code, § 772, being intended to protect the public from improper charges by their officials, the word "fees," as used therein, is not limited to those which may be collected by a public official for services rendered by him to the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fees.]

9. Statutes 🔑184—Wrong sought to be curbed is important in construing statute.

The wrong sought to be curbed is an important element entering into the proper construction of a statute.

10. Waters and water courses 🔑227—Charges by irrigation district director for mileage held illegal fees for official services (Pen. Code, § 772).

Improper charges by an irrigation district director for mileage, expenses of lobbying for the passage of a statute, political propaganda, etc., and compensation in addition to salary, *held* charges and collections of illegal fees for services rendered in his office, within Pen. Code, § 772.

11. Waters and water courses 🔑227—Illegal overcharges by irrigation district director give superior court jurisdiction to remove him, though collected through taxing channels; "charging and collecting" (Pen. Code, § 772).

Any illegal overcharges by an irrigation district director constitute charging and collecting of illegal fees for services rendered, within Pen. Code, § 772, so as to give the superior court jurisdiction to remove him from office, though collected from the public through taxing channels.

12. Waters and water courses 🔑227—Irrigation "district" officers are public officers, subject to removal by superior court (Pen. Code, §§ 772, 889; Const. art. 4, § 18).

Irrigation district officers are public officers within Const. art. 4, § 18, and hence may be removed by the superior court, under Pen. Code, § 772, as against objection that they are state officers and that such districts are not strictly political subdivisions; "district," as used in section 889, which must be construed with section 772, describing a geographical part of the state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, District.]

13. Statutes 🔑225—Statutory provisions on same subject must be so construed as to maintain integrity of both, if possible.

Two statutory provisions relating to the same subject-matter must be construed so as to maintain the integrity of both, if possible.

14. Waters and water courses 🔑227—Statute authorizing removal of irrigation district officers willfully violating duty does not preclude removal for other causes (Irrigation District Act, § 73; Pen. Code, §§ 758, 772).

Irrigation District Act, § 73 (St. 1897, p. 254), subjecting officers of irrigation districts to removal for "willful violation of any express duty," does not preclude removal for misconduct or misfeasance and nonfeasance, under Pen. Code, §§ 758, 772; the remedies being cumulative and separate.

Craig, J., dissenting.

Application by Mark Rose for a writ of prohibition to the Superior Court of Imperial County, E. J. Marks, Judge, and another. Peremptory writ denied.

Chas. L. Childers, of El Centro, A. C. Finney, of Brawley, and D. B. Roberts, of El Centro, for petitioner.

Harry W. Horton, of El Centro, and Kendall B. Perkins, of Long Beach, for respondents.

THOMPSON, J. This proceeding is brought for the purpose of prohibiting the superior court from proceeding with the trial of an accusation against Mark Rose as one of the directors of the Imperial Irrigation district, and for his removal from office as such director. The accusation in effect alleges that George Herrick Davis is a resident, qualified elector, and voter and taxpayer within the district; that Mark Rose was elected a director of the district in February, 1921; that Mark Rose has not nor has any person been elected as his successor, and that though an election was purported to have been held in February, 1925, that by a judicial determination the purported election was held void; that therefore Rose continues to hold by reason of the election of 1921; that since the election in 1921 Rose has "knowingly, willfully, corruptly, wrongfully, and intentionally" violated the express duty of his office in the following particulars:

First: That Mark Rose as such director approved and caused the expenditure, by warrants, of large sums of money for illegal and improper purposes (all of which are set out in detail), and failed to prevent the payment thereof, having at the time ability so to do.

Second: That Mark Rose as such director incurred indebtedness on behalf of the district, illegally and unlawfully and for purposes in excess of the provisions of the California Irrigation District Act and for purposes for which the district could not expend its funds, and that he failed to prevent the incurring of the indebtedness, he having at the time the ability to prevent. The alleged improper expenditures are also set out in detail.

Third: That Rose as such director did willfully, unlawfully, corruptly, and intentionally pay and cause to be paid to himself $4,967.74, which he claimed was to cover traveling and other expenses, laid out by him in lobbying for the passage of an act known as the "Swing-Johnson Bill"; but that in truth and in fact a large portion thereof was not incurred or paid out by Rose, but was appropriated to his own use and benefit, and that Rose also had paid to himself $1,500 as and for traveling expenses to be later accounted for, for which he has at all times refused to account, and that all of said payments are in addition to and in excess of the salary allowed by the act.

Fourth: That Rose as such director has charged and collected mileage at the rate of 15 cents per mile for attending meetings of the board of directors.

Fifth: That Rose as such director also caused to be paid to himself in varying amounts the sum of $2,809.56 for mileage and other expenses, which mileage charges were false and fraudulent, and Rose converted the sums so collected to his own personal use and benefit.

Sixth: That on December 7, 1923, Rose demanded and caused to be paid to himself the sum of $1,260 as and for extra compensation and in addition to the salary allowed by law.

Seventh: That, although formal demand was made in and since March, 1925, for an accounting and that the board recover the expenditures alleged to have been improperly paid out, no account has been rendered and no action taken to recover the expenditures.

Eighth: That subsequent to a permanent injunction issued by the superior court restraining Rose and his codirectors from expending any sums in behalf of any legislation pending in the Congress of the United States, Rose, for the sole purpose of evading the injunction, caused the salaries and compensation of certain employees to be raised, collected from the employees the difference, and continued to spend the same for the prohibited purposes, and employed others ostensibly to work for the district, but in fact to work for and on behalf of the legislation.

It is unnecessary to attempt to enumerate the various items expended further than to say that other than those paid to the petitioner and defendant, they are all alleged to have been in one way or another incurred or expended in behalf of pending legislation, either for publicity or in some way connected with political propaganda.

The defendant demurred, generally and specifically, to the accusation, and moved to strike certain portions thereof. The demurrer was overruled, but the motion was granted in part. The court struck out practically all of the items of expenditures for propaganda work as recited above.

Petitioner takes the position that the accusation does not allege facts sufficient to constitute a cause for removal under section 772 of the Penal Code or section 73 of an act known as the "California Irrigation District Act" (Stats. 1897, p. 254); Deering General Laws, 1923, p. 1425, and, especially, that section 772 of the Penal Code does not confer on the court jurisdiction to remove a director of an irrigation district.

The respondent George Herrick Davis complains of the action of the respondent court in striking out portions of the accusation, and in an affirmative answer asks that this court advise the trial court of the law applicable to the trial of said action. He especially urges that under section 772, neither a demurrer nor a motion to strike is contemplated, and that the order striking portions of the complaint should be declared ineffective and the trial be permitted to proceed under the original allegations and such denials as may be interposed.

[1-3] It being conceded and established by a long line of decisions that the writ of prohibition is the proper remedy where the accusation does not state facts sufficient to constitute a cause for removal or confer upon the superior court the jurisdiction to proceed with the accusation, the first question necessary for us to consider is whether or not in this proceeding we should review the action of the respondent court in striking out portions of the accusation. It must be borne in mind that the function of the writ of prohibition is preventive and not corrective.

Traffic Truck Sales Company v. Justice Court, 192 Cal. 377, 220 P. 306; Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192. And while it is true in the cases cited by respondent that upon application for the prohibitive writ the court granted relief in keeping with the record and law of the case as therein developed, but appropriate to the writ of review, yet that relief was granted at the instance of the petitioner when the particular thing complained of could not be reached by prohibition. Examples of this rule are found in Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; Traffic Truck Sales Co. v. Justice Court, 192 Cal. 377, 220 P. 306; and Finn v. Butler, 195 Cal. 759, 235 P. 992.

[4, 5] In this case we find two fatal differences: First, that the individual respondent, and not the respondent court, asks for the relief; and second, the order sought to be reviewed is an intermediate or interlocutory order which is not final in its nature. An appeal from the order does not lie on account of the fact that it is intermediate in its nature and not made an appealable order (Swain v. Burnette, 76 Cal. 299, 18 P. 394, and Cleland v. Walbridge, 78 Cal. 358, 20 P. 730), and which, even though an appeal does not lie from the final judgment, might be reviewed, if in excess of the court's jurisdiction, by a writ of review at the appropriate time. Dabney v. Wilhelm, 190 Cal. 340, 212 P. 203. We do not believe that it is in keeping with the rule announced by respondent to adopt such an innovation, particularly where, as here, the court was apparently acting within its jurisdiction. It has been the practice to raise the issues of law by a demurrer or motion to strike, and we see nothing improper in this method of confining and defining the issues. See Crossman v. Kenniston, 97 Cal. 379, 32 P. 448, Crossman v. Lesher, 97 Cal. 383, 32 P. 449, and In re Curtis, 108 Cal. 662, 41 P. 793. For the purposes of this hearing, therefore, we dispose of the charges herein designated as first, second, eighth, and a part of the seventh, leaving for consideration the third, fourth, fifth, and sixth and that part of the seventh wherein it is alleged that no account has been rendered.

[6-9] Petitioner's contention that "charging and collecting illegal fees for services rendered, or to be rendered, in his office" refers not to overcharges collected from the political subdivision of which he is an official, but only to the collection of fees from third parties, cannot be sustained. Nor is it necessary in our opinion to determine whether or not the salary provided for by section 57 of the California Irrigation District Act in an irrigation district containing 500,000 acres or more, which it is alleged the Imperial irrigation district does contain, is in lieu of mileage as well as the per diems, for the reason that the accusation herein charges the collection of moneys on the representation that it was for mileage and that it was not in fact for mileage. It also charges the collection of compensation over and above the salary therein allowed, and to which petitioner was not entitled. The allegations, therefore, do not relate solely to mileage, but they do charge that Rose collected from the district moneys to which he was not in any way entitled and that the said moneys were by him appropriated to his own use. Petitioner argues seriously and refers to many sections of the Code wherein the word "fees" is used to describe fees which may be collected by a public official for services rendered by that official to the public, but we do not think that it was intended that the word "fees" as used in section 772 of the Penal Code should be limited by any such definition. At least one of the purposes of the section is to assure the public that their officials shall not be permitted to mulct them by improper or illegal charges. And as was pointed out in People v. Lips, 59 Cal. App. 381, 211 P. 22, the wrong sought to be curbed is an important element entering into the proper construction of a statute.

[10] Petitioner has cited two cases from Idaho, Hudson v. Bertsch, 38 Idaho, 52, 220 P. 109, and Daniels v, Wrighton, 38 Idaho, 55, 220 P. 110, apparently growing out of one situation, which seem to hold that items of actual expense should not be classified as fees. It should be noted, however, that the items in the first case were included by mistake without suggestion of a willful attempt to overcharge, and in the other case $12 was collected as the actual expense of a trip to take possession of a gambling machine, and that for some reason not clearly shown the prosecution was dropped. In neither of these cases is there suggested a willful attempt to overcharge or burden the public. They are therefore to be distinguished from the allegations here made. There are direct allegations in the petition that the moneys claimed and collected by Rose were not to cover any proper expenses laid out by him, but that they were so named only for the purpose of giving them the appearance of regularity. It cannot be argued from the allegations that the claims were for reimbursement. We think the correct rule is enunciated in Rankin v. Jauman, 4 Idaho, 394, 39 P. 1111, State v. Richardson, 16 N. D. 1, 109 N. W. 1026, and State v. Borstad, 27 N. D. 533, 147 N. W. 380, Ann. Cas. 1916B, 1014, which were all cases involving the collection of per diems and mileage from the political subdivisions of which the accused was an officer. In State v. Borstad, supra, the argument in this particular was dismissed with this language:

> "We find no merit in the contention that the charge for the attendance at the association of county commissioners at Fargo, which is conceded was illegal, was not 'a charge and collec-

tion of illegal fees for services in his office,' for which the defendant could be removed. It is sufficient to say that it was presented and allowed as a fee of the office."

[11] It cannot be persuasively argued that the Legislature intended to make the collection of fees from the public an offense for which the official might be removed and at the same time say that moneys collected illegally from the public, by passing through the channels of the taxing power, should not. It is the wrong of burdening the public with charges with which they should not be burdened that constitutes the offense. An examination of the civil action, County of Los Angeles v. Cline, 37 Cal. App. 607, 174 P. 73, indicates further that the rule should be that any illegal overcharges should be held to be the "charging and collecting" of illegal fees for services rendered, within the contemplation of section 772 of the Penal Code. It is therefore within the jurisdiction of the court in so far as this question is concerned for it to proceed to hear the charges herein designated as third, fourth, fifth, sixth, and that part of the seventh not stricken out.

[12] Petitioner's next contention is that a director of an irrigation district is a state officer and not a district officer, and, being such, the superior court has no jurisdiction to entertain the accusation under section 772 of the Penal Code, which provision reads as follows, to wit:

> "When an accusation in writing, verified by the oath of any person, is presented to a superior court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered, in his office, or has refused or neglected to perform the official duties pertaining to his office the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented, and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation, and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a decree that the party accused be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer, and such costs as are allowed in civil cases."

He relies upon Kilburn v. Law, 111 Cal. 237, 43 P. 615, wherein it was held that the superior court had no jurisdiction to entertain an accusation against the bank commissioners, and authorities holding that irrigation districts are not strictly political subdivisions nor strictly public corporations, but government mandatories or agencies vested with limited powers to accomplish limited and specific work. It is apparent, we think, that an analogy cannot be drawn between bank commissioners whose activities and powers are state-wide and directors of an irrigation district confined to a particular district. Nor do we think it is significant that they are not strictly political subdivisions. The directors are elected by the qualified electors and voters of the irrigation district, and are responsible to, and answerable to, the voters of that district for a proper discharge of their official duties. It would be a strained and wholly unjustified construction to say that such officials should not be answerable to the voters of the district the same as officers of a municipality or other political subdivision. The clear legislative intent was to protect the public against derelict officials performing their duties within the county in which the superior court sits.

Petitioner attaches much importance to the statement found in the opinion in Re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, that, "The district officers thus become public officers of the state," and argues that this is the equivalent of saying that they are state-wide officers. He overlooks the words "district officers" and also the principles therein enunciated as reasons for holding the act to be constitutional, to wit: That the state, operating through the Legislature, has a right to delegate part of its authority to a district to attain the general welfare, but which may in fact, so far as legislative matters go, only affect a particular district. That as the holders of this delegated authority these officers of a district do represent the legislative authority of the state. We think this is made clear by a further quotation from that case as follows:

> "With greater propriety has it been left to the Legislature to provide the mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the state in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the Legislature in its desire to provide for the general welfare of the state, and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this state the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which, without such restriction, it could itself have exercised; and in providing for such organizations it need confer upon them only such powers, as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the state, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws with the Legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these

objects the law is the same, but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the Legislature would be justified, under its legislative power, to pass general laws in making such provision for that district. Whenever a special district of the state requires special legislation therefor, it is competent for the Legislature, by general law, to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as, in its judgment, are proper to be exercised within and for the benefit of such district."

Therefore, in using the words "public officers of the state," the court intended to convey the meaning that they were public officials, and in that sense every public official, whether of a municipality, county, district or state, be his duties of great or minor importance, is a "public officer of the state." This is but another way of expressing what was also said by the court in that case:

> "Its" (the district) "officers are public officers, chosen by the electors of the district, and invested with public duties."

Section 889 of the Penal Code must be construed with section 772 of the Penal Code, but when the word "district" is used in section 889 of the Penal Code it is descriptive of a geographical part of the state, and it may be a school district, an irrigation district, or any other district to which has been intrusted the discharge of certain public duties for that particular district.

In re Madera Irrigation District, supra, is authority, however, for the proposition that officers of the irrigation district are public officers or officials. And as such we are constrained to hold to be within the contemplation of section 18, art. 4, of the Constitution, designating the Legislature as the body to provide ways and means for the removal of those officers not liable to impeachment as that word is ordinarily understood. They are charged with the discharge of public duties for the general welfare of a particular district. Or, as stated in Coulter v. Pool, 187 Cal. 183, 201 P. 120, agents for a particular political unit exercising some governmental function.

[13, 14] Petitioner also questions the jurisdiction of the court on the ground that section 73 of the California Irrigation District Act provides the only offenses for which the directors of an irrigation district may be removed, and, being exclusive in its nature, section 772 of the Penal Code cannot apply. The material portion of section 73 of the California Irrigation District Act reads:

> "For any willful violation of any express duty herein provided for, on the part of any officer herein named, he shall be liable upon his official bond, and be subject to removal from office, by proceedings brought in the superior court of the county wherein the office of the board of directors of the district is located, by any assessment payer of the district."

It will be noted that section 73 uses the words, "willful violation of any express duty herein provided for." We see nothing herein to indicate that the "willful violation of any express duty" provided for in the act itself is to be the only offense for which the official should be removed. It is a familiar rule of statutory construction that where there are two provisions relating to the same subject-matter they must, if possible, be construed so as to maintain the integrity of both. Bateman v. Colgan, 111 Cal. 580, 44 P. 238; People v. Superior Court, 64 Cal. App. 770, 222 P. 864. The only construction which does not do violence to this rule is that both remedies were intended to be authorized and were authorized for the protection of the public, and that it was intended that they should be cumulative and separate; section 73 of the California Irrigation District Act providing for willful violation of any express duty, set forth in the act, and sections 772 and 758 of the Penal Code providing the general remedies for misconduct or misfeasance and nonfeasance in office.

The peremptory writ is denied.

WORKS, P. J. I concur.

CRAIG, J. I dissent, mainly because, in my opinion, officers of an irrigation district are not subject to a proceeding of this nature.

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80 Cal. App. 724

DICKEY v. DUNN. (Civ. 5209.)

(District Court of Appeal, First District, Division 1, California. Jan. 20, 1927.)

1. Vendor and purchaser ⚷37(1)—Right of action of purchaser, relying on false representations, is not destroyed because means of knowledge were open to him.

Where a purchaser is justified in relying, and in fact does rely, on false representations, his right of action is not destroyed because means of knowledge were open to him.

2. Vendor and purchaser ⚷37(4)—Statement of value, made as positive affirmation of fact, may be fraudulent representation warranting rescission.

Statement as to value when made as positive affirmation of fact, and not as mere expression of opinion, may be a fraudulent representation warranting rescission.

3. Contracts 🔑100—Trial court must determine whether statement of value was made as expression of opinion, or statement of fact.

Where there is a doubt as to whether statement as to value is made as positive affirmation of fact, or is mere expression of opinion, the question is one for determination by trial court.

4. Evidence 🔑258(2)—Principal and agent 🔑123(1)—Evidence held to show real estate agent was acting for vendor, making his representations admissible in action for rescission.

Evidence *held* sufficient to sustain finding that real estate agent was acting for vendor, hence representations of agent were admissible in action for rescission.

5. Evidence 🔑471(3)—Testimony as to observations made on property held admissible in action to rescind.

Testimony of witnesses who were not shown to be experts, as to their observations made on property, *held* admissible in action to rescind.

6. Evidence 🔑501(7)—Testimony of owner of land in immediate vicinity, as to price paid therefor, held inadmissible in action for rescission.

In action to rescind sale of real estate, testimony of owner of land in vicinity, relative to price paid for property, *held* inadmissible.

7. Cancellation of instruments 🔑47—Evidence held to show purchaser acted with reasonable promptness in bringing action for rescission.

Evidence, in action to rescind purchase of real estate, *held* to show that purchaser acted with reasonable promptness, so that relief was not barred by laches.

8. Contracts 🔑352(6)—Question of whether party defrauded has rescinded promptly is primarily for trial court.

Whether or not party defrauded has rescinded promptly will depend on all circumstances of particular case, and is question primarily for trial court.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by John Henry Zimmerman against Burt A. Dunn. Judgment for plaintiff, and defendant appeals, Elizabeth W. Z. Dickey, as administratrix, being substituted for plaintiff after his death. Judgment affirmed.

Kaufman & Martel, of Santa Ana, for appellant.

Webster & Lyon, of Paso Robles, for respondent.

CASHIN, J. An appeal from a judgment rescinding an assignment of a contract for the sale of real property executed by appellant, Dunn, and a conveyance of like property by plaintiff, Zimmerman. Subsequent to the taking of the appeal, Zimmerman died and Elizabeth W. Z. Dickey, as administratrix of his estate, was substituted as respondent therein. The appeal is presented on the judgment roll with a bill of exceptions, specifying as grounds for reversal an insufficiency of evidence to sustain the findings and rulings by the court in admitting and rejecting certain testimony.

It appears without conflict that on March 7, 1921, appellant was the owner of a contract for the purchase of a 5-acre tract of land in San Luis Obispo county, the purchase price being the sum of $2,000, of which the sum of $500 had been paid. Appellant had improved the property by the erection thereon of a dwelling house and certain outbuildings. A well had been sunk thereon in which was installed a pump and a motor engine, and the land planted with prune trees. The plaintiff, who was the owner of a lot in the city of Los Angeles upon which was erected his dwelling house, wished to purchase country property, and to that end communicated with a real estate agent named Schutte, who resided in San Luis Obispo county. Shortly thereafter appellant, who also resided in the latter county, stated to the agent his wish to sell his interest in the 5-acre tract in question, and, being apprised by the latter of the communication from the plaintiff, went to Los Angeles and commenced negotiations, which led to an exchange of the properties.

It was alleged and found that, as the inducement to the purchase of appellant's interest, the latter represented the property to be of the value of $5,000, the land to be productive, free from hardpan, adapted to the raising of fruits and vegetables, and that the well thereon furnished an abundance of water fit for human consumption. It was further found that the property did not exceed in value $2,000, and that the representations alleged were, and were known to the appellant to be, untrue; that plaintiff, due to his lack of experience in the buying of farm and orchard property, knew nothing of the character and worth of the property, and relied wholly upon the representations made, all of which was known to appellant, and that the purchase was induced thereby.

Plaintiff, as the consideration for the transfer of his property, received the assignment mentioned and the sum of $300. After taking possession he expended the sum of $412.85 in an attempt to increase the water supply and in replacing fruit trees which, as may fairly be inferred from the evidence, died as the result of the presence of hardpan beneath the surface of the soil. These sums, less the amount received as above, were allowed as part of the judgment.

[1-3] The evidence shows that the plaintiff, who was by trade a watchmaker, had

no knowledge of soil conditions and was without sufficient experience to determine the truth of the representations. Where a purchaser is justified in relying, and in fact does rely, upon false representations his right of action is not destroyed because means of knowledge were open to him (Teague v. Hall, 171 Cal. 668, 154 P. 851) and while it appears that the plaintiff visited the property before the transfer was made, the evidence sufficiently supports the finding that he relied upon the representations both as to its value and character. The statements as to the character of the soil and as to the water supply were clearly misrepresentations of fact. French v. Freeman, 191 Cal. 579, 217 P. 515; Stone v. McCarty, 64 Cal. App. 158, 220 P. 690. A statement as to value is not always made as a mere expression of opinion. It may be a positive affirmation of a fact, intended as such by the party making it, and reasonably regarded as such by the party to whom it is made; and when it is such it is like any other representation of fact, and may be a fraudulent representation warranting rescission. Crandall v. Parks, 152 Cal. 772, 93 P. 1018. Where there is a doubt as to whether or not such representation was intended and understood as the expression of an opinion or a statement of fact, the question is one for determination by the trial court. French v. Freeman, supra; Stockton v. Hind, 51 Cal. App. 131, 196 P. 122.

[4] Evidence of certain representations made by Schutte, the real estate agent, was admitted over appellant's objection that the evidence was insufficient to show that the former was acting as agent for appellant in the transaction. While it appears that no written authority to act was given by appellant, it was shown that the latter alone paid for the service rendered; that he was accompanied by the agent to Los Angeles, where both met the plaintiff; and that when the latter inspected the land in question, appellant being then absent, the agent was present. The evidence was sufficient to sustain a finding that the latter was acting for appellant and to negate the contention that he was merely a middleman.

[5] Certain witnesses, who were not shown to be experts, testified over appellant's objection to their observations made on the property as to the existence of hardpan, and one as to the number of replanted trees thereon as compared with those on neighboring land. This testimony was relevant, related to observed facts, and was properly admitted.

[6] A witness called by appellant, who testified that she was the owner of a lot in the tract wherein the property in question was situated, but was not familiar with the prices of land in the immediate vicinity, was asked, on direct examination, to state the price paid for her property. An objection to the question was properly sustained. Central Pac. R. R. Co. v. Pearson et al., 35 Cal. 247; Spring Valley W. W. v. Drinkhouse, 92 Cal. 528, 532, 28 P. 681; Freitas v. Suisun City, 170 Cal. 263, 267, 149 P. 553; Estate of Ross, 171 Cal. 64, 66, 151 P. 1138; Reclamation Dist. v. Inglin, 31 Cal. App. 495, 500, 160 P. 1098.

[7, 8] Appellant further contends that the right to relief is barred by laches. The evidence shows that plaintiff took possession during the month of March, 1921. The notice of rescission was given and the action filed April, 1923. The plaintiff testified that during the spring and summer of 1922 approximately 150 of the trees died; that in the course of their removal and after consulting neighboring farmers as to the cause of the condition, he became apprised of the extent to which the soil was underlaid by hardpan. The exact date when he became fully aware of the fact does not clearly appear, but the evidence supports the inference that this was not earlier than the fall of that year. We think that, in view of the circumstances shown by the evidence, it cannot be said that the plaintiff failed to act with reasonable promptness. As was said in French v. Freeman, supra:

> "Whether or not the defrauded party has rescinded 'promptly' will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court."

The implied finding in this connection was adverse to appellant; and this, together with the other findings, being fairly sustained by the evidence, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

80 Cal. App. 667

OFFERDAHL v. MOTOR TRANSIT CO. et al. (Civ. 5322.)★

(District Court of Appeal. First District, Division 1, California. Jan. 15, 1927. Hearing Denied by Supreme Court March 14, 1927.)

1. Negligence 🔑72 — One placed in danger through another's fault may not be negligent in putting himself in more dangerous position in attempting to escape.

Where person without fault on his part, and through negligence of another, is put in such apparent peril as to cause loss of self-possession, putting himself in more dangerous position in attempting to escape may not constitute negligence.

2. Highways 🔑184(3)—Question of negligence causing collision on highway is generally for jury.

Where two vehicles collide on public highway, and damage results therefrom, question of whose negligence caused injury is generally for jury.

3. Trial 🔑260(1)—Refusal of particular instruction held not error, where court fully instructed jury on issues.

Refusal of specific instruction requested in action for injuries *held* not error, where court fully and fairly instructed jury as to all law applicable to facts of case.

4. Carriers 🔑321(21) — Instruction on burden of proof as to avoidance of negligence of motorbus driver colliding with car while on wrong side of road, injuring bus passenger, held not misleading.

Where plaintiff, while passenger in defendant's bus, was injured in collision with another car, operators of both cars claiming the other was on wrong side of road, instruction that bus driver was negligent as matter of law from mere fact that he drove on left-hand side, and that, on proof thereof, it was necessary for defendant to show that driver's act was without his fault, and that, in absence of such proof, plaintiff could recover, *held* not erroneous as misleading.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Ingvald Offerdahl against the Motor Transit Company and Otto Pauls. The defendant last named defaulted, and judgment was rendered against him in plaintiff's favor. On trial of the action against the defendant first named, there was a judgment for the defendant Motor Transit Company, and plaintiff appeals. Affirmed.

E. B. Drake, of Los Angeles, for appellant.
W. I. Gilbert and B. P. Gibbs, both of Los Angeles, for respondent.

TYLER, P. J. Action to recover damages for personal injuries alleged to have been suffered by plaintiff while riding as a passenger for hire in one of the auto stages of respondent Motor Transit Company.

The complaint alleged the company and defendant Otto Pauls to be joint tort-feasors, and it charged that they so negligently operated their respective machines so as to collide one with the other, causing the plaintiff the injuries complained of. Defendant Otto Pauls defaulted, and a judgment in the sum of $2,000 was rendered against him. Defendant Motor Company denied specifically the allegations of the complaint, and, further answering, alleged that the accident was caused solely through the negligence of its codefendant Pauls. Trial was had by jury as to defendant Motor Company, which resulted in a verdict in its favor, and, upon judgment being rendered thereon, this appeal was taken.

The sole question here presented relates to the giving and refusal to give certain instructions as to the duty of the driver of an automobile when suddenly confronted with a dangerous situation. So much of the evidence as is necessary for an understanding and discussion of the case shows that on June 18, 1922, plaintiff was being carried as a passenger for hire by defendant Motor Transit Company in one of its autobusses, and, while en route therein at a point on the public highway about half way between the town of Montebello and the city of Los Angeles, the bus collided with a car owned by defendant Pauls, resulting in the alleged injuries. At the time of the accident the autobus of defendant was traveling westerly upon the highway towards Los Angeles, and the automobile of the defendant Pauls was being operated and driven thereon by one Cooper, as the agent of Pauls, in an easterly direction toward Montebello. The accident occurred in the nighttime, and each of the defendants claimed that the machine of the other was on the wrong side of the road. Upon this subject there was a sharp conflict in the evidence. Each set of witnesses agreed that both vehicles were operated upon their right side of the highway until within a point variously estimated at from 10 to 100 feet of each other. One set of witnesses testified that the Chevrolet car belonging to defendant Pauls then left its right side, and confronted the driver of the auto stage in which plaintiff was riding; the other set testifying that the stage left its proper position and crossed the road directly in front of the Chevrolet car. When confronted with the situation, the driver of defendant company testified that he had turned to the left to escape the impending danger.

[1-3] The rule is well established that, where one without his own fault is through the negligence of another put in such apparent peril as to cause loss of self-possession, and as a natural result thereof, in attempting to escape, he puts himself in a more dangerous position, he may not be guilty of negligence in so doing. This rule is held to apply only where such person is placed in danger through the negligence of another,

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★Hearing denied by Supreme Court.

and without fault on his part. When two vehicles collide on the public highway, and damage results therefrom, the question of whose negligence caused the injury is generally one for the jury. Newman v. Overholtzer, 182 Cal. 778, 190 P. 175; Simonsen v. Christopher, 186 Cal. 786, 200 P. 615. It may be conceded that the evidence to the effect that the driver of the Chevrolet car in turning to the left, if believed by the jury, was an act reasonably calculated to cause the driver of defendant's machine to apprehend danger, and justified him in altering his course, even though it resulted in the collision which caused the injury. The questions presented under the evidence were, as claimed by appellant: (1) Whether the driver of the auto stage was suddenly confronted with danger; (2) whether or not his own driving produced such danger; (3) what he did thereafter; and (4) what he had a right in law to do. No question is here raised concerning the conflict in the evidence, the sole claim being that the verdict reached was undoubtedly the result of erroneous instructions upon the subject indicated. At the request of defendant, the trial court gave an instruction relating to the duty of the driver of a vehicle when suddenly confronted with a dangerous situation which did not include within its terms the element that the danger must have been caused through the negligence of another. Because of the omission of this element, it is claimed it had a tendency of misleading the jury as to the measure of duty required of defendant. The court also refused an instruction presented by plaintiff which included the element, giving as a reason for such refusal that the point was fully covered by other instructions. We see no merit in appellant's contention. The court fully and fairly instructed the jury as to the law applicable to the facts, and the instructions were amply sufficient to properly advise the jury upon all the issues presented. No single instruction can contain all the law upon a subject.

[4] The jury was instructed in substance, that in determining whether it should find a verdict against defendant Motor Company it should consider the time and place of the accident; that defendant owed to plaintiff the duty of exercising the highest degree of care; the speed of the motorbus; the side of the highway upon which the accident happened, and all other facts and circumstances proven; and if, after considering the same, it was of the opinion that the company was guilty of any negligence that contributed in any degree or in any manner to the happening of the accident, it should find in favor of plaintiff and against defendant. The court also correctly instructed the jury as to the presumption of negligence by reason of the mere happening of the accident. As to the degree of care that defendant was bound to exercise when confronted with danger, the court charged the jury that men, when suddenly confronted with danger, are not to be held to the strict degree of accountability for their acts that they would be under ordinary circumstances, and, in judging whether or not the driver of the motorbus exercised the high degree of care required of him, his actions were to be measured by the facts and circumstances as they would have appeared to a reasonably prudent man in the exercise of the highest degree of care; and the fact that he might have taken some other course, and thus avoided the accident, when viewed from circumstances discovered later, would not be negligence on his part, simply because he chose the wrong course to avoid a danger then open and apparent to him. Immediately following the court further instructed the jury that, if it found that the bus in which the plaintiff was riding as a passenger at any time during the accident was operated or driven to the left of the center of the highway, in the direction in which it was being driven, this fact alone constituted negligence as a matter of law, and the burden was then upon defendant to show that it became necessary without fault on its driver's part to so operate the bus, and, unless it was so shown, defendant was guilty of negligence as a matter of law. Upon the same subject the jury was further instructed, in substance, that the driver of the bus had the right to operate his vehicle along the right-hand side of the boulevard, and had the right to assume at all times that other persons operating their automobiles along the same boulevard would do so in accordance with the law, and that the drivers thereof would use the right-hand side of the road at the time they attempted to drive past a point at which they would meet, if it found that the owner of the Chevrolet automobile suddenly and without warning swerved to the left and in front of the motorbus, and thereafter the driver of the bus did all in his power to avoid the accident he was not guilty of negligence. It seems manifest to us that these instructions in an orderly manner fully and fairly stated the law upon the subject with relation to the facts, and that they are not inconsistent or prejudicial to appellant. They fully advised the jury that the driver of the bus was guilty of negligence as a matter of law from the mere fact that he drove upon the left-hand side of the road, and that upon proof of this fact it became necessary for defendant, in order to avoid a charge of negligence, to show that the driver's act was without any fault of his, and that, in the absence of such proof, plaintiff was entitled to recover. We do not consider that there is any merit in the appeal.

The judgment is affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

80 Cal. App. 713

NEW YORK INDEMNITY CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5572.)★

(District Court of Appeal, Second District, Division 1, California. Jan. 19, 1927. Hearing Denied by Supreme Court March 17, 1927.)

1. Master and servant 🔑367—Control as to means and method of work determines whether person is employee or independent contractor.

Whether person, sought to be charged under Workmen's Compensation Act (St. 1913, p. 279, as amended), is employee or independent contractor, depends on power of control as to result of work, and also as to means and method by which result is accomplished.

2. Master and servant 🔑367—Workman paid by piece rate comes within provisions of Workmen's Compensation Act.

Workman who is paid wages by piece or quantity comes within Workmen's Compensation Act (St. 1913, p. 279, as amended) along with workman who is paid by day, as wages may be measured by time, piece, or any other standard.

3. Master and servant 🔑367—Whether person is "independent contractor" depends, not on fact of actual interference with control of work, but right so to interfere.

Whether person sought to be charged for injury is employee or "independent contractor" depends, not on fact of actual interference with control of workman, but right to interfere, as distinguished from act itself or failure to act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Independent Contractor.]

4. Master and servant 🔑367—Right to discharge involves control, on which relation of employer and employee rests.

Right to immediately discharge employee involves right to control, on which is determined question as to whether person sought to be charged is employee or independent contractor.

5. Master and servant 🔑405(2)—Evidence held to sustain finding that principal contractor was employee, notwithstanding he received wages, and took orders, from another contractor.

Where person against whom award was made as employer retained right to control workmen hired on job or to fire them at any time, finding of Industrial Accident Commission that person who paid workman and gave him instructions was employee, and not independent contractor, *held* sustained by evidence.

6. Master and servant 🔑367—One from whom workman received instructions and wages was not necessarily independent contractor.

Person from whom workman collected wages and took instructions was not necessarily independent contractor, though he collected his wages only on job's completion.

Application by the New York Indemnity Company, employer's insurance carrier, for writ of certiorari to be directed to the Industrial Accident Commission, Richard B. Lennon, employee, and J. P. Jessel, to review an order of the Industrial Accident Commission awarding compensation to employee as employee of O. W. Dorman. Petition for writ denied.

George L. Greer and S. L. Carpenter, both of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CONREY, P. J. Petitioner, the insurance carrier for one O. W. Dorman, has applied for a writ of certiorari to review a decision of the Industrial Accident Commission awarding compensation to Richard B. Lennon for injuries received arising out of and in the course of his employment as painter on a building being constructed by Dorman as contractor. Petitioner claims that J. P. Jessel was an independent subcontractor, operating under contract with Dorman, and that Lennon was an employee of Jessel and not of Dorman. The sole question is whether or not Lennon while employed as painter on the house in question was an employee of Dorman or was an employee of Jessel and of Jessel only.

The evidence relied upon by petitioner is set forth in his petition. Petitioner maintains that the evidence does not justify the finding that Lennon was in the employ of Dorman, and further contends that the evidence does show without substantial conflict that he was not in the employ of Dorman at the time he sustained the injuries, but was then an employee of Jessel, whose relation to Dorman then was that of an independent contractor; and that in awarding compensation to Lennon against petitioner, the Commission acted without and in excess of its powers.

[1-4] "In determining in any given case whether a person was an employee or an independent contractor there are usually present various circumstances which are persuasive to one conclusion, and other circumstances persuasive to the opposite conclusion. But an analysis of the cases makes it plain that the determinative factor is usually found in the solution of the question: Who has the power of control, not as to the result of the work only, but as to the means and method by which such result is accomplished?" Fidelity & C. Co. v. Industrial Acc. Com., 191 Cal. 404, 407, 216 P. 578, 579 (43 A. L. R. 1304). "A workman who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. McKinstry v. Guy Coal Co., 116 Kan. 192, 225 P. 743, and note in 38 A. L. R. 839. One of the best tests to determine whether the relation is that of an in-

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★Hearing denied by Supreme Court.

dependent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and servant or agent. Tuttle v. Emburg Martin Lumber Co., 192 Mich. 385, 399, 158 N. W. 875, Ann. Cas. 1918C, 664. It is not a question of interference, or noninterference, not a question of whether there have been suggestions, or even orders, as to the conduct of the work, but a question of the right to act, as distinguished from the act itself or the failure to act. Carleton v. Foundry, etc., Co., 199 Mich. 148, 152, 165 N. W. 816, 19 A. L. R. 1141. * * * Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control. Industrial Comm. v. Bonfils, 78 Colo. 306, 241 P. 735. The decision of the District Court of Appeal in Helmuth v. Ind. Acc. Comm., 59 Cal. App. 160, 210 P. 428, correctly applies the rule in this state." Hillen v. Industrial Acc. Commission (Cal. Sup.) 250 P. 570, 571.

[5, 6] An examination of the evidence as contained in the petition demonstrates that there is evidence sufficient to have warranted the commission in finding that Jessel was merely the foreman of Dorman; that both Jessel and Lennon received their compensation as wages; that the wages of Lennon, although received by him from the hands of Jessel, were merely advanced by Jessel, and, in fact, came from Dorman; and that Dorman retained the right to discharge Lennon at any time, and therefore retained the right of control of the manner in which the work should be done. The facts that Lennon usually received his instructions and his wages from Jessel, and that Jessel did not ordinarily collect from Dorman on any job until its completion, are not circumstances conclusively proving that Jessel was an independent contractor. Dorman made his contracts with the owners under what is commonly known as the cost-plus basis; that is, his contract price was the cost of construction plus a percentage. Jessel was allowed wages for his own work, and, in addition, was allowed $1 per day for each man employed under Jessel on the job. This allowance on each man, "was for brushes and for profits." As Dorman said, "The deal with Jessel was that he should get $1 per day on each man and his own wages." As to control of the employees, Dorman further said:

"Mr. Jessel did not ordinarily consult me about laying off painters and taking them on. If I saw a man on the job, and didn't like him I would tell him to lay him off same as I would with any subcontractor. I have asked him to put a man on. I am boss of Mr. Jessel when he works for me, and everybody else. I am not boss of everybody under him, they take orders from him. If I saw a man doing something objectionable, I would enter protest with Mr. Jessel. My understanding with Mr. Jessel was that he ran my painting. He furnished my material, and charged me up for the material and labor and he was allowed one dollar a day per man extra. Of course he got his own wages all the time because he was running different jobs. At the end of the job he turned in so much for material, so much for labor, no items. * * * I never checked up on his books. I know he was perfectly honest. I could have discontinued relations with Mr. Jessel in the middle of a job if I felt dissatisfied. I can fire anybody off the job at any time."

Under the foregoing evidence, we are satisfied that the commission was authorized to find that Dorman was the employer of Lennon.

The petition for writ is denied.

We concur: HOUSER, J.; YORK, J.

RIVERSIDE COUNTY v. TITLE INS. & TRUST CO. (Civ. 5569.) ★

(District Court of Appeal, First District, Division 2, California. Jan. 18, 1927. Hearing Granted by Supreme Court March 18, 1927.)

1. Agriculture ⚷15—County may foreclose lien for eradicating noxious weeds, though complaint alleged work commenced before expiration of time in which owner could act.

County may foreclose statutory lien for eradication of noxious weeds, though complaint alleged that work commenced before expiration of time in which owner was entitled to act under notice, where no expenditures claimed by county were for labor done before expiration of such period.

2. Agriculture ⚷15—Lien for eradicating weeds held not invalid because of allegation work commenced before expiration of time in which owner could act.

County's lien for eradication of noxious weeds *held* not invalid because of allegation that work was commenced before expiration of time in which owner was entitled to act, on contention that statutory procedure was not followed where court found that work began seven days after date alleged.

3. Agriculture ⚷15—Lien for eradicating noxious weeds may be imposed on entire premises without finding as to particular lots; "different premises" (Pol. Code, §§ 3628, 3650).

In county's action to foreclose statutory lien for eradication of noxious weeds, court is not required to find which particular lots were infested with thistle, but may impose lien on entire premises, in view of Pol. Code, §§ 3628, 3650, but parcels separated by fence are different "premises."

★Superseded by opinion of Supreme Court 259 P. 759.

4. Agriculture 🔑15—Premature claim for exterminating ground squirrels may be deducted from judgment to enforce lien for eradicating noxious weeds.

Where county's claim for exterminating ground squirrels was premature, such claim, being entirely separable from claim for eradication of noxious weeds, may be deducted from judgment in county's action to foreclose statutory lien without injury to landowner.

5. Agriculture 🔑11—One notice cannot subject land on opposite sides of road to lien for eradicating noxious weeds.

Land on opposite sides of road cannot be subjected to county's lien for eradication of noxious weeds by putting up one notice.

6. Agriculture 🔑15—Findings contrary to notice as to when horticultural commissioner entered to eradicate noxious weeds, held not variance invalidating lien.

In county's action to foreclose statutory lien for eradication of noxious weeds, statements in notice of lien that horticultural commissioner entered premises on certain date is not binding on plaintiff, and findings of trial court to contrary do not therefore create fatal variance invalidating lien.

7. Agriculture 🔑11—Statute creating mechanic's lien should not be considered in construing statute giving lien for eradicating noxious weeds (Code Civ. Proc. § 1183; Pol. Code, § 2322a).

Each statute creating lien is entity unto itself, unless it contains cross-reference so that Code Civ. Proc. § 1183, and following, regarding mechanics' liens, is not to be considered by analogy in construing Pol. Code, § 2322a (St. 1917, p. 631), relative to lien for eradicating noxious weeds.

8. Agriculture 🔑11—Notice to eradicate noxious weeds held properly served by horticultural inspector by direction of commissioner.

Notice to abate nuisance by eradicating noxious weeds *held* properly served by horticultural inspector, who was directed by horticultural commissioner to serve it, since person serving notice is not required to have title of deputy.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by Riverside County against the Title Insurance & Trust Company, to enforce a statutory lien for the eradication of noxious weeds and extermination of ground squirrels. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Woodruff & Shoemaker, of Los Angeles, for appellant.

Albert H. Ford, Dist. Atty., of Riverside, for respondent.

STURTEVANT, J. The plaintiff commenced an action to foreclose a statutory lien. The defendant answered, and the trial court made findings in favor of the plaintiff, and caused a decree to be entered in accordance therewith. The defendant has appealed from the judgment, and has brought up a bill of exceptions.

The defendant is the owner of certain lands, including, among others, lands described in the plaintiff's complaint. So far as the record discloses the entire holding of the defendant is known as Fairhaven Farms, which was heretofore mapped and platted and a map thereof was filed of record. In the bill of exceptions there is evidence to the effect that Limonite street runs east and west and that some of the lands owned by the defendant are on the north side and some are on the south side of that street. It further appears that running along the north side of Limonite street is a fence. No other fences are mentioned in the record.

According to the uncontradicted evidence, on the 8th day of July, 1919, Russian thistle was growing in more or less abundance on the lands owned by the defendant. At the same time there were many ground squirrels on the same lands. The horticultural commissioner made an inspection, and, on finding the presence of the thistles and squirrels, proceeded to take steps to abate the nuisance. It is not disputed but what he attempted to follow the provisions of section 2322a of the Policital Code (chapter 508 of the Statutes of 1917).

On July 8, 1919, he caused Frank Babel, an inspector theretofore appointed by him, to serve a notice on the defendant to abate the nuisance. Said notice required the defendant to abate the nuisance "within ten days after the service" of the notice on the defendant. As the defendant did not reside in Riverside county, the notice was served by posting it and by mailing a copy to the owner. Those acts were done on July 8, 1919. Babel posted the notice on lot 8, which is bounded by Limonite street on the south, and which is about one-half way from the east toward the west in crossing over Limonite street. Thereafter, no steps having been taken by the defendant to abate the nuisance, the horticultural commissioner sent men and teams to do the work. The work consisted of scattering poisoned wheat to kill the ground squirrels and of plowing and raking the ground and thereafter of burning the débris for the purpose of destroying the thistles. The expense incurred in scattering poisoned wheat, etc., was $15, which sum was included by the trial court in estimating the amount of the plaintiff's lien. The men and teams entered on the lands owned by the defendant and commenced the work on July 18, 1919. As found by the trial court, they did not enter the lands described in the complaint until July 24, 1919. The judgment appealed from does not include any moneys expended for labor done prior to July 24th. Other expenditures were eliminated.

[1] The appellant contends that its demurrer should have been sustained. In this behalf it claims that, as it was served with the notice at Los Angeles, 60 miles away, therefore it was entitled to commence work at any time within the 10-day notice, plus two additional days. However, it points out that in the complaint it is alleged the work commenced July 18; that is, three days before the defendant's time had expired. The vice in the contention is that plaintiff's complaint contains several allegations as to when labor was done and performed, and it does not appear therefrom that any of the expenditures now claimed by the plaintiff were incurred for labor done or performed prior to the 22d day of July, 1919. The labor was not therefore prematurely rendered.

[2, 3] The appellant relies on the same facts to support its contention that the statutory procedure was not followed, and no valid lien ever attached to the premises, or any part thereof. In making this contention it relies on an allegation in the plaintiff's complaint that some work was done on the 18th day of July, and a recital in the notice of lien to the same effect, but turning to the findings, it will be seen that the trial court found the fact to be "that said commissioner entered upon the premises described in the claim of lien and in the complaint on the 25th day of July, 1919." In doing so he was following the statutory procedure and the plaintiff's lien was not rendered invalid for that reason. The appellant complains because the trial court did not find which particular lots were infested with thistle and impose a lien separately on those lots only which were infested. The first answer is that the statute contains no requirement supporting the contention of the appellant. The statute authorized the plaintiff's officers to inspect "any premises," or "any other place," and to proceed accordingly. The statute did not impose the duty on the county official to proceed against the lands "by sections or fractions of sections." Pol. Code, §§ 3628 and 3650. In other words, there is much in the statute to indicate that the Legislature intended that each holding could be proceeded against whether the entire holding was infested with the particular pest or only a portion was so infested. In this same connection the appellant points out that some of the work was done on the property south of Limonite street. That is true, but no part of the expenses for work done south of Limonite street is involved in this litigation. As a fence separates the parcels, the portion in the south was a different "premises."

[4] The appellant contends that the claim for exterminating ground squirrels was premature and cites County of San Benito v. Wapple, 188 Cal. 423, 205 P. 673. We see no answer to the point. However, the claim included $15, and no more, and is entirely separable from the rest of the plaintiff's claim; therefore it can be deducted without injury to the appellant.

[5] The appellant argues that, if the several lots north of the road may be covered by putting up one notice, the same reasoning will include the lots south of the road, and that it follows that the entity is all of the defendant's lands comprised, within the expression Fairhaven Farms. With this contention we do not agree. In the first place, a fence and a road divided the two properties; in the next place, if the statute must be construed as using the word premises or place as synonymous with Fairhaven Farms, it is equally to be contended that the statute would likewise be construed to include an entire township as being synonymous with those words. But there is nothing in the statute leading to such extremes.

[6, 7] As recited above, one of the statements contained in the notice of lien was that the horticultural commissioner entered upon the premises on July 18, 1919. The appellant asserts that such a statement is binding upon the plaintiff and that the findings of the trial court to the contrary create a fatal variance. That there is a variance it is quite clear, but there is no reason for saying that the variance is fatal. The statute does not attempt to state what shall be contained in the claim of lien. The appellant's argument rests on the analogy which it would draw from the decisions which construed statutes regarding mechanics' liens. Code Civ. Proc. § 1183 et seq. However, in California we have many statutes creating liens. There is no more reason why we should couple Political Code, § 2322a, and Code of Civil Procedure, § 1183 et seq., than that we should couple it with any other statute on the subject. Each of those statutes is an entity unto itself unless it contains a cross-reference. Keener v. Eagle Lake L. & I. Co., 110 Cal. 627, 631, 43 P. 14.

[8] The appellant calls attention to the decision of the Supreme Court entitled County of San Bernardino v. Stewart, 173 Cal. 236, 159 P. 717, and thereupon it contends that the notice to abate the nuisance, although it was signed by the horticultural commissioner in person, it was not properly served, because it was served by Mr. Babel, who was not a deputy horticultural commissioner, but was a horticultural inspector, who was directed by the commissioner to serve the notice. The statute provides that "any person deputed by the said commissioner" may serve the notice. The statute, by the expression used, does not mean that the person serving the notice shall have the title of deputy, but it does mean that the person serving the notice must either be the principal or a person selected and authorized by

the principal to perform the act. Cent. Dict. "depute."

We find no error in the record except the charge for exterminating ground squirrels. The judgment will be modified by deducting $15 from the principal amount contained in the judgment and as so modified the judgment will stand affirmed. It is further ordered that respondent recover its costs.

We concur: KOFORD, P. J.; NOURSE, J.

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80 Cal. App. 709

PEOPLE v. ALLAN. (Cr. 1296.)

(District Court of Appeal, First District, Division 1, California. Jan. 19, 1927.)

1. Indictment and information ⚷171—Variance is not material if instrument pleaded informs defendant of criminal act so that he is not misled.

In determining whether variance is material, question is whether instrument pleaded informs defendant of criminal act, of which he is charged so fully and correctly that, considering proof introduced against him, he is not misled in making defense or placed in danger of being twice put in jeopardy for same offense.

2. Forgery ⚷34(2) — Fictitious travelers' check, introduced in trial, held material variance from that set out in information (Pen. Code, § 476).

Fictitious travelers' check, introduced at trial in prosecution for violating Pen. Code, § 476, *held* material variance from that set out in information, in view of differences relating to parties and provisions forming material parts of contract.

3. Criminal law ⚷170—That fictitious travelers' check produced at trial was material variance from that set out in information will not bar prosecution for offense shown by proof (Pen. Code, § 476).

That fictitious travelers' check, introduced in prosecution for violating Pen. Code, § 476, constituted material variance from that set out in information, will not bar prosecution of defendant for offense shown by proof, since he cannot be put in jeopardy by indictment under which he could not be convicted.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Harry Allan was convicted of violating Penal Code, § 476, by uttering and passing a fictitious check, and he appeals. Reversed.

See, also, 241 P. 897.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Defendant was charged by an information with the violation of section 476 of the Penal Code. He appeals from the judgment entered on the verdict of guilty and from an order denying a new trial.

The information alleged that on July 21, 1925, the defendant made a fictitious check for the payment of money, purporting to be signed by Robert Dean when in fact there was no such person; that, knowing the check to be fictitious, and with intent to defraud Livingston Bros., Inc., a corporation, he uttered and passed the check to the corporation as true and genuine. The check alleged to be fictitious is set out in the information in the words and figures following:

"100. American Bankers' Association. 100.
"Travelers' Cheque No. A1846905.
"Bankers' Trust Company, New York City.
July 21, 1925 19—
"Robert Dean.
"Pay to the order of Livingston Bros., Inc., $100.00 or its equivalent as below. Farmers' & Merchants' Bank of Compton, Lynwood Branch. Compton, Cal. Countersignature: Robert Dean, by R. H. Giles, Treasurer, by A. R. Titus, Cashier."

At the trial, the prosecution offered in support of the charge a travelers' check of which the following is a copy:

"100. American Bankers' Association. 100
"Travelers' Cheque.
"Bankers' Trust Company, New York City.
"No. A1846905.
"When countersigned below with this signature at any time within two years from date, to wit, Robt. Dean:
"July 21, 1925.
"Pay to the order of Livingston Bros. $100.00, or its equivalent as below. Farmers' & Merchants' Bank of Compton, Lynwood Branch, Compton, Cal., by A. R. Titus, Cashier. Countersigned (in the presence of person cashing): Robt. Dean.
"We hereby accept and certify the foregoing order and will pay the same, when properly negotiated, through any of our correspondents named on the back hereof. Bankers' Trust Company, by R. H. Giles, Treasurer."

The check was admitted in evidence over the objection of defendant who contends, as grounds for reversal, that the variance between the check described in the information and the proof offered as above was material, that the court erred in overruling the objection to its admission, and that the evidence was insufficient to support the verdict.

It appears that the words and figures contained in the check last mentioned, including the acceptance by the trust company, were printed, with the exception of the date, the name of the payee, the name of the purchaser, whose signature for purposes of identification is placed thereon and whose countersignature is required in order that the instrument may be negotiated or paid, and that of the officer of the bank issuing the same, which were written.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] As was said in People v. Terrill, 132 Cal. 497, 64 P. 894:

> "In determining whether a variance is material, the question to be decided is, Does the indictment so far correctly and fully inform the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense?"

The requirement that the instrument offered in evidence must conform to that laid in the information has reference to its identity and the manner in which it is described, and the presence or absence of unimportant words which do not affect the sense of the instrument or change its identity in any material respect will not constitute a material variance. People v. Crane, 4 Cal. App. 142, 87 P. 239.

[2, 3] While the instruments in certain respects are the same, differences relating to the parties, and provisions forming material parts of the contracts, appear, which affect the sense and change the identity of the instrument alleged to an extent which under the rule stated constitutes a material variance; and, no other evidence sufficient to support the charge as laid in the information having been adduced, it will be necessary to reverse the judgment. But it does not follow therefrom, as contended by appellant, that the proceedings had will bar his prosecution for the offense shown by the proofs. As was said in People v. McNealy, 17 Cal. 333:

> "It would be a contradiction in terms to say that a person was put in jeopardy by an indictment under which he could not be convicted, and it is obviously immaterial whether the inability to convict arise from a variance between the proof and the indictment, or from some defect in the indictment itself."

The judgment and order are reversed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

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80 Cal. App. 689

GIBSON v. HERCULES MFG. & SALES CO., Inc., et al. (Civ. 3190.)

(District Court of Appeal, Third District, California. Jan. 18, 1927.)

1. Damages 🔑147 — Complaint for loss of profits, resulting to unestablished business on breach of contract, held not to state cause of action.

Complaint, alleging damages for breach of contract resulting in loss of anticipated profits, based on unrealized hopes of unestablished business, *held* not to state cause of action.

2. Damages 🔑40(2)—Anticipated profits of unestablished business are too remote, uncertain, and speculative to be recovered for contract breach.

Plaintiff could not recover, in action for breach of contract, for alleged loss of anticipated profits, based on unrealized hopes of an unestablished business, since such anticipated profits were too remote, uncertain, and speculative.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by J. Bruce Gibson against the Hercules Manufacturing & Sales Company, Inc., and others, for loss of profits due to breach of contract. From a judgment for defendants, plaintiff appeals. Affirmed.

Humphrey, Grant, Zimdars & Warren, of San Francisco, for appellant.

Corbet & Selby and Wm. T. Eckhoff, all of San Francisco, for respondents.

PLUMMER, J. Plaintiff began this action against the defendant corporation and its stockholders to recover damages in the sum of $100,000, consisting principally of loss of profits alleged to have been suffered by him for and on account of the failure of the defendant corporation to keep and perform on its part the terms and conditions of a certain contract annexed as an exhibit and made a part of plaintiff's complaint. The defendants interposed demurrers, both general and special, setting forth in detail 89 general and special reasons why the plaintiff's complaint is insufficient. Five complaints in all were filed. After the defendants' demurrers were sustained to the plaintiff's fourth amended complaint, plaintiff declined to amend, judgment was entered for the defendants, and the plaintiff appeals.

Passing the allegations in the complaint as to the corporate existence of the Hercules Manufacturing & Sales Company, Inc., the names of the stockholders and the respective number of shares owned and held by each in the defendant corporation, the complaint alleges that on or about the 8th day of December, 1920, one of the defendants, Norman Lombard, a large stockholder in the Hercules Manufacturing & Sales Company, made a proposition to the plaintiff that said two persons should unite their efforts, and, either as a company composed of themselves, or in their personal capacity, or through the agency of a corporation to be formed, effect an arrangement with the Hercules Manufacturing & Sales Company for the acquisition and sale of a certain automobile lock, known as the Hercules lock, invented by one S. H. Waterman, and then owned by the defendant corporation; that a certain paper was drawn up embodying the terms and arrangements of the proposition, which was in the form of

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

a letter dictated and signed by the said Norman Lombard and addressed to the plaintiff, J. Bruce Gibson. This writing is in the following words and figures, to wit:

"Exhibit A.

"Norman Lombard & Co., First National Bank Building, San Francisco.

"December 8, 1920.

"J. Bruce Gibson, Esq., San Francisco, Cal.—Dear Sir: In order to reduce to writing our several conversations covering your connection and association with myself and the Hercules Manufacturing & Sales Company, Inc., I am writing you this letter covering the arrangement understood between us to this date. Kindly indicate your approval of the same in the place indicated below, returning one copy for my files, and oblige.

"I proposed to organize a sales company or to revive an existing corporation and give it a proper and suitable name; this company to handle the sale of the Hercules lock or locks under substantially the following conditions:

"The Hercules Company is to give an exclusive contract to the Sales Company to distribute and sell in all parts of the world all of the Hercules locks to be manufactured, including all improvements thereon, and all lock devices which the Hercules Company may control or acquire, so long as the Sales Company shall continue to sell the bona fide purchasers not less than 120,000 locks per annum, beginning July 1, 1922, provided not less than 60,000 locks to be sold by them prior to July 1, 1922. It is understood that all locks sold in excess of 120,000 per annum is to be credited to succeeding years.

"For the failure to make such sales in any year the sales contract may be terminated at the option of the Hercules Company.

"The Sales Company shall agree to handle no other locks than those owned or controlled by the Hercules Company, except by mutual consent, during the life of this agreement.

"The Hercules Company is to pay all rewards offered for arrest and conviction of persons stealing cars locked with Hercules locks and to protect the Sales Company against all claims for damages on account of infringement of patents.

"The Hercules Company is to sell and deliver to the Sales Company all locks ordered at times stated and in quantity ordered, reasonable notice being given by the Sales Company of requirements, subject to delays and contingencies beyond the control of the Hercules Company.

"The Hercules Company is to furnish necessary financial assistance to enable the Sales Company to properly introduce the Hercules lock; the extent of such financial assistance to be mutually agreed upon.

"The Sales Company shall pay interest to the Hercules Company upon all moneys advanced for its account at a rate to be agreed upon, not to exceed 2 per cent. more than the maximum rate of rediscount announced by the Federal Reserve Bank of San Francisco from time to time. Interest payable monthly or to be compounded.

"Each company shall be conducted independently and shall pay all of its own expenses, subject, however, to any future arrangements which may be made between them for services rendered by one to the other, or for work jointly undertaken.

"The Sales Company agrees to purchase annually from the Hercules Company the number of locks hereinbefore specified at the following prices: No. 1 size at $3.75 each; No. 2 size at $4.25 each; No. 3 size at $4.75 each.

"Said prices being based upon estimated cost of manufacture for the No. 1 size of $3.03 each; No. 2 size of $3.24½ each; No. 3 size of $3.62½ each.

"All locks to be of first-class quality and workmanship.

"It is agreed and understood that, if any saving in the first cost of manufacture shall be effected, one-half of the said saving shall accrue to the benefit of the Sales Company and one-half retained by the Hercules Company, and, on the other hand, if the first cost of manufacture shall prove greater than that estimated, one-half of such difference shall be borne by the Sales Company to the Hercules Company and the other half by the Hercules Company.

"No charge shall be made, except first cost of manufacture for locks given away by the Sales Company for advertising purposes.

"It is agreed that you will devote substantially all of your time and energy to this business, engaging in no other going occupation and that you will receive as compensation, first, a salary of $300 per month, and usual and necessary traveling and other expenses incurred while engaged in the business of either or both corporations; same to be paid by the Hercules Company until such time as your activities shall be more largely given over to the selling of the product, after which the salary shall be prorated between the two companies.

"In addition such salary, and in consideration of your acceptance of such nominal salary for your services, I agree that you shall participate in the net profits of the Sales Company to the extent of 25 per cent., as represented by 25 per cent. of the capital stock of the said company, which said stock I agree to place in escrow, to be turned over to you at such time prior to July 1, 1922, as you have caused the Sales Company to earn in net profits the sum of $12,000 as shown by the books of the company. Should the profits fail to equal this amount by July 1, 1922, then and in that case the majority holder or holders of the stock shall have the right to declare the 25 per cent. equity in the stock issue forfeited, but all earnings to that date shall thereupon be paid to you to the extent of 25 per cent., less any amounts standing charged to your account; and in such case the agreement for compensation shall thereupon terminate ipso facto and the stock shall return to the treasury of the Sales Company.

"It is agreed that you shall be vice president and general manager of the Sales Company, with authority to conduct its general business subject to the control and direction of the board of directors.

"When the Sales Company shall be organized, it is agreed and understood that a new contract or contracts shall be entered into by and between the interested parties, embracing the terms hereof, and including such additional provisions as shall be found necessary or desirable, in order to carry out the terms of this agreement and at the same time to arrange the details to the satisfaction of all concerned. Thereafter I shall be relieved of personal responsibility hereunder for those agreements herein which are to be performed by the Sales Company.

"Prices above are to be f. o. b. cars point of production; also provided the sales price shall not be less than 25 per cent. more than the cost of manufacture. Following is an estimate of expenditures for the Sales Company up to and including May, 1921, showing income as of that date equaling expenditures. * * *"

This letter was signed, as stated, by the said Norman Lombard and accepted by the plaintiff, and also one H. S. Waterman, a stockholder in the defendant corporation.

The complaint further alleges that this contract, or agreement, or memorandum of agreement, was, at a subsequent date, not given, ratified and approved by the directors of the defendant corporation; that, in pursuance of the terms of said memorandum, the plaintiff and the said Lombard, in their individual capacities, left San Francisco and went to certain eastern cities and negotiated and arranged for the manufacture of said locks upon prices and terms very much better than said defendant Hercules Manufacturing & Sales Company had tentatively arranged therefor, effecting a savings of many thousands of dollars in the cost of the manufacturing of said locks. The complaint further alleges that the defendant corporation advanced and paid to the plaintiff all expenses and outlays attendant and necessarily incurred on said eastern trip, and also paid the plaintiff the sum of $300 per month on account of salary from the month of December, 1920, down to and including the month of August, 1921, and that the plaintiff gave all his time and attention exclusively to the performance of his duties under said contract from the 8th day of December, 1920, down to the month of August, 1921, and that plaintiff, in all respects, performed all the terms and conditions of the said contract on his part to be performed, and was willing, able, and ready to perform all the terms and conditions of said contract on his part to be performed; that on or about the month of December, 1920, it was agreed by and between the plaintiff and the Hercules Company that the obligations to be performed by plaintiff, under the terms of said agreement, could be carried out and performed as well in the interest of both the plaintiff and Hercules Company by and through a sales company, composed of the plaintiff and the said Lombard, as individuals, as by a corporation organized for that purpose, and that the said Lombard and the said plaintiff should constitute the sales company; that on or about the 8th day of March, 1921, the Hercules Company, by its board of directors, agreed to said contract, as so modified; that the said plaintiff and said Lombard might comply with the obligations on their part to be performed, etc., as a sales agency. The said complaint then sets forth the following:

"V. That the said defendant Hercules Company was unable to, and did not, provide money or credit or means to enable it to manufacture or have manufactured the said locks, or any kind of locks, and no locks were manufactured, and the said Hercules Company failed to have manufactured or delivered to this plaintiff and to the said Lombard as such sales company, or to either of them, any locks whatever as provided in said contract or otherwise, or at all, and no locks were manufactured by the said Hercules Company as provided in the said contract or otherwise, or at all, or were delivered by it to this plaintiff and to said Lombard, or to either of them, and the failure of the said Hercules Company to comply with the said contract and deliver locks as aforesaid was caused by and is attributed to no other cause than the inability of the said Hercules Company to manufacture or have manufactured the said locks as contemplated by them under the terms of the said contract. And in this connection, plaintiff alleges that many times after the said 8th day of March, 1921, he demanded of the said Hercules Company, on behalf of himself and the said Lombard, that the said Hercules Company provide and deliver said locks as aforesaid, and the said Hercules Company has many times promised so to do, but failed to keep its promise in this regard, and no locks of any kind whatever were ever supplied, as provided by the said contracts, or otherwise, or at all.

"VII. That by reason of the failure of the said Hercules Company to supply or furnish or deliver to this plaintiff and the said Lombard, or either of them, as such Sales Company, or otherwise, any locks whatever in accordance with the terms of the said contract on its part to be performed as aforesaid, the said plaintiff and the said Lombard have been damaged in the sums of money as hereinafter stated: and this plaintiff, because of being entitled to 25 per cent. of the profits accruing jointly to this plaintiff and the said Lombard as hereinbefore set forth, and arising or growing out of the said contract, has been damaged to the extent of 25 per cent. of the said sum; and in this connection plaintiff alleges that the damages so sustained by him as aforesaid, and arising and growing out of the failure of the defendant Hercules Company to comply with the terms of the said agreement on its part to be performed, are as follows:

"First. That under the terms of the said contract this plaintiff and the said Lombard agreed to purchase, and the said defendant corporation agreed to sell not, less than 120,000 locks per annum, beginning July 1, 1922, at the prices set forth in said contract, to wit: No. 1 size, $3.75 each; No. 2 size, $4.25 each; No. 3 size, $4.75 each; and the said prices were based upon an estimated cost of manufacture of $3.03 for No. 1 size, $3.24½ for No. 2 size, and $3.62½ for No. 3 size.

"Said contract contained the provision that, if any saving in the first cost of manufacture should be effected, one-half of said saving should accrue to the benefit of the said plaintiff and the said Lombard, and to that extent reduce the price to be paid by the said plaintiff and the said Lombard for the said locks as hereinbefore set forth, and that the other one-half should be retained by the Hercules Company, and, on the other hand, that, if the first cost of manufacture should prove greater than the estimated cost set out in the said contract, one-half of the increased cost, over and above the estimate, should be borne by Sales Company composed of the plaintiff and the said Lombard, and the other one-half by the Hercules Company.

"That this plaintiff, acting for himself and the said Lombard, composing the said Sales Company, was able to and did secure a contract by responsible parties providing for the manufacture of the said locks, and of the kind, quality, and workmanship required by said contract, at a figure or cost for the 120,000 locks of the sum of $66,150, and for 360,000 of said locks, at a proportionate reduction, or the sum of $198,450, less than the estimated cost of the manufacture of said locks as set forth in the said contract.

"That it was agreed by and between the parties to said contract that the same should continue in force and effect for a reasonable time, and it was agreed that the said contract should continue in force and effect for not less than three years, and during each of said three years the said plaintiff and the said Lombard should buy, and the said defendant Hercules Company should sell, not less than 120,000 locks per annum as hereinbefore stated. That, assuming the said contract did not continue in force or effect for a period longer than three years, a saving in the cost of manufacturing over the estimated cost would be three times the said $66,150, or the sum of $198,450.

"That the saving and lessened cost of manufacture of said 360,000 locks above the estimated cost as hereinbefore set forth, so effected and brought about by this plaintiff as hereinbefore set forth, amounted to the said sum of $198,450, and of which saving or lessened cost the said Sales Company, composed of this plaintiff and the said Lombard, would be entitled to 50 per cent. or the sum of $99,225; and this plaintiff is entitled to 25 per cent. of the 50 per cent., or the sum of $24,806.25.

"Second. That the other element constituting the damage sustained by plaintiff in the loss of profits that would have followed from the sales of said locks, had the said Hercules Company performed its contract to supply and furnish said locks, is as follows:

"That this plaintiff, acting on behalf of himself and the said Lombard, as the Sales Company, gave great publicity to the said lock, and to the merits thereof, and, by the aid of agents and persons specially qualified for such purposes, canvassed and solicited orders for the purchase of said locks, and learned that the plaintiff and said Lombard, as such Sales Company, could sell and dispose of more than the minimum quantity of locks so contracted to be purchased by them and supplied by the said Hercules Company and for a period of not less than three years; and this plaintiff alleges on information and belief that, if the said Hercules Company had kept its contract to supply said locks as hereinbefore stated, this plaintiff on behalf of himself and the said Lombard, as such Sales Company, could and would have sold not less than 120,000 locks per annum for three years from and after the date of said contract, and at a price or figure which, after deducting the price to be paid to the Hercules Company for the said locks, and expenses of every kind pertaining to the matter of the sales, overhead, and otherwise, would have left remaining to this plaintiff and the said Lombard, as such Sales Company, a profit of 90½ cents per lock, over and above the price to be paid for said lock at the figures expressed in the contract; that is to say—without taking into consideration the deduction to be made by reason of the saving in the cost of manufacture as hereinbefore expressed—this plaintiff and the said Lombard could have sold 120,000 locks per annum for not less than a period of three years at a price that would net above all expenses entailed upon the selling and the payment of the purchase price the sum of 90½ cents per lock, or a profit of $108,600 per annum, of which sum this plaintiff would be entitled to 25 per cent., or $27,130 and for a period of three years the profit to the said plaintiff and the said Lombard would be the sum of $325,800 and plaintiff's share, or 25 per cent., would be the sum of $81,450.

"Plaintiff alleges that, in the publicity given by him to the said lock and to the merits thereof, and in the work done by himself and by the agents and persons employed to canvass and solicit orders for the purchase of said locks as aforesaid, he, the plaintiff, acting on behalf of himself and the said Lombard, expended a great deal of time and also expended, in the employment of the said agents and persons who canvassed and solicited orders as aforesaid, large sums of money, and the reasonable value of which time, together with the money so expended by him exceeded the sum of $2,500, and no part of which has been repaid.

"Plaintiff alleges that he and the said Lombard have been damaged as hereinbefore stated in the said sums of money, representing, as before stated, the profit that would have been made by them over and above the payment of all expenses of every kind in connection with the sales of said locks and over and above the sums of money required to be paid by the Sales Company, composed of the said plaintiff and the said Lombard, to the said Hercules Company, as provided in the said agreement for the said locks, and without any deduction or credits to the said plaintiff and said Lombard, as such Sales Company, on account of the saving and lessened cost of the manufacture of the said locks so brought about and effected by plaintiff as hereinbefore set out in this complaint."

[1] The complaint states the reasons why Lombard is made a defendant instead of joining herewith as a plaintiff and then asks for the recovery of $100,000 damages, alleged to have been suffered in the manner herein set forth. As stated, the defendants interposed demurrers, specifying 89 grounds wherein the complaint is insufficient, 3 or 4 of which only are necessary to be considered in the disposition of this cause, to wit: That the complaint is insufficient to state a cause of action; that the alleged damages consist of uncertain, contingent, and speculative

profits so remote and indefinite of ascertainment as not to furnish a cause of action; that it cannot be ascertained from the complaint what publicity of the merits of said lock was given by the said plaintiff, what persons were employed by him as agents, how much time he expended, what his services were worth, or how much money, if any, he expended that had not been repaid by the said corporation. We have not followed the wording of the demurrer, but we have stated the substance in concrete form in order that time may be saved and the length of this opinion curtailed.

Paragraph 5 of plaintiff's complaint alleges the failure on the part of defendant corporation to have manufactured and delivered to the plaintiff, or the said Lombard, any of the locks referred to in the memorandum of agreement and attempts to charge the defendant corporation with responsibility in the following language:

> "And in this connection, plaintiff alleges that many times after the said 8th day of March, 1921, he demanded of the Hercules Company, on behalf of himself and the said Lombard, that the said Hercules Company provide and deliver said locks as aforesaid."

Turning to the memorandum of agreement, we find the following paragraph relative to the selling and delivery by the defendant corporation of Hercules locks to the plaintiff, to wit:

> "The Hercules Company is to sell and deliver to the Sales Company all locks ordered at times stated and in quantity ordered, reasonable notice being given by the Sales Company of requirements, subject to delays and contingencies beyond the control of the Hercules Company."

Nowhere in the complaint is there any allegation of the time when the plaintiff ordered said locks to be delivered, nowhere in the complaint is there any statement of the quantity ordered, nor is there anything in the complaint indicating that a reasonable notice, or any notice, being given by the Sales Company of its requirement of locks to be delivered to it by the defendant corporation. So far as the complaint is concerned, it may be that the demands made by the plaintiff for the delivery of the locks were made long after the contract had been abandoned by all the parties thereto. The complaint itself, as we have said, indicates that the plaintiff ceased giving his attention thereto at about the beginning of August, 1921. Again, the memorandum of agreement contains a provision that not less than 60,000 locks shall be sold prior to July 1, 1922, before the defendant becomes obligated to deliver 120,000 locks per annum. There is no allegation in the complaint that the plaintiff ever sold said 60,000 locks, or ever demanded of or sought to obtain from the defendant said 60,000 locks or any of them. The agreement calls for three sizes of locks. There is nothing in the complaint that locks of any particular size were ever ordered or called for by the plaintiff from the defendant corporation. Again, the memorandum of agreement relating to the plaintiff's right to have and receive 25 per cent. of the capital stock, etc., as a part of his profits is made dependent upon the Sales Company showing a profit of $12,000 prior to July 1, 1922. There is not a line in the complaint indicating that $1 of profit was ever made or furnished by anybody in connection either with the manufacturing or selling of said locks.

As shown by the excerpt which we have quoted from the complaint, there is nothing set out indicating what publicity the plaintiff has given to the lock in question, no statement of what agents were employed, or what work they have done, what compensation they have earned, if any, or the value of their labor. No statement of the time expended by the plaintiff other than the allegation of its being a "great deal," no statement of the time expended by the agents or persons canvassing as solicitors, or of how much money has been paid therefor, if any, or how much is owing therefor, if any, no statement of how much money the plaintiff has expended, but only the blanket statement that all these matters exceed in value the sum of $2,500.

Turning to the agreement, we find the following clause relating to the matters just treated:

> "The Hercules Company is to furnish necessary financial assistance to enable the Sales Company to properly introduce the Hercules lock; the extent of such financial assistance to be mutually agreed upon."

There is not a word in the complaint showing what financial assistance was agreed upon, or whether the defendant ever assumed to pay any sum whatever for and on account of the alleged expenditures, work, etc., alleged to exceed in value the sum of $2,500. This analysis, we think, clearly establishes that the complaint was subject to the special demurrers interposed by the defendants.

[2] There is, however, another matter which goes to the very vitals of this action and precludes the possibility of plaintiff's recovery, which is best stated in section 118, p. 797, 17 C. J.:

> "Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation."

The paragraphs of the complaint which we have copied show that no business has ever been transacted; that no locks have ever been manufactured; and no locks have ever been sold. The alleged loss of profits relates not to the interruption of the business of a going concern, but is remote, contingent, speculative, existing only in anticipation, without any tangible basis upon which to predicate any loss whatever. The allegation that the plaintiff could have done this and could have done that, if the defendant had done something else, furnishes no facts upon which to predicate a judgment. The past profits of a going concern, if any, may be ascertained when its business is interrupted, but the fact of profits to be realized from a business about to be launched can exist only on paper, and, while profits may be possible, losses in the enterprise are just as possible, and in either case they are nothing more than contingent probabilities. In Cal. Press Mfg. Co. v. Stafford Pack. Co., 192 Cal. 479, 221 P. 345, 32 A. L. R. 114, the Supreme Court of this state says:

> "As a proposition of law, it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. Kettering v. Sheppard, 19 N. M. 330 [142 P. 1128]. Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation. 17 Cor. Jur. p. 797, § 118; Shoemaker v. Acker, 116 Cal. 239, 244 [48 P. 62]. The rule is one of necessity. Damages must be certain of ascertainment. If one engages in a new industry, there are no provable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. Central Coal Co. v. Hartman, 111 F. 96, 99 [49 C. C. A. 244]."

In Central Coal Co. v. Hartman, supra, we find the following:

> "He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced"—citing a number of authorities.

In 8 Cal. Jur., p. 777, the distinction is clearly drawn by the text-writer as to when loss of profits may be allowed. If the business is established and is interrupted, past profits furnish the basis for calculating the damage. If the business is unestablished, such anticipated profits are held to be remote, uncertain, and speculative, on the ground that no satisfactory statement of the loss can be made. To state it in different language: No one can say that any profits would ever have been realized. The rules which we are here stating relative to loss of future profits are also clearly set forth in Shoemaker v. Acker, 116 Cal. at pages 244, 245, 48 P. 62. The substance of the holding there is that when the business prevented or interrupted is an established one, a basis for allowing damages is found in the past profits of the concern, but, if no business has ever been done, no profits earned, the possibility of proving profits does not exist, and no court can determine whether there would be profits, or whether the prospective business would not rather result in losses. To the same effect is the case of McConnell v. Water Co., 149 Cal. 65, 66, 85 P. 929, 8 L. R. A. (N. S.) 1171. Since the briefs were written in this case, the leading case, California Press Mfg. Co. v. Stafford Pack. Co., above referred to, reported in 192 Cal. 479, 221 P. 345, has been rereported in 32 A. L. R. 114, to which has been appended annotations covering 36 pages. On page 126 of the same volume, under the subtitle setting forth the rule of law that no recovery can be had for losses of profits, which are uncertain, speculative, contingent, and conjectural, is collated authorities from nearly every state in the Union, showing an unbroken line of decisions confirming the principle set forth in the case of California Press Mfg. Co. v. Stafford Pack. Co., supra, and on page 153 of the same volume under the subtitle dealing with the rule relating to anticipated profits of an unestablished business, is also collected a long list of decisions showing the unanimity of courts in upholding such doctrine.

The cases collected and appended in the notes to the principal case, reported in 32 A. L. R. 120, are so extensive and so numerous that it is unnecessary to do more than cite the volume and page of said work to show that plaintiff has no cause of action on account of his alleged loss of anticipated profits, based upon unrealized hopes of an unestablished business. Whatever damage he may have suffered, by reason of the acts of the defendants, must be based upon something tangible and not upon future prospects, and there being nothing of that character in the complaint, and nothing in the complaint other than what we have referred to, it follows that the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; BUCK, Justice pro tem.

80 Cal. App. 717

LEWIS et ux. v. FOWLER et ux.

(Civ. 3134, 3151.)

(District Court of Appeal, Third District, California. Jan. 19, 1927.)

1. Appeal and error 🔑681—Appeal from order, copy of which is not in record, cannot be considered.

Appeal from order denying motion to strike amendment to complaint from files and to vacate order to file amendment cannot be considered, where record does not contain copy of such order.

2. Pleading 🔑238(2)—Affidavit that motion would be made to vacate order, filed 10 days before request for transcript, constituted waiver of formal notice thereof (Code Civ. Proc. § 953a).

Affidavit of attorney stating that motion to vacate order granting leave to amend complaint would be made, filed more than 10 days before request for transcript of evidence was filed, as required by Code Civ. Proc. § 953a, constituted a waiver of formal notice of such order.

3. Appeal and error 🔑607(1)—Transcript of evidence cannot be considered on appeal, where notice to clerk requesting it was not filed within time (Code Civ. Proc. § 953a).

Where notice to clerk for transcript of evidence was not filed within 10 days after notice of entry of judgment, as required by Code Civ. Proc. § 953a, transcript cannot be considered on appeal.

4. Appeal and error 🔑607(1)—Time within which to request transcript is not extended by motion to vacate order permitting amendment to complaint after judgment (Code Civ. Proc. § 953a).

Time allowed under Code Civ. Proc. § 953a, for requesting transcript from clerk, is not extended by motion to vacate order permitting amendment of complaint made after judgment.

5. Pleading 🔑126—Denial of plaintiff's ability, readiness, or willingness at all times to perform held negative pregnant.

Denial "that plaintiffs have at all times been ready, or able, or willing, to comply with all, or any of the conditions and covenants or conditions or covenants, of said lease, and/or to pay to defendants the consideration therein named," is a negative pregnant, and admits allegation attempted to be denied.

6. Trial 🔑388(4)—Findings need not include facts admitted by pleadings.

Facts admitted by pleadings need not be found by the court.

7. Appeal and error 🔑544(1)—Objection that finding is outside issues will not be considered on appeal on judgment roll alone.

Where appeal is on judgment roll alone, objection that finding is outside the issues will not be considered, but it will be presumed that case was tried without objection, on theory that fact so found was in issue.

8. Landlord and tenant 🔑185—Landlord's repudiation of lease excused lessees from making formal tender of first month's rent.

Landlord's repudiation of contract of lease by declaring it terminated and rights of lessees forfeited excused lessees from making formal tender of first month's rent in accordance with contract.

9. Specific performance 🔑92(1)—Finding that lessees' offer to pay first month's rent on February 13th, in compliance with lessors' demand of February 2d, after lessor's prior waiver, was within reasonable time, held warranted.

Where lessor was unable to give possession at date of lease, and thereafter demanded payment of first month's rent on February 2d, finding that offer of payment by lessee on February 13th was within reasonable time *held* warranted.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by Albert J. Lewis and wife against William Fowler and wife. From a judgment for plaintiffs and an order denying defendants' motion to vacate an order, made after judgment permitting amendment to third amended complaint, and to strike such purported amendment from files, defendants appeal. Affirmed.

Milton M. Cohen, James S. Roche, and C. O. Bacon, all of Los Angeles, for appellants.

Harry Lyons, of Los Angeles, for respondents.

FINCH, P. J. The defendants have appealed, on a record prepared in accordance with the provisions of section 953a of the Code of Civil Procedure, from the judgment entered herein in favor of the plaintiffs. They have also appealed, on a bill of exceptions, from the order of the trial court denying their motion to vacate an order, made after entry of judgment, "permitting the plaintiffs to amend their third amended complaint and to strike from the files plaintiffs' purported amendment to third amended complaint." The two appeals have been consolidated, and they were argued and submitted together.

June 23, 1922, the parties executed a written lease, by the terms of which the defendants leased to the plaintiffs the Fowler Apartments in the city of Los Angeles for a term of three years, commencing November 15, 1922, at a monthly rental of $200, payable monthly in advance. The lease provided for the payment of $200 at the time of its execution, which sum was so paid, and "$200 September 1, 1922, being two last months rent, and $200 when taking possession of said premises."

The third amended complaint alleges the foregoing admitted facts, and, further, that at numerous times after the execution of the lease the plaintiffs tendered to the defendants payment of the sum of $200 due September 1, 1922, and demanded possession of the premises, but that the defendants refused to accept such payment or to admit plaintiffs into possession; that "plaintiffs have at all times been and now are ready, able, and willing to comply with all of the conditions and covenants of said lease, and pay to defendants the consideration therein named, and are ready to occupy said premises, but that defendants have refused to carry out said lease according to the terms and conditions therein provided, and refuse to let into possession the plaintiffs herein." Among other things, the prayer is for judgment "that this lease be specifically performed, and that plaintiffs be let into possession of said premises upon the payment by plaintiffs of the consideration as in said contract of lease provided."

The answer admits the execution of the lease and the payment of $200 at the time of such execution. The remainder of the answer is as follows:

> "Defendants deny that at numerous, or at any time, or times, between the execution of said contract of lease and the commencement of this action, the plaintiffs tendered, or have tendered, defendants a further sum of $200, as in said contract provided, or otherwise, and defendants further deny that upon the alleged tendering of the aforesaid amount to defendants plaintiffs, or either of them, demanded that they be let into possession of the said premises on the 15th day of November, 1922, or at any time, or at all: defendants deny that plaintiffs have at all times been ready, or able, or willing, to comply with all or any of the conditions and covenants, or conditions or covenants, of said lease, and/or to pay to defendants the consideration therein named, and these defendants further deny that they have refused to carry out said lease according to the terms and conditions, or terms or conditions, therein provided."

The court found that at the time of the execution of the lease the leased property was in the possession of one Elsie Coltrin under a lease, the term of which ended November 14, 1922; that at the expiration of her term she refused to surrender possession; that on November 23, 1922, defendants commenced an action against her for the possession of the premises, and recovered judgment therein February 2, 1923; "that prior to the 2d day of February, 1923, the defendants were unable to deliver possession of the said premises to the plaintiffs"; that the plaintiffs did not make payment of the sum of $200 provided by the lease to be paid September 1, 1922, but that such payment at that time "was waived by the defendants, and that the payment thereof was deferred by the defendants until such time as they should be able to deliver possession of the premises unto the plaintiffs, and that up to the 7th day of February, 1923, the defendants respected the plaintiffs' rights to the property and were willing to go on with the lease made with the plaintiffs; that the plaintiffs had likewise waived the delivery of possession unto them, * * * as provided for in the lease, and had deferred the delivery and possession until such time as the defendants should be able to do so"; that "on February 2, 1923, the defendants made a verbal demand upon the plaintiffs for the payment of the said sum of $200 and stated to the plaintiffs that they may make the said payment at any time between the said date and * * * the 5th of February, 1923; that on the 7th day of February, 1923, the said sum of $200 was still unpaid; that the defendants on said date tendered to plaintiffs the said sum of $200 which the said plaintiffs had paid to defendants on the 3d day of June, 1922, and declared the lease terminated and the rights of the plaintiffs thereunder forfeited; that the plaintiffs have refused to accept a return of the $200; that on the 13th day of February, 1923, the plaintiff offered to pay to the defendants the said sum of $200, the sum provided for in the lease to be paid on the 1st day of September, 1922, and offered to go on with the lease"; that the defendants refused to let plaintiffs into possession of the premises; that "the period of time within which to make the payment of the said $200 by the plaintiffs specified in the aforesaid demand on the 2d day of February, 1923, was too short, arbitrary, and unreasonable; that the subsequent offer of payment by the plaintiffs on the 13th day of February, 1923, was made within a reasonable time after the demand for such payment was made by the defendants upon the plaintiffs." The judgment, among other things, requires the defendants to deliver possession of the premises to the plaintiffs upon payment by the latter of the rental then due, including the first month's rent of $200.

[1] After the entry of judgment, and after the denial of defendants' motion for a new trial, the court granted the plaintiffs permission to file an amendment to the third amended complaint, alleging the aforesaid facts found by the court relative to the inability of the defendants to deliver possession of the premises at the time required by the lease, their waiver of the time of payment of the installment of rent falling due September 1, 1922, and the subsequent demands, offers, and acts of the respective parties. The order granting such permission recites that, during the trial, on the 20th day of March, 1924, the plaintiffs moved the court for leave to amend the complaint, and, at the conclusion of the trial, moved the court "that the said pleadings be deemed amended to conform to the proof in the said cause," and that both motions were duly granted. The order granted leave to file such amend-

ment "as of the 20th day of March, 1924," and directed the clerk to file the amendment and include the same in the judgment roll. The amendment was thereupon filed. Thereafter the defendants moved the court to strike the amendment from the files and to vacate the order granting plaintiffs leave to file the amendment. The motion was denied, and the defendants gave notice of appeal from the order denying their motion. The record does not contain a copy of the order from which the appeal was taken, and therefore the appeal cannot be considered. Code Civ. Proc. § 951; Kimple v. Conway, 69 Cal. 71, 72, 10 P. 189; Timmons v. Coonley, 39 Cal. App. 35, 36, 179 P. 429.

[2-4] Judgment was entered May 23, 1924. July 14, 1924, the defendants' motion for a new trial was denied. The order granting plaintiffs leave to amend the third amended complaint was made July 16, 1924. Thereafter the defendants served and filed their notice, together with the affidavit of C. A. Bacon, one of the attorneys for defendants, that they would move the court on the 31st day of July, 1924, to vacate the order granting leave to amend the complaint. The affidavit was sworn to on the 25th of July, 1924, and it is stated therein that the defendants' motion for a new trial was heard on the 14th of July, 1924, and that the court "denied the motion for a new trial, and that thereafter the attorney for the plaintiffs obtained from said court a purported order, granting leave to file an amendment to plaintiffs' third amended complaint." Appellants did not file with the clerk a request for a transcript until August 14, 1924. Section 953a of the Code of Civil Procedure provides that such a notice "must be filed within ten days after notice of entry of the judgment, order or decree, or if a proceeding on motion for new trial be pending, within ten days after notice of decision denying said motion, or of other termination thereof." It does not appear that any notice of the order denying a new trial was served upon defendants, but the aforesaid affidavit, stating that the motion for a new trial had been denied, was filed more than ten days before the request for a transcript of the evidence was filed. This constituted a waiver of formal notice of the order. "A written admission by a party entitled to notice, of knowledge that the judgment had been entered would supersede the necessity of giving such notice." Smith v. Questa, 58 Cal. App. 1, 6, 207 P. 1036. See, also, Hughes v. De Mund, 195 Cal. 242, 233 P. 94, and Mallory v. See, 129 Cal. 356, 61 P. 1123. The notice to the clerk having been filed too late, the transcript of the evidence cannot be considered. Spear v. Monore, 181 Cal. 728, 186 P. 149; Des Granges v. Des Granges, 165 P. 13, 175 Cal. 67. Appellants contend that their time to request a transcript was extended by their motion to vacate the order permitting amendment of the third amended complaint, which motion was not decided until after they had made such request. In support of such contention, they rely upon the provision of section 953a of the Code of Civil Procedure hereinbefore quoted. It is clear that the word "thereof" in such provision relates to the "proceeding on motion for a new trial," and not to other proceedings in the action.

[5-9] The judgment may be affirmed without giving any effect to the amendment to the third amended complaint. Appellants contend that there is a fatal variance between the allegations of the complaint and the findings, in that the complaint alleges performance, or offer to perform the covenants of the lease, while the court finds that performance at the time required by the terms of the lease was waived by defendants. Where the appeal is on the judgment roll alone, the objection that a finding is outside the issues will not be considered, but it will be presumed that the case was tried, without objection, upon the theory that the fact so found was in issue. Peck v. Noee, 154 Cal. 354, 97 P. 865; Horton v. Dominguez, 68 Cal. 642, 643, 10 P. 186; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318, 325, 147 P. 90; Schroeder v. Mauzy, 16 Cal. App. 443, 447, 118 P. 459. There is no denial of the allegation that "plaintiffs have at all times been and now are ready, able, and willing to comply with all the conditions and covenants of said lease and pay to defendants the consideration therein named, and are ready to occupy said premises"; the attempted denial thereof being a negative pregnant. It is not necessary to find a fact admitted by the pleadings. It is neither alleged nor found that the plaintiffs tendered payment of the first month's rental of $200 upon demanding possession, but the court found that the defendants, prior to such demand, had repudiated the contract of lease by declaring it "terminated and the rights of the plaintiffs thereunder forfeited." Such repudiation excused the plaintiffs from making a formal tender of the first month's rent. Buckmaster v. Bertram, 186 Cal. 673, 678, 200 P. 610. It may be observed further that the defendants denied in their answer that they had "refused to carry out said lease according to the terms and conditions, or terms or conditions, therein provided." It may be inferred from the findings that at the trial the defendants attempted to prove, without having alleged, a rescission of the contract or a forfeiture of the plaintiffs' rights thereunder, and that the plaintiffs met such attempt by proof of a waiver by defendants. It cannot be held that the court was not justified in finding that "the offer of payment by the plaintiffs on the 13th day of February, 1923, in compliance with the demand of the defendants made on the 2d day of Febru-

ary, 1923, * * * was made within a reasonable time." Noyes v. Schlegel, 9 Cal. App. 516, 521, 99 P. 726.

The appeal from the order is dismissed, and the judgment is affirmed.

We concur: PLUMMER, J.; PRESTON, Justice pro tem.

200 Cal. 276

GLOBE COTTON OIL MILLS v. ZELLERBACH et al., State Fish and Game Commission. (S. F. 12323.)

(Supreme Court of California. Jan. 20, 1927.)

Constitutional law ⚷80(2)—Fish ⚷9—Granting to fish and game commission power to determine facts incidental to regulation is valid as administrative (Const. art. 6, § 1).

Granting of power to fish and game commission to hold hearings and determine facts incidental to regulation of fish and game and to granting of permits to take and use fish is valid as administrative or regulatory power, and does not transgress on exclusive functions of judicial department, contrary to Const. art. 6, § 1.

In Bank.

Application by Globe Cotton Oil Mills for writ of mandate prayed to be directed to I. Zellerbach and others, members of the Fish and Game Commission of the State of California. Writ granted.

Warren H. Pillsbury, of San Francisco, and John L. Dyer, of Los Angeles, for petitioner.

B. D. Marx Greene, of San Francisco, for respondents.

PER CURIAM. Upon submission of the cause in open court, the Chief Justice announced the decision of the court as follows:

The petitioner, owning and operating a fish reduction plant at Terminal Island, San Pedro, Harbor, seeks a writ of mandate to compel the respondent fish and game commission to set for hearing and to act on the application filed with the commission by petitioner for a permit authorizing it to use in its plant the quantity of fish designated in the application, for the purposes therein specified. The commission has refused to entertain jurisdiction of the application upon the ground that it is a nonjudicial body, and that to act as requested by the petitioner would be to exercise judicial functions. In assuming this position, the respondent relies upon Van Camp Sea Food Co. v. Fish and Game Commission (Cal. App.) 243 P. 702, in which it was held that a commission like the fish and game commission, which is one having a state-wide jurisdiction, as distinguished from

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

a local board, cannot be invested with judicial functions, for the reason that, "except for local purposes," section 1 of article 6 of the Constitution confines all judicial power to certain specified courts.

This court is of the view, however, that, admitting that the fish and game commission cannot be granted any power which constitutionally belongs exclusively to the judicial department of the state government, the granting of power to hold hearings and determine facts incidental to the regulation of fish and game, and to the granting of permits to take and use fish, is valid as an administrative or regulatory power, and in no wise transgresses upon the exclusive functions of the judicial department.

Let the writ of mandate issue as prayed for.

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200 Cal. 252

In re BABB'S ESTATE.

WILLIAMS v. BABB et al.

(S. F. 11937.)

(Supreme Court of California. Jan. 14, 1927.)

1. Appeal and error 🔑151(3)—Executor, not being party aggrieved by decree of distribution determining rights of devisees, has no right of appeal.

On appeal from decree of final distribution, executor has no interest, not being party aggrieved in distribution, which determined rights of several devisees to estate of testator, so executor's appeal must be dismissed.

2. Executors and administrators 🔑314(12)—Legatee, complaining of final distribution, has right of appeal.

Legatee, claiming that property disposed of under will had been improperly distributed by final decree has right of appeal.

3. Wills 🔑481—Will speaks from date of testator's death, not from date of its execution.

Will speaks from date of death of deceased testator, not from date of its execution.

4. Wills 🔑481—Legatee of bank account held entitled to money from another estate deposited by testator before death, though testator's interest in such estate was devised to others.

Where testator, heir at law to property in another estate, provided that one person should have all money in bank at time of testator's death, and that certain others should have his interest in the other estate, legatee of bank account *held* entitled to moneys received from such estate before testator's death and deposited in bank, will being construed as speaking from date of testator's death, not from date of will's execution.

5. Wills 🔑767—Testator's receipt in his lifetime of assets from another's estate caused pro rata ademption of legacies of interest in such estate.

Receipt by testator in his lifetime of money and property from another's estate *held* to produce pro rata ademption of legacies in testator's will of such estate.

6. Wills 🔑753—Legacies of testator's interest as heir to another estate are specific (Civ. Code, § 1357).

Where testator, heir at law to portion of certain estate, bequeathed such portion to certain legatees, such legacies were specific, in view of Civ. Code, § 1357.

7. Wills 🔑768—Ademption results from extinction of thing bequeathed.

Ademption is effected by extinction of thing or fund bequeathed.

8. Executors and administrators 🔑314(12)—Erroneous final distribution held to warrant only modification, not reversal, on complaint of legatee improperly charged with expenses deductible from residuary estate.

Erroneous final distribution of stock shares, received by testator in his lifetime from estate of another, to legatees under provision willing interest as heir at law to such other estate to them instead of to residuary legatees, who were properly entitled to such interest, *held* to warrant, not reversal, but modification of distribution, on complaint of legatee interested only in expenses deducted from his share, which should have been deducted from residue.

9. Wills 🔑812—Specific legacies are not chargeable with debts or expenses, which are charge against general residuary legacies (Civ. Code, §§ 1357, 1359; Code Civ. Proc. § 1563).

Testator's debts, funeral expenses, and administration expenses are not deductible from specific legacies, in view of Civ. Code, §§ 1357, 1359, Code Civ. Proc. § 1563, if general residuary legacies are sufficient to defray same.

10. Executors and administrators 🔑314(12)—Erroneous decree of distribution is final as to nonappealing legatees, but may be corrected as to expenses erroneously charged to appellant's share.

Erroneous final decree of distribution is conclusive against residuary legatees not appealing, but may be modified by relieving appellant from expenses properly chargeable to residuum.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the estate of Walter W. Babb, also known as W. W. Babb. From a decree directing final distribution of certain property to Frank H. Babb and others, Edward N. Williams, individually as legatee, and also as executor of the last will of Walter W. Babb, deceased, appeals. Modified and reversed, with directions.

George W. Waldorf, and Edwin A. Wilcox, both of San Jose, for appellant.

Owen D. Richardson, of San Jose, for respondents.

CURTIS, J. On March 7, 1922, Walter W. Babb, a single man, executed his will, by the terms of which he gave to his uncle, Edward N. Williams, "all the money I may have in any bank at the time of my decease, and all the money I may then have loaned out." This provision was contained in paragraph II of his will. By paragraph III of said will, after reciting that he was one of the heirs at law of Mary L. Taylor, deceased, and as such was entitled to an interest in her estate, he disposed of said interest as follows:

> "I give, devise and bequeath all my right, title and interest in said Mary L. Taylor estate, and the real and personal property thereto belonging as follows, to wit."

Then follows the five names of respondents herein, each of whom was given an undivided one-fifth of the testator's interest in the estate of Mary L. Taylor, deceased, and the property thereof. By paragraph VI of said will the respondents, Harriet B. Sargent and Lucy S. Boyd, were named as his residuary legatees. The testator died on October 26, 1925, at which time there was on deposit in the Bank of San Jose, at San Jose, Cal., to his credit, the sum of $7,652.54. At the time he executed his will the estate of Mary L. Taylor, deceased, was in course of administration, and was still unsettled at the time of the death of said testator. During his lifetime, and subsequent to the execution of said will, said testator received from the estate of said Mary L. Taylor, deceased, the sum of $4,048.20 in money, and 70 shares of the capital stock of the Cincinnati Discount Company. The money received from the Taylor estate was deposited to the credit of testator by him in said Bank of San Jose, and was undoubtedly a part of the money the said deceased left on deposit in said bank at the time of his death. The executor of the will of said deceased received from the 70 shares of the capital stock of the Cincinnati Discount Company the sum of $4,620, $420 as dividends on said stock, and $4,200 from a subsequent sale thereof. Said executor also received the sum of $97 direct from the estate of Mary L. Taylor, deceased, which last named sum was the only money or property received by said executor from said estate. On the final distribution the probate court distributed to respondents the sum of $8,765.20, which sum was made up of said sum of $4,048.20, received by said testator during his lifetime from the estate of Mary L. Taylor, deceased, the further sum of $4,620 being the proceeds received from the said 70 shares of the capital stock of the Cincinnati Discount Company, and also said sum of $97 received by said executor direct from said estate of Mary L. Taylor, deceased. Other property belonging to the estate of Walter W. Babb, deceased, was distributed according to the terms of his last will and testament, and there is no controversy over the correctness of the decree of distribution in respect to this last-mentioned property. From that part of the decree of distribution, however, distributing to the respondents the said sum of $8,765.20, the said Edward N. Williams has appealed, both as the executor of said will and also individually as one of the legatees under said will.

[1] This controversy is entirely between the different legatees under the last will of said deceased, in which controversy the executor of said will, as such, has no interest. He is not a party aggrieved by a decree of distribution determining the rights of several devisees to the estate of the testator. 2 Cal. Jur. 220; Estate of Ross, 179 Cal. 358, 360, 182 P. 303; Estate of Marrey, 65 Cal. 287, 3 P. 896. The appeal of the executor should therefore be dismissed.

[2] The appeal of Edward N. Williams as a legatee under the will of said deceased, claiming that the property of said estate, or, at least a portion thereof, distributed to the respondents herein, should have been distributed to him under the terms of said will, is properly before us. It is the contention of appellant that said sum of $4,048.20 (received by the testator during his lifetime from the estate of Mary L. Taylor, deceased, and which was on deposit with the Bank of San José, with other moneys of said testator at the time of the latter's death), should have been under paragraph II of said will distributed to him. On the other hand, the respondents, seeking an affirmance of the decree of distribution distributing this money to them, assert that, as this money was received by said testator from the estate of Mary L. Taylor, deceased, it was by the terms of paragraph III of said will bequeathed and devised to them, and was therefore rightly distributed to them.

[3] A will speaks from the date of the death of the deceased, and not from the date of its execution. Estate of Rounds, 180 Cal. 386, 181 P. 638; Estate of Page, 181 Cal. 537, 185 P. 383; 1 Redfield on Wills (3d Ed.) § 30; 3 Woerner, American Law of Administration (3d Ed.) § 419; 40 Cyc. 1424. The rule is stated in the above citation from Cyc. in the following language:

> "Although for some purposes a will is considered as speaking from the date of its execution, as a general rule it speaks from the death of the testator and must be construed as operating according to the state of things then existing. * * *"

In 1 Redfield on Wills (3d Ed.) § 30, we find the rule expressed as follows:

"The very nature of the testamentary act, which is expected to take effect only at the time of the decease of the testator, presupposes, that so far as facts and circumstances are susceptible of anticipation by him, so as to enable him to place himself in the position he will then be, relatively to his property and his obligations to his family, that he will have used the language of his will, with reference more particularly to that period."

[4-7] Examining the will of the testator, Walter W. Babb, deceased, in the light of the rule enunciated by these authorities, we are forced to the conclusion that, when the testator, in paragraph II of his will, used the expression, "Unto my Uncle, Edward N. Williams, * * * I give and bequeath all the money I may have in any bank at the time of my decease," that he intended to refer, and did refer, in as clear and apt language as it was possible for him to employ, to all the money which belonged to him and which was on deposit in any bank at the time of his death, irrespective of the sources from which he had received said money. Any other construction would do violence to the plain and direct intent of the testator as expressed in this paragraph of his will. Therefore the provision of paragraph II of his will, devising and bequeathing to appellant the money on deposit in any bank at the time of his death, must control, unless there is some other direction contained in the will limiting this provision or evincing a clear intent to make a different disposition of said money or of some part thereof. Respondents contend that such a provision is to be found in paragraph III of the will whereby the testator devises and bequeaths to them all of his right, title, and interest in the estate of Mary L. Taylor, deceased, and the property belonging thereto. As we have already seen at the time of the execution of the will, the Taylor estate was in process of administration, and during the lifetime of the testator he received from said estate, and deposited to his credit in said bank the sum of $4,048.20. He also received the 70 shares of capital stock in the Cincinnati Discount Company. So that at the death of said testator this money and these shares of stock previously received by him from said estate were no part of the Taylor estate, but constituted a part of the estate of the testator in kind and character as they existed at the time of his death. This property had been severed from the Taylor estate, and completely extinguished as a part of said estate upon its receipt by the testator. Thereafter it had no relation to said estate, except as money and property derived therefrom. Therefore, when paragraph III of the will is read, having in mind the rule that a will speaks from the date of the death of the testator, in connection with the interest of the testator in the Taylor estate, it can only refer to the interest therein at the death of the testator, and cannot be extended or enlarged so as to include or embrace any part of the property previously received by said testator from said estate. The receipt by the testator of the money and property from the Taylor estate produced an ademption of the legacies to the respondents in so far as the money and property so received by the testator might have been included in said legacies had said money and property remained a part of the Taylor estate up to and including the date of the testator's death. Estate of Goodfellow, 166 Cal. 409, 137 P. 12. The legacies bequeathed to respondents by said will were specific legacies. Civ. Code, § 1357. "Ademption is effected by the extinction of the thing or fund bequeathed. * * *" Kramer v. Kramer (C. C. A.) 201 F. 248. Had the Taylor estate been finally distributed during the lifetime of the testator, "the thing or fund" bequeathed to the respondents would have been completely extinguished at the date of the testator's death, and the respondents would have taken nothing under paragraph III of testator's will. In so far as any part or portion of the Taylor estate had been distributed to the testator during his lifetime, to that extent had the fund or property bequeathed to respondents become extinguished, and they are entitled to receive under the provisions of said will only that portion of the fund or property remaining at the date of the testator's death. In Estate of Goodfellow, supra, the testatrix directed her executors "to proceed to obtain the sum of $5,000 from my share of Dr. Dempster's estate, and place it in the care of the Methodist Episcopal Conference * * * said Conference being pledged never to use said $5,000 except as part of an endowment fund for a school for Methodist ministers." The testatrix was a daughter of Dr. Dempster, and one of his heirs. After the execution of her will, but prior to her death, however, the estate of her father had been closed, and the property thereof finally distributed in accordance with the terms of his will. It was held that the legacy of $5,000 to the Methodist Episcopal Conference was adeemed by the final settlement of said estate and the distribution to Mrs. Goodfellow of her interest therein prior to her death. For the same reason it must be held that the bequest to respondents was adeemed to the extent of the property of the Taylor estate distributed to the testator during his lifetime, and said respondents are therefore entitled to receive under paragraph III of said will only such interest in the Taylor estate and the property thereof as existed at the date of the testator's death. We are therefore of the opinion that the probate court was in error in distributing to the respondents said sum of $4,048.20, received by said testator during his lifetime from the state of Mary L. Taylor, deceased. Appellant herein was entitled to have said amount

distributed to him under the terms of said will, whereby he was given all the money of said testator on deposit in any bank at the date of the death of said testator.

[8-10] Appellant further contends that a similar error was made by said court in distributing to respondents said sum of $4,620, being the proceeds received from said 70 shares of the capital stock of the Cincinnati Discount Company. These shares of stock, as we have already seen, were received by the testator from the Taylor estate during the lifetime of the testator, and comprised a portion of his estate at the date of his death. The appellant, under the will of the deceased, was given only the money belonging to said deceased and deposited in any bank and such money as said testator had loaned out. He was therefore not entitled to any of the proceeds received from said 70 shares of stock, and, if any error was made by the court in distributing said proceeds to respondents, the appellant is not a party aggrieved thereby except to the extent hereinafter considered, which does not necessitate a reversal of said order, but at most a modification thereof. While appellant concedes that he was not entitled to any of the proceeds derived from said shares of stock, he contends that said proceeds should be distributed solely to the respondents, Harriet B. Sargent and Lucy S. Boyd, as residuary legatees under paragraph VI of testator's will, and not to all of the respondents herein under paragraph III of said will. He further contends that, had such proceeds been distributed to the said residuary legatees, it would have been the duty of said court to have deducted from said proceeds the debts of said deceased, his funeral expenses, and the expenses of administration before making any distribution of the residue thereof, and that only the residue of said proceeds should have been distributed to said residuary legatees. It appears from the record that the entire property of the estate was distributed to the several legatees and devisees named in said will, and that said distribution was made of the several parts or portions of said estate as special bequests or devises, and that said court apportioned the debts of said deceased, the funeral expenses, and the expenses of administration among the several devisees and legatees in proportion to the amount of property which each one of them received, and that the portion which appellant was required to pay under this plan was the sum of $901.21, which amount was deducted from the amount of the legacies bequeathed to appellant. It is the appellant's contention, therefore, that, had the proceeds received by the executor from said shares of stock been distributed to the residuary legatees under paragraph VI of said will, he would not have been required to deduct from the amount of the legacies bequeathed to him said sum of $901.21. With this contention of appellant we must agree. As already indicated herein, the respondents were not entitled to receive under paragraph III of said will any part of the money or property received by the testator during his lifetime from the estate of Mary L. Taylor, deceased. This property, as we have also seen, included said sum of $4,048.20 in money received directly from the Taylor estate and the $4,620 received by the executor as proceeds from said shares of stock, but by the terms of said will said sum of $4,048.20 should have been distributed to the appellant, and the distribution of the said sum of $4,620 was governed by the provisions of paragraph VI of said will, bequeathing the residue of the said estate to the respondents, Harriet B. Sargent and Lucy L. Boyd. All the bequests and devises under said will, except that to the residuary legatees, were specific, and that to the residuary legatees was general. Civ. Code, § 1357. Property bequeathed to a residuary legatee must be resorted to for the payment of the debts of the deceased, funeral expenses, and expenses of administration, prior to any resort being made to property specifically devised or bequeathed. Civ. Code, § 1359; Code Civ. Proc. § 1563. The debts of the testator, funeral expenses, and the expenses of administration in the present estate should, therefore, have been deducted in whole from the property bequeathed by said testator to the residuary legatees. It was accordingly error for the trial court to have provided in said decree of distribution for the payment by appellant of said sum of $901.21 as appellant's proportionate share of said debts, funeral expenses, and expenses of administration. The decree of distribution awarding the proceeds received by the executor from the shares of stock in the Cincinnati Discount Company to all of the respondents was not appealed from by the respondents Harriet B. Sargent and Lucy S. Boyd, the residuary legatees, the parties aggrieved by said decree. It therefore, in so far as the rights of these two respondents are concerned, is final and conclusive against them. Accordingly it should not be reversed. It should be modified, however, by striking from said decree the provision thereof deducting from the amount distributed to appellant the sum of $901.21 as appellant's proportionate share of the debts of deceased, funeral expenses, and expenses of administration.

The appeal of the executor is dismissed. That portion of said decree of distribution distributing said sum of $4,048.20 to respondents is reversed, with directions to the probate court to enter its decree distributing to appellant the said sum of $4,048.20, in addition to the other sums of money and property distributed to appellant by said decree of distribution. Said decree of distribution is also directed to be modified by striking therefrom the provision contained therein deducting from the amount of the legacies bequeathed to appellant said sum of $901.21 as appellant's proportionate share of the debts of deceased, the funeral expenses, and expenses of administration. It is directed that such decree further provide that said sum of $901.21 be deducted from said sum of $4,620, and that the amount remaining after making such deduction be distributed to respondents.

We concur: WASTE, C. J., RICHARDS, J.; SHENK, J.; SEAWELL, J; LANGDON, J.; PRESTON, J.

200 Cal. 277

ISLAIS CREEK RECLAMATION DIST. v. ALL PERSONS, etc., et al. (S. F. 11948.)

(Supreme Court of California. Jan. 21, 1927.)

1. Drains 🔑1—Creation of reclamation district is exercise of police power within authority of Legislature.

Creation of a reclamation district is an exercise of police power within authority of the Legislature, which is presumed to act with knowledge of the facts and on a determination of the benefits to the lands included within the district.

2. Constitutional law 🔑48—Legislative act should not be declared unconstitutional unless clearly violative of Constitution.

An act of the Legislature should not be declared unconstitutional by the courts unless its provisions are clearly violative of some provision of Constitution.

3. Constitutional law 🔑278(2)—Drains 🔑1—Act creating Islais reclamation district in aid of navigation held within authority of Legislature, and not denial of due process (St. 1925, p. 87).

St. 1925, p. 87, creating Islais Creek reclamation district for the purpose of reclaiming marsh and tidelands in aid of commerce and navigation, *held* clearly within the scope of the power of the Legislature, and not a taking of property without due process in violation of state or federal Constitution.

4. Drains 🔑1—Drainage and reclamation of land, apart from commerce or navigation, is within police power of state.

Drainage and reclamation of land, apart from any question of commerce or navigation, are in themselves a legitimate exercise of the police power of the state.

5. Statutes 🔑97(3) — Legislature creating reclamation district by special act may define manner and plan and provide necessary works.

It is within the power of the Legislature, in creating a reclamation district by special act, to define the manner and plan and provide for the necessary works by which the contemplated reclamation shall be carried out.

6. Drains 🔑13—Islais reclamation district in aid of navigation held not private enterprise with only indirect public benefit, insufficient to support assessment (St. 1925, p. 87).

Islais Creek reclamation district, created by St. 1925, p. 87, in aid of navigation and commerce, *held* not a private industrial enterprise or venture with only an indirect benefit to the public insufficient to sustain assessment of benefits.

7. Drains 🔑2(1)—Statute creating reclamation district is not unconstitutional because public benefit is practically limited to lands within district.

It is no objection to the constitutionality of a statute, creating a reclamation district in aid of commerce and navigation, that the public benefit, which is to be subserved, is practically limited to those in the district whose lands are to be protected.

8. Statutes 🔑123(5)—Statute creating reclamation district and providing for raising lands to street grades held not violative of constitutional requirement that act embrace but one subject expressed in its title (St. 1925, p. 87, § 9; Const. art. 4, § 24).

St. 1925, p. 87, creating Islais Creek reclamation district and providing by § 9 for the filling of lands to official street grades, *held* not violative of Const. art. 4, § 24, requiring every act to embrace but one subject expressed in its title, though title contains no reference to filling in of lands and streets.

9. Drains 🔑15—Reclamation district created by special act held not invalid, though all lands were not swamp or overflowed lands (St. 1925, p. 87).

Validity of Islais Creek reclamation district. created by St. 1925, p. 87, *held* not affected by fact, if established, that all lands within district were not swamp or overflowed lands, the legislative determination of the property benefited being final and conclusive.

In Banc.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by the Islais Creek Reclamation District against all persons whomsoever and the State of California to have determined the legality of plaintiff's existence. From a judgment that plaintiff was a legal reclamation district, Josiah A. Simpson and wife appeal. Affirmed.

Joseph T. O'Connor and Sylvester J. McAtee, both of San Francisco, for appellants.

Allen G. Wright, of San Francisco (Wright & Wright & Stetson, of San Francisco, of counsel), for respondent.

WASTE, C. J. The Islais Creek reclamation district, situate wholly within the city and county of San Francisco, was created by the Legislature by statute, without reference or notice to the inhabitants of the district.

Stats. 1925, p. 87. Under the authority of the statute creating it, the district commenced a proceeding in the superior court to determine the legality of its existence. The defaults of the state of California and of all persons other than the defendants Simpson were entered, and the cause was submitted on an agreed statement of facts. The lower court adjudged the plaintiff to be a legal reclamation district duly created and organized, and having the statutory powers and authority conferred upon it. The defendants Simpson have appealed, contending that the act creating the district, by imposing a tax on their lands, violates the provisions of the state and federal Constitutions and amounts to a taking of property without due process of law.

[1, 2] The appellants, who are owners of real property within the boundaries of the district, concede, as they must, that the creation of a reclamation district is an exercise of the police power of the state, and that the Legislature, which has the power to create, is presumed to act with knowledge of the facts and upon a determination of the benefits to the land included within the boundaries of such a district by the proposed work of reclamation. See People ex rel. Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 103 P. 207. They also concede the full weight of authority to the effect that an act of the Legislature should not be declared unconstitutional by the courts unless its provisions are clearly violative of some provision of the Constitution, and recognize that the courts of this state have liberally construed acts of the Legislature creating reclamation and other improvement districts, because of the public benefit derived therefrom. In re Bonds of Madera Irr. Dist., 92 Cal. 296, 311 et seq., 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106.

[3] After making these concessions, however, and arguing from a premise that "the original purpose of reclamation districts was the unwatering of lands and, in the beginning of such legislation, had application more especially to agricultural lands," and that "reclamation is practically synonymous with drainage," appellants contend that, in enacting the present statute, the Legislature has distorted the "original purpose for which reclamation districts were created." Assuming some other word than "reclamation" might have been used, such, for instance, as "improvement," in describing the nature of the district created, we do not seriously regard the appellants' contention. The purpose and scope of the act are clearly discernible from a reading of it. It is entitled, in part:

> "An act to aid commerce and navigation by authorizing certain improvements in and about Islais creek and as a means thereof creating a reclamation district to be called and known as the 'Islais Creek reclamation district,' * * * and authorizing a method for the reclamation of the lands of said district. * * *"

In section 1 it is declared that:

> In order "to aid commerce and navigation it is necessary to dredge Islais creek in the city and county of San Francisco, to dredge the shoals in the bay of San Francisco lying off the mouth of Islais creek, and to reclaim the old salt marsh and tidelands now lying in the district hereinafter described so that they may become a useful adjunct to commerce and navigation, * * * a reclamation district is hereby created. * * *"

These purposes clearly bring the act creating the district within the scope of the power of the Legislature.

> Whatever "tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." In re Bonds of Madera Irr. Dist., supra, at page 314, 28 P. 275.

[4] Commerce and navigation generally, and particularly in the harbor of San Francisco, will be benefited by the improvement contemplated by this act; but the drainage and reclamation of the lands, apart from any question of commerce or navigation, are in themselves a legitimate exercise of the police power of the state. Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 638, 163 P. 1024.

[5] By section 9 of the act, Islais Creek reclamation district is given the power to reclaim and protect the lands of the district by making, constructing, and maintaining such fills, drains, canals, sluices, bulkheads, water gates, levees, embankments, and pumping plants as, in the opinion of the trustees of the district, are or may be necessary to the general plans as decided upon by the trustees. It was within the power of the Legislature, in creating the district by special act, to define the manner and plan and provide for the necessary works by which the contemplated reclamation should be carried out. Reclamation Dist. v. Superior Court, 171 Cal. 672, 678, 154 P. 845.

[6] All assessments must be made for a public purpose. Appellants therefore argue that while it may be conceded to be of local benefit to create an industrial district where now is marsh land, this is purely a private industrial enterprise or venture, the indirect benefit to the public from which should not be used as a cloak for the exercise of the police power of the state to impose a burden of taxation upon the lands of a citizen. This court said, in Re Bonds of Madera Irr. Dist., supra, at page 310 (28 P. 274), that:

> "Whenever it is apparent from the scope of the act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the act will be upheld, even though incidental

advantages may accrue to individuals beyond those enjoyed by the general public."

[7] It is no objection to the constitutionality of the statute that the public benefit which is to be subserved is practically limited to those in the district whose lands are to be protected. Laguna, etc., Dist. v. Martin Co., 144 Cal. 209, 217, 77 P. 933. It may be assumed that the lands held in private ownership within the district, which, without the improvements contemplated by the creation of the district, will be marsh and overflowed lands, will be especially benefited by the contemplated improvement. But it may not be denied that the state has the power to impose upon the adjacent lands specially benefited by the work an assessment in proportion to such benefits to defray part of the costs. People, etc., v. Sacramento Drainage Dist., supra.

[8] Under the provisions of section 9 of the act, the district may fill the land therein held in private ownership and the streets lying therein, and thereby raise them to the official street grades as the same may be now or hereafter legally established. Because the title does not specifically refer to the filling in of the lands and streets, appellants contend that the act is a violation of section 24, article 4, of the Constitution, which provides that every act shall embrace but one subject, which subject shall be expressed in its title. The objection is not well taken. The title is broad enough in its language to disclose that the general purpose of the act is to provide a scheme for the betterment of the lands lying within the described area. Such aspects of the reclamation and improvement of the land as are set forth in the act, if falling within and germane to the general purposes announced by the title, do not require expression in the title. People, etc., v. Sacramento Drainage Dist., supra, at page 384 (103 P. 207); People v. Jordan, 172 Cal. 391, 394, 156 P. 451; Estate of Wellings, 192 Cal. 506, 519, 221 P. 628.

[9] It was a stipulated fact in the case that the lands in this district were at one time all swamp and overflowed lands, or lands subject to overflow, and the greater part thereof are still of that character. The fact that they are not all of such character at the present time does not affect the validity of the district. Appellants did not attempt, in the court below, to show that their holdings in the district were not overflowed lands. Any attempt to show that fact would have been futile, for the Legislature itself fixed the exterior boundaries of the district and included the appellant's land therein. Its determination as to the property benefited and the property to be included in the district was final and conclusive. Brookes v. City of Oakland, 160 Cal. 423, 427, 117 P. 433.

We have referred to but a few of the many cases sustaining the legality of Islais Creek reclamation district on all contentions advanced by appellants. We find nothing in the points raised by appellants which renders the statute creating the district obnoxious to either the state or the federal Constitution.

The judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.; RICHARDS, J.

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200 Cal. 265

ROBINET v. HAWK et al. (Sac. 3765.)

(Supreme Court of California. Jan. 18, 1927.)

1. Master and servant 🔑87, 363—Liability for injuries to driver of ranch wagon is governed by Roseberry Act; Workmen's Compensation Act being inapplicable.

In action for personal injuries sustained by driver of wagon of fruit ranch, Roseberry Act (St. 1911, p. 796), governing liability of employers for injuries to employees, *held* applicable, there being relationship of employer and employee involved; Workmen's Compensation Act (St. 1913, p. 279), being inapplicable.

2. Master and servant 🔑204(1)—Assumption of risk is no defense under Roseberry Act.

Assumption of risk is no defense to action for personal injuries brought by employee against employer under the Roseberry Act (St. 1911, p. 796).

3. Negligence 🔑101—Employee contributorily negligent may recover for injuries due to employer's gross negligence (Roseberry Act).

Under Roseberry Act (St. 1911, p. 796), governing liability of employers for injuries to employees, employee may recover if he is injured while in course of his employment through want of reasonable care of employer; slight contradictory negligence not being barred from recovery if employer's negligence was gross in comparison.

4. Master and servant 🔑278(3) — Evidence held to warrant finding of employer's negligence as to driver on ranch wagon.

In action for personal injuries received by driver on fruit farm when wagon loaded with fruit crates overturned, evidence *held* sufficient to warrant finding of negligence on part of ranch owners.

5. Master and servant 🔑289(18) — Injured driver of ranch wagon held not negligent as matter of law in using fruit boxes as seat.

In action for injuries to driver on fruit ranch, plaintiff *held* not guilty, as matter of law, of either contributory negligence or of gross negligence, in sitting on fruit crates, when no wagon seat was provided.

6. Negligence 🔑136(31)—Relative negligence of employer and driver of ranch wagon held for jury.

In action for personal injuries to driver of ranch wagon, questions of gross and contributory negligence were for jury.

7. Trial 🔑296(3) — Instruction held not erroneous as making employer insurer, in view of other instructions.

In action for injuries to driver on fruit ranch, instruction *held* not erroneous as making employers insurers in effect, in view of attendant instructions, such instruction not amounting to formula instruction.

8. Master and servant 🔑270(11)—Evidence as to custom of furnishing teamster something to hold onto held immaterial.

In action for injuries to driver on fruit ranch, evidence as to whether it was customary to furnish anything for the teamster to hold onto *held* immaterial.

9. Negligence 🔑5 — Doctrine of customary usage held inapplicable to legal duty under law of negligence.

Doctrine of customary usage does not apply to question of legal duty under law of negligence.

10. Appeal and error 🔑1058(3)—Exclusion of evidence custom of drivers held without prejudice, where same evidence was received from other witness.

In action for injuries to driver on fruit ranch, exclusion of evidence as to custom of drivers of wagons in harvesting fruit and gathering fruit boxes *held* not prejudicial, where another witness was permitted to testify fully as to such custom.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by D. Robinet against E. L. Hawk and another, individually and as copartners doing business under the firm name and style of Hawk & Son. From a judgment for plaintiff, defendants appeal. Affirmed.

White, Miller, Needham & Harber, of Sacramento, for appellants.

Ray T. Coughlin, of Sacramento, and H. W. McGowan, of Willows, for respondent.

PRESTON, J. Defendants are farmers and owners of a team and wagon driven by plaintiff on defendant's ranch. Plaintiff was employed as a teamster collecting boxes of fruit, and was injured by being thrown off the wagon he was driving, along with the load of fruit thereon, for which injuries so sustained he sought judgment against defendants from the court sitting with a jury and charging defendants with negligence in and about the matters alleged in the complaint.

Defendants denied negligence and pleaded that the injuries received by plaintiff were solely the result of his own negligence. Upon the issues thus made the jury awarded plaintiff $1,000 in damages and the trial judge gave judgment on the verdict, from which judgment defendants have appealed.

Appellants urge that the evidence is such as to preclude a finding of negligence on the part of defendants; also that the evidence shows conclusively that the plaintiff's negligence was the sole cause of the injuries received by him; also that the court misdirected the jury in that it told them that defendants were insurers of the safety of their premises and of the appliances used by plaintiff as their employee; and, lastly, that the evidence offered by defendants to the effect that the equipment and appliances furnished plaintiff by the defendants were those customarily used for such purposes was erroneously excluded by the court. We shall discuss these questions in the order named.

[1] It must be borne in mind that the relationship here between the parties is that of employer and employee, which makes what is known as the Roseberry Act (Stats. 1911, p. 796), applicable, excluding, however, from operation herein the so-called Workmen's Compensation Act (St. 1913, p. 279).

[2, 3] Under the Roseberry Act assumption of the risk is no defense to an action of this character, and the doctrine of relative negligence modifies the old rule of contributory negligence. Hackelberry v. Sherlock, 39 Cal. App. 764, 180 P. 37, where numerous cases are cited; Elder v. Rose, 63 Cal. App. 545, 219 P. 74. Under this act plaintiff may recover if he is injured while in the course of his employment through "the want of ordinary or reasonable care of the employer," and in such cases "the fact that such employee may have been guilty of contributory negligence shall not bar a recovery therein where his contributory negligence was slight and that of the employer was gross in comparison."

As we have seen, the plaintiff was employed by the defendants as a teamster, his duties being to drive along between the rows of peach trees, gather up the loaded boxes, and drive them to the place desired by the employer. Plaintiff's duties were purely those of driving the team, as he had helpers in other departments of the work. On the morning of the accident he was instructed to drive a team attached to an ordinary farm wagon throughout the orchard for the purposes above stated. The wagon floor or bed was without sides other than a rim around it about four inches high, and there was no device by which the driver could hold on. Portions of the territory over which he drove the team were covered with Bermuda grass and weeds, the latter being, as certain witnesses testified, about three feet high. The ground was rough, and it was admitted that the orchard had been irrigated by means of ridges thrown up by a disc and also by ditches; that after the irrigation season was over these ridges had not been smoothed down. One witness testified that it was customary in the vicinity, before the harvesting season began, to smooth down the ground so as to permit the access of teams along the rows of trees. The evidence also showed that there may have been irrigation ditches left open, washout holes, called by some "cat-holes," and holes caused by the taking out of old trees in the orchard preparatory to the planting of new trees therein; also that in places where these grasses and weeds were, the ordinary eye could not detect the presence of washouts or holes.

The evidence showed that on the day of the accident, while driving through the orchard, and upon making a turn therein, the wagon gave a lurch, which threw the plaintiff, together with his load of fruit, violently to the ground, rendering plaintiff unconscious for a short period of time and giving him the injuries complained of. When plaintiff finally recovered his senses and investigated his condition he found the wagon with one wheel in a hole, hub-deep, with the surrounding ground rough, and with weeds which may well have obscured plaintiff's view. Also about half the orchard was in a similar condition as to grasses, weeds, and roughness.

Plaintiff testified that he was a careful driver, with 35 years' experience, and that he had never experienced any trouble before in executing his work. He admitted, however, that at the time of the accident he was sitting on top of three of the lug boxes piled one on top of the other. The height of each of these boxes is some 15 or 16 inches. There was no evidence that defendants or their employees had any actual notice that the hole existed by reason of which plaintiff was injured, but it is admitted that no effort was made to smooth down the irrigation ridges and that defendants relied upon the presence of the wagon wheels to smooth down these ridges, which they said were of a sandy material.

[4] It is too clear for controversy that the jury would have been warranted in believing all or either of the following propositions: (1) That it was negligence on the part of defendants to allow a hole deep enough to bury a wagon wheel to the hub to remain upon the premises where servants were expected to go, with the view thereof hidden by the presence of grasses and weeds; or (2) that defendants were negligent in not providing a wagon which either had a seat or a stanchion or some other device thereon with which the employee might steady himself in case of emergency; or, indeed, (3) that it was negligence on the part of defendants to have no means of holding the boxes on the wagon floor which would at least prevent the bottom layer of boxes from sliding off in case of a sudden lurch or tilting of the wagon.

There is, in our opinion, ample evidence warranting the jury in finding negligence on the part of defendants, and this by a "countrybred" jury as well as by a "townbred" jury, of which latter type defendants complain. Negligence was properly defined by the court to the jury, and therefore no reason appears for setting aside the verdict of the jury for insufficiency of evidence of negligence on the part of defendants.

[5] Appellants further contend that even if negligence might be inferred it was slight as compared with the gross negligence of plaintiff in sitting down on the seat made by three of the fruit boxes piled one upon the other, and driving the team while thus sitting, with no seat, stanchion, or other device by which he could hold on or steady himself. However, with the combined height of the three boxes being only from 45 to 50 inches, we cannot say as a matter of law that the plaintiff was guilty of any contributory negligence, to say nothing of gross negligence.

It must be remembered that the boxes were filled with fruit. As we understand it the packing was done in the following manner: A row of lug boxes were filled with fruit and were stacked lengthwise along the center of the floor of the wagon, and then on either side of the center line boxes were also packed along the side at right angles to the center line rows, with the outside end of each box tilted to the height of the rim or border around the floor bed of said wagon. This method would, if anything, make the center row of boxes the steadiest part of the entire load. Whether with three of these center rows and the plaintiff leaning against them while standing would have placed him in less danger than if seated is indeed hard to say, but we are satisfied that the jury was warranted in finding that some better method should have been provided for the safety of plaintiff when driving a team with a wagon loaded with boxes of fruit stored thereon in the manner herein described, and that plaintiff was not guilty of gross negligence in being seated on the boxes at the time of the accident.

[6] We are also satisfied that such cases as Hontz v. San Pedro, 173 Cal. 750, 161 P. 971, have no application to the facts of this case. The questions of gross or contributory negligence, like the question of negligence on the part of plaintiff, were proper questions, under the evidence, for the consideration of the jury alone, and no reason exists for our interference therewith. Moore v. Pacific Coast Steel Co., 171 Cal. 489, 153 P. 912; Scherer v. Danziger, 178 Cal. 253, 173 P. 85; Lassen v. Southern Pacific Co., 173 Cal. 71, 159 P. 143.

[7] Complaint is also made of the following instruction to the jury:

"While the servant must use ordinary care and assumes the risks of his employment he is not obliged to do anything further and the employer is liable to the employee for injuries caused from defective or unsafe appliances or places of employment especially when the defects and the dangers were unknown to the employee and were not obvious to his view. If you find from the evidence in this case that such was the situation here, under the instructions as I have given them to you, your verdict should be for the plaintiff."

The criticism is that the jury in practical effect were told that the defendants were insurers of the safety of plaintiff and that the elements of reasonable care and prudence were excluded from the case. The instruction is poorly drafted and not properly balanced, and if standing alone we would say it was erroneous. It is a misstatement of the doctrine of assumption of risk, to the detriment of plaintiff, and, standing alone, it would permit also the criticism of defendants, in that it excludes application of the principle that defendants are only required to exercise reasonable care in seeing that the place and tools of employment provided for their employees must be safe. We are also aware of the rule expressed by the court as follows in the case of Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 278, 201 P. 599, 602:

"The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict. Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 P. 700, citing Killelea v. California, etc., Co., 140 Cal. 602, 74 P. 157."

To the same effect is Fidelity, etc., Co. v. Paraffine Paint Co., 188 Cal. 184, 192, 204 P. 1076.

But it will be noted that said above-quoted instruction does not undertake to be a so-called "formula" instruction, for it contains within it these saving words:

"If you find from the evidence in this case that such was the situation here, under the instructions as I have given them to you. * * *"

Elsewhere in the instructions the court proceeds to say:

"A master is bound to use reasonable care to prevent injuries to his servants in the course of their employment. * * *

"The care required of an employer is that of reasonable diligence; and reasonable diligence implies as between the employer and employee such watchfulness, caution, and foresight as under all circumstances of the particular service an ordinary careful, prudent and cautious man would exercise, * * * and if you find from the evidence and under these instructions that the defendant was so negligent and the plaintiff was not guilty of any contributory negligence, your verdict should be for the plaintiff.

"You are instructed that under the law of the state of California the defendant as an employer was bound at all times to exercise ordinary care in furnishing a reasonably safe place for his employee to work in, and if, in the present instance he failed to do so and by reason thereof the plaintiff, without negligence on his part, sustained injuries, the defendant is liable.

"It is the duty of all employers to furnish reasonably safe places in which the employees may perform their work, and to use ordinary care to keep the place reasonably safe so that the employee may not be exposed to danger. * * * While he is not an insurer of the safety of the employees, he must use ordinary care in seeing that the place is safe in the first place and to employ the same degree of care to keep it such.

"The court instructs the jury that if the plaintiff's injuries were the result of a pure accident, such as could not ordinarily be anticipated, and not the result of the negligence of either the plaintiff or the defendant, then the plaintiff cannot recover. He cannot recover at all unless his injuries were caused by the negligence of the defendant."

We therefore readily conclude that when the instructions are read together they are not erroneous, especially to the injury of defendants, but that they are in reality more favorable to defendants than the law required, for, in addition to the statement that plaintiff assumed the risk of his employment, which is not the law, the instructions also keep in the case the old doctrine of contributory negligence before any modification was made in favor of the employee.

[8] Likewise there is no substance in the contention concerning the rulings of the court in the rejection of certain evidence. During the examination of A. S. Hawk, one of the defendants herein, a juror propounded questions indicating that he was interested in the question as to whether the bed of the wagon had sides thereon, to which question defendant replied that there was no sides on the wagon, for if there were a man could not lift the fruit over them. The juror also wanted to know if the driver of the team had anything to catch hold of, and the reply to this question was in the negative, whereupon counsel for this witness propounded to him this question: "Q. Is it customary to have sides on the wagon collecting fruit in an orchard? A. No; if there were, we could not get the fruit up there."

The above answer was made without objection, whereupon the following question was asked: "Is it customary to furnish anything for the teamster to hold onto on the wagon?" Objection was made that the question was "irrelevant, immaterial, and incompetent" and the court sustained the objection, stating that he did not think it was material; that the issue was what was done in this particular case rather than what the custom was. We are unable to see any error whatsoever in this ruling of the trial court.

[9] In the first place the doctrine of customary usage does not to our knowledge apply to the question of legal duty under the

law of negligence. In Perry v. Angelus Hospital Association, 172 Cal. 311, 315, 156 P. 449, 450, we say:

> "We know of no authority for the proposition that by continuing in a careless performance of duty a party transforms its negligence into due care. Silviera v. Iverson, 125 Cal. 266, 57 P. 996."

[10] In the second place the wife of the defendant, Mrs. Rose Hawk, testified without objection at length as to the method used by the teamsters with wagons of this character. She said some teamsters sat down upon the floor of the wagon with their feet hanging off and others stood up while driving and leaned against the load of boxes; that she was not sure, but that she did not think any of them ever sat down upon the boxes while driving, although she was not sure of it. In other words, her entire testimony was in legal effect testimony as to the custom of drivers of wagons of that type in the harvesting of fruit and the gathering of fruit boxes. There was no possible injury, therefore, to defendants by sustaining this objection.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; SHENK, J.

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200 Cal. 299

In re JOHNSON'S ESTATE. (S. F. 11925.)

(Supreme Court of California. Jan. 27, 1927, as Modified Feb. 24, 1927.)

1. Wills 🔑302(6)—Verdict that alleged will was not entirely in hand of decedent held sustained by conflicting evidence.

Evidence, being conflicting, *held* sufficient to sustain verdict that alleged will was not entirely written, dated, and signed by the hand of decedent.

2. Wills 🔑384—Appellate court must assume that jury believed evidence which would sustain verdict that olographic will was not entirely in hand of testatrix.

Where certain evidence, if believed, would be sufficient to sustain verdict that alleged olographic will was not entirely written, dated, and signed by the hand of the testatrix, appellate court must assume that the jury believed it.

3. Wills 🔑324(2)—Verdict against competency of testatrix, adjudicated insane because of senile dementia shortly after executing will, held sustained by conflicting evidence.

Evidence, being conflicting, *held* to sustain verdict against soundness of mind of testatrix nearing 80 years of age, who had been adjudicated incompetent and was adjudicated insane and committed to hospital because of senile dementia shortly after execution of alleged will.

4. Wills 🔑55(1), 302(6)—Testimony that will is not in hand of testatrix and to show her mental incompetency need not be corroborated (Code Civ. Proc. § 1844).

That testimony to show that alleged will is not entirely in hand of testatrix and to show that testatrix was mentally incompetent is not corroborated does not remove it from consideration of jury, in view of Code Civ. Proc. § 1844, providing that direct evidence of one witness entitled to full credit is sufficient proof of any fact except perjury and treason.

5. Trial 🔑296(2)—Instruction that will and exemplars of decedent's handwriting were before jury, who should determine therefrom whether will was in handwriting of decedent, held harmless, in view of other instructions.

Instruction that jury had the alleged will before it, as well as the exemplars of the handwriting of deceased, and that it was for them to determine therefrom whether the alleged will was wholly written, dated, and signed in handwriting of deceased, *held* not prejudicial because of the word therefrom, in view of other instructions.

6. Trial 🔑194(9)—Instruction that jury could determine whether will was in decedent's handwriting contrary to opinion of expert or without opinion of expert held not error.

Instruction that jury could determine whether alleged will was wholly written, dated, and signed in handwriting of deceased "contrary to the opinion of an expert or without the opinion of a handwriting expert" *held* not to usurp the functions of the jury, where no professional examiner of questioned documents was called as witness, since fair assumption is that jury understood by the instruction that testimony of such witness was unnecessary.

7. Wills 🔑302(6)—Testimony of handwriting expert is unnecessary to enable jury to determine whether will is in decedent's handwriting.

Testimony of a professional examiner of questioned documents is unnecessary to enable jury to determine whether alleged will was entirely written, dated, and signed by hand of decedent.

8. Wills 🔑302(6)—Jury may determine whether will is in decedent's handwriting from comparison with exemplars of decedent's handwriting.

Jury can determine whether alleged will was entirely written, dated, and signed by hand of decedent by comparison of exemplars of handwriting of decedent and alleged will, without aid of any oral testimony.

9. Wills 🔑55(1)—Adjudication of incompetency in guardianship proceeding is evidence of mental condition then existing, but is not prima facie evidence of testamentary incapacity (Civ. Code, § 40).

Adjudication of incompetency in guardianship proceeding is evidence of mental condition on the date of adjudication, but since amendment in 1878 of Civ. Code, § 40, is not prima facie evidence of testamentary incapacity on date of adjudication so as to shift the burden of proof to the proponent of the will.

10. Trial ⚷296(2) — Erroneous instruction that adjudication of incompetency in guardianship proceedings was prima facie evidence of then existing testamentary incapacity held harmless, in view of other instructions.

Instruction that adjudication of incompetency in guardianship proceedings was prima facie evidence of incompetent's want of testamentary capacity on the dates of the adjudication *held* harmless error, in view of other instructions.

11. Wills ⚷52(1)—Contestant has burden of showing claimed unsoundness of mind.

Where contestant claims that testatrix was of unsound mind at date of execution of will, he has burden of showing it.

12. Wills ⚷329(1, 2) — Instruction that in weighing evidence jury must treat contestant, an adopted daughter, as though born in lawful wedlock, held not error.

In will contest by adopted daughter, it was not error to instruct that jury, in weighing the evidence, must treat the contestant in all respects as though she had been born to decedent in lawful wedlock.

13. Adoption ⚷18—By statute, adopted daughter is lawful child of person adopting her, as though born in wedlock (Civ. Code, § 228).

By terms of Civ. Code, § 228, adopted daughter is the lawful child of the person adopting her, the same as though she had been born in lawful wedlock.

14. Appeal and error ⚷1056(1) — Excluding doctor's private conversation with testatrix, his patient, held not prejudicial error, where he was permitted to give opinion as to her mental condition.

In will contest, excluding doctor's testimony to conversation with testatrix, his patient, for purpose of ascertaining her mental condition on ground that conversation was privileged, *held* not prejudicial error, where there was no showing that any third person heard the conversation, and doctor was permitted to give his opinion as to her mental condition at time of conversation.

15. Trial ⚷260(5)—Failure to instruct at time of request to disregard question whether proponent did not intend to be bound by adverse verdict held not error, in view of later charge.

Failure to instruct at time of objection and request to instruct to disregard excluded question, which was whether proponent did not intend to be bound by jury if they found testatrix was of unsound mind, *held* not error, where court later instructed jury to disregard all questions to which objections had been sustained.

16. Wills ⚷405—Costs will be paid from estate, where proponents appeal from denial of probate in good faith (Code Civ. Proc. § 1720).

Where appeal by proponents of will from denial of probate is in good faith, costs will be paid from the assets of the estate, under Code Civ. Proc. § 1720.

In Bank.

Appeal from Superior Court, Santa Clara County; John L. Hudner, Judge.

Proceeding by Aurilla Mabel Waller against Amos O. Williams, Public Administrator of Santa Clara County, and another, to contest probate of the will of Aurilla Johnson, deceased. From the judgment in favor of contestant, proponents appeal. Affirmed.

See, also, 198 Cal. 469, 245 P. 1089, 252 P. 1052.

Maurice J. Rankin and L. H. Walker, both of San Jose, for appellants.

H. A. Blanchard, of San Jose, and Daniel Rygel, of Oakland, for respondent.

SHENK, J. Aurilla Johnson died at the Agnews State Hospital for the Insane on January 11, 1924, at the age of 79 years. The public administrator of Santa Clara county offered for probate a document purporting to be her last will and testament, olographic in form. Emily W. Ewald, a niece of the deceased husband of the decedent, was named as the sole beneficiary. Aurilla Mabel Waller, an adopted daughter of the decedent and the respondent herein, was expressly omitted. The respondent contested the probate of the alleged will on the ground that the same was not entirely written, dated, and signed by the hand of the decedent and that decedent was not of sound mind on the day of its alleged execution. The case was tried before a jury, which returned a verdict as to each issue in favor of the contestant. From the judgment on the verdict this appeal is prosecuted by the proponent and by the sole beneficiary named therein.

The grounds of appeal are that the evidence was insufficient to support the verdict on either of said issues and that the court erred in giving certain instructions and in admitting and excluding certain testimony.

[1-3] On the issue of whether the alleged will was wholly written, dated, and signed by the decedent, evidence was introduced on behalf of the appellants to the effect that the said document was entirely written, dated, and signed by her. On the other hand, the contestant testified that while the signature attached to the document was genuine the remainder of the document was not in her mother's handwriting. If the latter testimony was believed by the jury to be true, and we must on appeal assume that it was, the said evidence was sufficient to support the verdict on that issue. As to the issue of testamentary incapacity the same situation is disclosed by the record, namely, a conflict in the evidence. On behalf of the contestant it appeared that on the 22d day of March, 1922, the decedent was, in pro-

ceedings instituted in the superior court of Santa Clara county, declared to be incompetent to manage her property or to care for her person, and a guardian of her person and estate was appointed. She was continuously thereafter subjected to such guardianship by judgments of said court. On the 10th day of May, 1923, she was by said court adjudged an insane person and committed to the Agnews State Hospital, where she remained until her death. The alleged will was dated April 3, 1923. No one claims to have witnessed its execution. The appellant Mrs. Ewald testified that it was delivered to her by the decedent personally a few days after its date. One of the physicians at the State Hospital testified that the decedent was suffering from senile dementia to such an extent that she could not discern the difference between day and night. The adjudication, on May 10, 1923, that the decedent was insane raised a presumption that she was wanting in testamentary capacity on that date. Estate of Baker, 176 Cal. 430, 168 P. 881. The judgments in the incompetency proceedings were evidence of the mental condition of the decedent on the days of those adjudications. Assuming, as contended by appellants, that neither the judgments in the incompetency proceedings nor the adjudication of insanity on May 10, 1923, would be sufficient to show want of testamentary capacity on April 3, 1923, the date of the alleged will, nevertheless, the appellant Mrs. Ewald testified that the mental condition of the decedent was absolutely the same from October, 1922, to December, 1923, which dates would include May 10, 1923, when she was presumed to be lacking in testamentary capacity, and April 3, 1923, the date of the alleged will. See Estate of Loveland, 162 Cal. 595, 123 P. 801.

In addition to the record evidence and the testimony of Mrs. Ewald there was other oral testimony on the issue of want of testamentary capacity, both in support of and against that issue. The contestant testified at length as to the mental condition of the decedent for several years prior to her death, including the period subsequent to October, 1922. From this testimony, coupled with the testimony of Mrs. Ewald that the mental condition of the decedent was absolutely the same from October, 1922, to December, 1923, the jury was entitled to infer that on the date of the alleged will the decedent did not possess testamentary capacity.

[4] The appellants urge that much of the testimony of the contestant was uncorroborated, but even so, the same was not for that reason removed from the consideration of the jury. Section 1844, Code Civ. Proc. The record, therefore, presents a conflict in the evidence as to both issues which, when resolved in favor of the contestant by the jury, may not otherwise be resolved on appeal.

[5-8] The appellants contend that the court committed prejudicial error in giving the following instructions:

> "The jury has the proposed will before it, as well as the exemplars of the handwriting of Aurilla Johnson, and it is for you to determine therefrom whether or not this document is wholly written, dated, and signed in the handwriting of the decedent. You may determine this issue even contrary to the opinion of an expert, or without the evidence of a handwriting expert."

It is insisted that by the use of the word "therefrom" in the foregoing instruction the court withdrew from the consideration of the jury the oral testimony relating to the genuineness of the document in question and limited its consideration of the evidence to the proposed will and the exemplars. In the absence of other instructions given the point urged might present a serious situation, but the court went on to instruct the jury that the instructions must be considered by the jury as a whole and that the proposed will might be considered together with *all* the evidence in the case. When considered in their entirety it may not be said that the appellants were prejudicially affected by the use of the word complained of. It is also insisted that in said instruction the court usurped the function of the jury in stating that the issue might be determined "contrary to the opinion of an expert, or without the opinion of a handwriting expert." No witness was called who assumed to be a handwriting expert in the sense of a professional examiner of questioned documents. It may fairly be assumed that the court meant, and that the jury understood, that the testimony of such an expert was not necessary to a determination of the issue. It is then a correct statement of the law. If in the first use of the word "expert" the court referred to those witnesses who were familiar with the handwriting of the decedent, it is also a correct statement of the law that the jury could determine the issue by comparison of the documents and without the aid of the oral testimony of any witness. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

[9-11] The court instructed the jury that the adjudications of March 22, 1922, and January 31, 1923, declaring the decedent to be an incompetent person in the guardianship proceedings, were "prima facie evidence of want of testamentary capacity" on the dates of said orders. It is urged that such was not the legal effect of such orders. We are cited to no authority in this state, and we have discovered none since the amendment of section 40 of the Civil Code in 1878, holding that an adjudication of incompetency in a guardianship proceeding raises a presumption of testamentary incapacity or is even prima facie evidence of testamentary incapacity. Estate of Johnson, 57 Cal. 529, construed said section 40 prior to its amendment. Proof

of incompetency in a guardianship proceeding is evidence of mental condition on the date of the adjudication, but it is not prima facie evidence of testamentary incapacity so as to shift the burden of proof to the proponent of the will. Estate of Loveland, supra; Rice v. Rice, 50 Mich. 448, 15 N. W. 545. Notwithstanding the erroneous use of the term "prima facie" in the instruction complained of, we are of the opinion that the appellants were not prejudiced thereby, in view of the fact that the court elsewhere fully instructed the jury that said adjudications of incompetency in the guardianship proceedings did not necessarily mean that the decedent was of unsound mind at the time of such adjudications, or that she was not then competent to make a valid will; also that the adjudication of insanity of May 10, 1923, did not raise a presumption of testamentary incapacity on April 3, 1923, the date of the alleged will, and that the burden of proving that the decedent was of unsound mind at the time of the execution of the alleged will rested at all times upon the contestant. When considered as a whole, we think the jury was made clearly to understand that, notwithstanding the several adjudications, the burden of proving unsoundness of mind on the date of the alleged will was always on the contestant.

[12, 13] Complaint is made of the instruction that "in weighing the evidence you must treat the contestant in this case in all respects as though she was born to Aurilla Johnson in lawful wedlock." It is insisted that the jury had the right to take into consideration the fact that the contestant was not a blood relative of the decedent, but a relative only by adoption, and that the giving of said instruction was in violence of our constitutional provision forbidding a judge to charge the jury with respect to matters of fact. It was conceded at the trial that the contestant was the adopted child of the decedent. As such she was the lawful child of the decedent the same as though she had been born to the decedent in lawful wedlock. Section 228, Civ. Code; 1 Cal. Jur. 449. The instruction correctly declared the law and we find no error in the declaration by the court that in considering the evidence the jury should bear in mind the legal effect of the adoption proceeding.

[14] Complaint is also made of the ruling of the court in sustaining an objection to a question propounded to Dr. Stocking, wherein the witness was requested to relate a conversation he had with the decedent at the hospital. Dr. Stocking, as a physician and medical superintendent of the Agnews State Hospital was interviewing the decedent as one of his patients in the hospital for the purpose of ascertaining particularly her mental condition. It does not appear that any third party heard the conversation and the objection was sustained on the ground that the said conversation was privileged. The witness was permitted to give his opinion as to the mental condition of the decedent at the time of the conversation and we find no prejudicial error in excluding evidence of the conversation itself.

[15] During the cross-examination of Mrs. Ewald, the contestant's counsel asked her the following question:

> "Then you do not propose to be bound by the action of this jury in the event that they find that she was of unsound mind on April 3, 1923, do you?"

This question was objected to by appellants' counsel and the court was requested to instruct the jury to disregard the same. The court sustained the objection, but did not at that time direct the jury to pay no heed to the question. The point is made that the refusal then to instruct the jury is prejudicial error. There is no merit in the contention, for the reason that in its instructions to the jury the court specifically directed the jury to banish from their minds all question propounded by counsel to which objections had been sustained. This we think was all that was required under the record here presented.

[16] The judgment is affirmed. As the appeal herein appears to have been prosecuted in good faith, it is ordered that the costs of the appellants be paid out of the assets of said estate. Section 1720, Code Civ. Proc.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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200 Cal. 307

In re JOHNSON'S ESTATE.

WALLER v. EWALD et al.

(S. F. 11752.)

(Supreme Court of California. Jan. 27, 1927.)

1. Costs ⚿244—Where Supreme Court did not exercise discretion as to costs on affirming order vacating judgment for costs in will contest, clerk's insertion in remittitur of order for costs to respondent was improper (Code Civ. Proc. § 1720).

Where Supreme Court did not exercise its discretion, under Code Civ. Proc. § 1720, as to award of costs on appeal when it affirmed order vacating judgment for costs in will contest before probate, insertion in remittitur of provision awarding costs on appeal to respondent was improper.

2. Appeal and error 🔑1222—Motion to recall remittitur and to strike out provision is proper remedy for unauthorized award of costs.

Motion to recall remittitur and to strike out unauthorized provision awarding costs to respondent is proper remedy to exclude unauthorized award from remittitur.

3. Costs 🔑223—Discretion as to award of costs cannot be exercised by Supreme Court after it loses jurisdiction (Code Civ. Proc. § 1720).

After Supreme Court has lost jurisdiction of appeal, it cannot exercise any discretion as to award of costs, under Code Civ. Proc. § 1720.

4. Appeal and error 🔑1217—Supreme Court has no jurisdiction of appeal after remittitur goes down.

After remittitur goes down to trial court, Supreme Court has no jurisdiction of the appeal.

5. Appeal and error 🔑1207(3)—Trial court may award costs on appeal, where Supreme Court does not (Code Civ. Proc. § 1720).

Where Supreme Court fails to exercise discretion as to award of costs on appeal, trial court may make the award, under Code Civ. Proc. § 1720.

In Bank.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Proceeding by Aurilla Mabel Waller against Emily W. Ewald and another to contest probate of the will of Aurilla Johnson, deceased. Order vacating the portion of the judgment awarding costs to contestant against Emily W. Ewald was affirmed (198 Cal. 469, 245 P. 1089). On motion to recall remittitur and to strike out provision as to costs on appeal. Motion granted.

See, also, 252 P. 1049.

H. A. Blanchard, of San Jose, and Daniel Rygel, of Oakland, for appellant.

Maurice J. Rankin and L. H. Walker, both of San Jose, for respondents.

SHENK, J. [1-5] On a contest before probate of the alleged will of the decedent the jury found for the contestant and judgment was entered accordingly, including costs to the contestant. On motion of the proponent the trial court entered an order vacating the judgment for costs. The contestant appealed from said order and the order was affirmed. Estate of Johnson, 198 Cal. 469, 245 P. 1089. On the going down of the remittitur the clerk of this court inserted therein the words, "Respondents to recover costs on appeal," in accordance with the rule governing ordinary civil actions. In due time the contestant filed a notice of motion in this court to recall the remittitur and to strike therefrom the provision for costs on appeal on the ground that the allowance of costs in a contest before probate must abide the final determination of the proceeding. Section 1720, Code Civ. Proc.; Estate of Johnson, supra. The proceeding is finally determined by the affirmance of the judgment on the main appeal this day decided (252 P. 1049) wherein this court has in the exercise of its discretion under said section 1720 directed that costs on the main appeal be paid out of the assets of the estate. On the former appeal the court did not exercise its discretion in awarding costs pursuant to said section 1720, and the provision for costs on said appeal was improperly incorporated in the remittitur. This motion is the proper remedy on behalf of the contestant to exclude from the remittitur the unauthorized provision. San Joaquin, etc., Irr. Co. v. Stevinson, 165 Cal. 540, 132 P. 1021. As this court has lost jurisdiction of the former appeal, we may not now exercise any discretionary power in awarding costs therein. An appropriate order may, however, be made by the trial court with reference to the costs on the former appeal in the exercise of its discretion under said section 1720.

The motion is therefore granted, and it is ordered that the remittitur issued herein by the clerk of this court on May 20, 1926, be recalled, and that a correct remittitur be issued in its place nunc pro tunc omitting the words, "Respondents to recover costs on appeal."

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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81 Cal. App. 105

Ex parte BLANC et al. (Cr. 1401.)

(District Court of Appeal, Second District, Division 2, California. Jan. 27, 1927.)

1. Habeas corpus 🔑92(1)—Inquiry on habeas corpus is whether under proofs on which prisoners were committed lower tribunal had jurisdiction to act (Pen. Code, §§ 1474, 1480).

On habeas corpus to secure release for violation of ordinance, inquiry into extrinsic facts outside of record, under Pen. Code, §§ 1474, 1480, is not authorized, since only purpose of writ is to ascertain whether under proofs on which prisoners were committed lower tribunal had jurisdiction to act.

2. Constitutional law 🔑88—Lawful pursuit not infringing general public welfare is not subject to police regulation.

While discretion in proper administration of police power is permitted, all constituted authority, lawful pursuit, which is not infringement upon public health, morals, safety, or general welfare is not subject of police regulation, being exempt from governmental concern unless necessarily and properly taxable for revenue.

3. Constitutional law 🔑87—Ordinance regulating endless chain selling, not establishing any standard for regulation, held unconstitutional.

Ordinance governing endless chain sale of merchandise *held* unconstitutional, where it was not a mere regulatory enactment, but vested full power in police commissioners to destroy, without establishing any standard of business integrity up to which merchant may measure; full authority being given commissioners to grant petition of disreputable and to deny that of most creditable merchant.

4. Constitutional law 🔑88—To sustain withholding of permit to engage in lawful business, authority must be reasonably regulated, and pertaining to general public welfare, with standards definitely fixed.

Authority to withhold permit to engage in lawful business to be sustained must be regulated by reasonable provisions applying to matters of conduct in some way affecting general public welfare, standards being required to be fixed with such certainty that citizens may be apprised of their requirements.

5. Constitutional law 🔑38—Whether act is unconstitutional depends upon whether it is broad enough to authorize unconstitutional act.

Rule in determining whether act is unconstitutional is whether or not act is broad enough to authorize unconstitutional act, it being immaterial that person clothed with unconstitutional power may not use it.

Application by S. J. Blanc and another for writ of habeas corpus against the Chief of Police of the City of Los Angeles, to secure release from custody under warrant issued upon complaint charging violation of alleged unconstitutional ordinance. Writ granted.

Mitchell, Silberberg & Davis, of Los Angeles, for petitioners.

J. M. Friedlander, City Prosecutor, and A. T. Folsom, Deputy City Prosecutor, both of Los Angeles, for respondent.

CRAIG, J. The petitioners were arrested and are detained upon a warrant issued by the municipal court pursuant to a complaint charging them with conducting, operating, and carrying on "a certain plan and scheme and system of merchandising by means of an endless chain for the sale of silk hosiery and ladies' underwear and men's furnishings, * * * without first having obtained from the board of police commissioners of the city of Los Angeles a permit so to do." It is admitted that the acts complained of were contrary to the provisions of a municipal ordinance regularly adopted and approved by the properly constituted authorities, and that it is still in force.

The ordinance in controversy, and under which the petitioners were sought to be prosecuted, is known as No. 53,315, and is entitled "An ordinance regulating the sale of merchandise or other property by means of the plan commonly known as the 'Endless Chain.'" By its terms "Endless Chain" is said to mean and include:

> "* * * Any plan or scheme wherein any person, firm, or corporation, sells, transfers, assigns or issues to any person any right, property, ticket, coupon, certificate, contract, or other token, and wherein the purchaser, transferee or assignee thereof or the person to whom the same is issued, undertakes or is required or permitted to undertake, for himself, or as the agent, representative, or attorney of such person, firm, or corporation, to sell, transfer, assign, or issue to another any right, property, ticket, coupon, certificate, contract or other token which may under certain conditions entitle the purchaser or recipient thereof to any right, property, ticket, coupon, certificate, contract, or other token from the original purchasers, transferees, or assignees thereof from the original purchasers, assignees, or transferees are also given, as a consideration for their entry into or participation in such plan or scheme and their purchase or receipt of such right, property, ticket, coupon, certificate, contract, or other token, the right, privilege or obligation of making further sales, assignments, or transfers of any right, property, ticket, coupon, certificate, contract, or other token."

Hence, any person who sells or issues to another a right or contract by the terms of which the latter undertakes or is required or permitted to undertake, either personally or by agent, to issue to a subsequent person any right, property, contract, or token "which may under certain conditions entitle the purchaser or recipient thereof to any right, property * * * contract, or other token and wherein the purchasers, * * * from the original purchasers, * * * or from subsequent purchasers, * * * are also given, as a consideration for their entry into or participation in such plan or other token, the right, privilege or obligation of making further sales * * * of any right, contract, or other token," shall, unless previously authorized in writing by permit from the board of police commissioners so to do, be guilty of a misdemeanor. Further, it is required by the ordinance that any person, firm, or corporation desiring such permit shall file with the board a verified or sworn statement, setting forth the names and addresses of all members of the firm or corporation, together with a statement of the applicant's financial condition, its assets and liabilities, giving full details of its plan of operation, together with copies of any written or printed matter proposed to be used therewith.

It is conceded that the petitioners when arrested were conducting, without having procured the permit above mentioned, a merchandising enterprise under the style of Golden States Sales Corporation, by means of contracts the contents, purpose, and effect of which were such as the terms of the ordinance sought to regulate, and this is the offense with the commission of which they have been charged.

The petitioners contend that the ordinance is unconstitutional, in that it is discriminative, vests an arbitrary power in the board, and that by requiring an application, financial statement, and literature from each agent, solicitor, and canvasser, its ultimate object and effect is prohibitive. They argue that no particular personal qualifications, financial standing, or form of contract is specified as a standard; that there is no duty of the board, or assurance to the merchant, that such information when furnished may or may not, together with, or without, "such further information as said board may require," entitle an applicant to a permit; and that it lies entirely within the arbitrary discretion of the police commissioners to grant one application and to deny another upon the same state of facts.

[1] Each of the respective parties to this proceeding has devoted much argument to assumed conditions which, if they exist, would not assist in determining as to whether or not the questioned enactment is constitutional. A sample of the contract as printed and circulated by petitioners is attached to the petition herein, and its various provisions are attempted to be construed and their virtues expounded. Conversely, the endless chain system is attacked by respondent as "mathematically, commercially, and financially unsound"; dangers of their use as gambling mediums or swindles, are attempted to be demonstrated, and it is asserted generally that the community should protect itself against the machinations of unscrupulous sharpers. But these are considerations dehors the record and foreign to the constitutional question which is alone before us for our determination.

No issue was presented nor evidence adduced in the municipal court after the issuance and execution of the warrant upon which the petitioners are held. In such cases the record consists of a petition under oath, alleging the jurisdictional facts required by section 1474 of the Penal Code, with copies of the ordinance and complaint (In re Crowley, 171 Cal. 58, 151 P. 739), and the return, accompanied by a copy of the written authority by virtue of, which the petitioners are restrained of their liberty (Pen. Code, § 1480).

Upon this record inquiry into extrinsic facts is not authorized in habeas corpus since the only purpose of the writ is to ascertain whether or not under the proofs upon which the prisoners were committed, the lower tribunal had jurisdiction to act.

[2] Therefore the only proposition here is: Is the ordinance a valid exercise of the police power, or is it in violation of the constitutional guaranties by which the petitioners are surrounded? It has been held that if a board be invested with the right not only to determine that a given vocation is unsafe, but to require other methods of conduct and thus control the livelihood of another, legislation which affords such authority is unconstitutional. Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. We are not unmindful of the fact that discretion in the proper administration of the police power is permitted all constituted authorities, but a lawful pursuit which is not an infringement upon public health, morals, or safety, or the general welfare, is not a subject of police regulation, and is exempt from governmental concern unless necessarily and properly taxable for revenue. Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 147; Sonora v. Curtin, 137 Cal. 583, 585, 70 P. 674.

[3] We think that the ordinance before us is incapable of construction as merely a regulatory enactment. It vests full power in the police commissioners, not only to regulate, but to destroy. Nowhere within its four corners do we find any standard of business integrity up to which a merchant may measure, any safeguard for the protection of the public which he may supply, any guaranty of honesty and fair dealing which he may furnish, or condition of any character with which he may comply and have the right to demand and receive a permit. It is true that the ordinance requires that certain information be furnished the commissioners concerning the financial condition of the applicant, his reputation, etc., but nowhere is it provided that if in all respects as to which inquiry is made and information supplied, no shadow is cast upon his character, financial standing, or plan of merchandising, a permit will be issued. We do not assume that a board would issue permits to applicants furnishing entirely negative reports; yet it is elementary that no board may exercise arbitrary and unguided discretion, and the fact that this ordinance endows the commissioners with full authority to grant a petition of the disreputable and to deny that of the most creditable merchant, renders it obnoxious both to constitutional precepts and democratic principles. The same rule was applied in Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750, wherein was involved a statute which forbade advertising by the publication of "grossly improbable statements." The Supreme Court there said, "the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion," that "One might conclude that the statement while 'improbable' was not 'grossly'

so." Such legislation has repeatedly been condemned by the courts of this state. Los Angeles County v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 P. 153, 71 Am. St. Rep. 75; Ex parte Drexel, 147 Cal. 763, 82 P. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; Ex parte Sing Lee, 96 Cal. 354, 31 P. 245, 24 L. R. A. 195, 31 Am. St. Rep. 218; In re Farb, 178 Cal. 592, 174 P. 320, 3 A. L. R. 301; In re Williams (Cal. App.) 240 P. 42. Here we have an attempt to confer upon a commission the right to arbitrarily decide in any case not only whether or not a chain system is inimical to the public welfare, but even if entirely free from features having any tendency to deceive or defraud, to arbitrarily refuse to allow its operation. It seems impossible to conceive that a law which would thus place it within the power of a single commission to deny a citizen the right to contract, the privilege of earning a living, merely and solely because the commission should not see fit to allow him to do so, can be justified or defended. Respondent cites in support of the ordinance in controversy but one case which we think in any way analogous to the instant one. Hubbard v. Freiberger, 133 Mich. 139, 94 N. W. 727, was an action upon a promissory note given by the defendant to a wagon dealer on account of the purchase price specified in an endless chain contract. It was held that the contract was against public policy and void, and that the note was therefore without consideration. The court there announced, however, that "It is a scheme which, upon its face, shows that it cannot be worked out without ultimately leaving parties with these so-called coupons on their hands, possessing no value." The decision was rendered upon appeal after a trial in which, among other evidence, the contract was received, and was contained in the record before the Supreme Court of Michigan. No constitutional question was involved. Unlike that situation, we have here not a particular contract the consideration of which is questioned, but an ordinance whose validity is challenged. Assuming that some endless chain schemes may be against public policy, it cannot be said that all such systems, especially as limited by the definition contained in the ordinance before us, are void. Yet, a sales system by which in endless succession purchasers of goods might be authorized to sell to others doubtless might be devised so as to give full value to each. Under this ordinance such a plan might be denied permission to operate in a community, and the owner of another of a grossly swindling character be granted a permit. The decision in the case last mentioned is based principally upon the authority of McNamara v. Gargett, 68 Mich. 454, 36 N. W. 218, 13 Am. St. Rep. 355. What we have said of the dissimilarity of the situations presented in the case at bar and in Hubbard v. Freiberger, supra, is obviously equally applicable here. In the former case it appeared that the Bohemian Oats Association, which was found to have no legal existence, sold twenty-five bushels of oats, worth little more than ordinary grain, for $125 in cash and a promissory note for $125, upon condition that the buyer should undertake to sell within fourteen months fifty bushels more at $10 per bushel, and receive a commission of ten per cent, or twenty-five per cent. according to the manner in which the sale might be consummated. It was held that such contract was a gambling venture, was against public policy, extorted an exorbitant present price for the oats, and fixed a fictitious future value.

As upholding the right of the police commission to grant or reject applications for permits without other limitation or guidance than that afforded by the ordinance under consideration, respondent refers to several decisions which we will briefly distinguish. In People v. Monterey Fish Products Co., 195 Cal. 548, 234 P. 398, 38 A. L. R. 1186, it is said, as quoted in respondent's brief, the discretion of the commission is neither unguided nor uncontrolled, but that its exercise is made dependent upon findings of fact after a hearing. In Leach v. Daugherty (Cal. App.) 238 P. 160, the rule is announced that—

> "It is well-settled principle of law in this state that by legislative act a commission or board may be empowered to ascertain the existence of facts, upon the finding of which may depend the right to continue in the practice of a profession or a regulated business."

The act there upheld specifies certain facts to be found and upon the determination of which the ruling of the commission upon application for a permit is required to be based. The same is true of the statute construed in Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418, and Brecheen v. Riley, 187 Cal. 121, 200 P. 1042. Under the provisions of that statute the showing required to be made to secure a broker's license was that the applicant be "honest, truthful, and of good reputation." Here is a definite standard of eligibility. If the facts be established, the applicant might demand and secure a license. No such provision is contained in this endless chain ordinance. In both Co-operative Junk Co. of California v. Board of Police Commissioners, 38 Cal. App. 676, 177 P. 308, and Goytino v. McAleer, 4 Cal. App. 655, 88 P. 991, the nature of the business involved was such as to be peculiarly appropriate to police supervision, and in each decisions of questions of fact were held to be controlling as to the action of the commission.

[4, 5] In any case the authority to withhold a permit to engage in lawful business,

to be sustained, must be regulated by provisions of the law which are reasonable and which apply to matters of conduct upon the part of the applicant in some way affecting the health, morals or safety of the community The law must fix standards with such certainty that the citizen may be apprised of their requirements, and it is not enough that the commissioners may establish their own conditions. If they have the power to act regardless of any legislative guidance and control, the authority conferred is arbitrary and unlawful. "It does not answer the charge that the act in question is unconstitutional to say that a person clothed with such power may not see fit to use the power. The rule in determining whether the act is in conflict with constitutional guaranties is whether or not the act is broad enough to authorize such unconstitutional act." People v. Pace (Cal. App.) 238 P. 1089.

Other provisions of the ordinance are attacked upon constitutional grounds, but since they are not the basis of the prosecution out of which this proceeding has resulted, a discussion of them would be inappropriate.

As a necessary result of the views herein expressed, it is ordered that the petitioners be discharged.

We concur: WORKS, P. J.,; THOMPSON, J.

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81 Cal. App. 128

Ex parte FLESHER. (Cr. 1451.)

(District Court of Appeal, Second District, Division 2, California. Jan. 28, 1927.)

1. Statutes 🔑190—Appellate court cannot apply rule of construction to unambiguous statute.

Appellate court cannot apply rule of construction to statute, where its language is not fairly subject to different constructions.

2. Banks and banking 🔑232, 233—Congress may create banking corporations under constitutional provision authorizing laws to execute its powers, and states cannot regulate them to impair efficiency (Const. U. S. art. I, § 8).

Under Const. U. S. art. 1, § 8, authorizing Congress to make laws necessary to carry powers into execution, Congress may create such corporations as national banks, railroads, and telegraph and bridge companies in aid of revenue laws and interstate commerce, and states cannot regulate them to interfere with their efficiency.

3. Corporations 🔑1—Corporations organized under Code of Laws for District of Columbia are same as those of states (31 Stat. 1189).

Corporations organized and existing under the Code of Laws for the District of Columbia (31 Stat. 1189), are not different from those organized in one of the states.

4. Licenses 🔑8(1)—Clause in Corporate Securities Act, excepting corporations organized under acts of Congress, is open to construction (Const. U. S. art. I, § 8; 31 Stat. 1189; St. Cal. 1917, p. 673, § 2, subd. 3 [a]).

Clause in Corporate Securities Act (St. 1917, p. 673, § 2, subd. 3 [a]), excepting "corporations organized and existing under and by virtue of the acts of the Congress of the United States," is open to construction and interpretation, since it may mean either corporations of public character created under Const. U. S. art. 1, § 8, or those organized under such general laws as 31 Stat. 1189, in District of Columbia or territories.

5. Licenses 🔑18½, New vol. 12A Key-No. Series—"Other corporations" organized under acts of Congress, which are excepted from Corporate Securities Act, mean same class of corporations as national banking organizations under rule of ejusdem generis (St. 1917, p. 673, § 2, subd. 3 [a]).

In clause in Corporate Securities Act (St. 1917, p. 673, § 2, subd. 3 [a]), excepting "national banking associations and other corporations organized and existing under and by virtue of the acts of the Congress of the United States," general words should be construed to mean same class of corporations as national banking organizations, under rule of ejusdem generis.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

6. Constitutional law 🔑48—Court should construe statute favorable to constitutionality.

Where statute is fairly capable of two different constructions, court should give to it that construction which will favor its constitutionality.

7. Licenses 🔑7(2)—Any clause of Corporate Securities Act excepting corporations of District of Columbia would be unconstitutional as substantial discrimination (31 Stat. 1189).

Any clause in Corporate Securities Act (St. 1917, p. 673), which would except corporations organized in District of Columbia under 31 Stat. 1189 et seq. would be unconstitutional as substantial discrimination.

8. Licenses 🔑8(1)—Same purpose was intended in Corporate Securities Act as in Investment Companies Act 1913, notwithstanding different language.

Same purpose was intended in Corporate Securities Act (St. 1917, p. 673), as in Investment Companies Act of 1913 (St. 1913, p. 715), though language is different, since changes were merely attempt to arrange act logically and dispense with unnecessary verbiage.

9. Licenses 🔑18½, New, vol. 12A Key-No. Series—Appellate court should construe Corporate Securities Act to prevent issuance without permit of corporate securities within state by foreign corporations organized in any other state, territory, or District of Columbia.

Appellate court should give effect to intention of Legislature in enacting Corporate Securities Act (St. 1917, p. 673), to prevent

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

issuance without permit of corporate securities within state by foreign corporations organized in any other state or territory or District of Columbia.

Application by H. B. Flesher for a writ of habeas corpus, prayed to be directed to the Sheriff of Los Angeles County, to secure release of petitioner from custody on a charge of violating the Corporate Securities Act. Writ denied.

Shaw & McDaniel, Victor E. Shaw and W. I. Gilbert, all of Los Angeles, D. H. Cannon, of Salt Lake City, Utah, and Frank P. Doherty, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

THOMPSON, J. This is an application for the writ of habeas corpus, and from the petition and return thereto it appears that the petitioner was charged with violating the Corporate Securities Act. The complaint shows that on the 5th day of October, 1926, petitioner knowingly, willfully, and unlawfully sold ten shares of the capital stock of the Julian Merger Mines, Incorporated, which corporation did not at the time have a permit from the commissioner of corporations of the state of California authorizing it to sell or issue any of its securities. It also shows that the Julian Merger Mines, Incorporated, is organized and existing under and by virtue of the Code of Law for the District of Columbia created by "An Act to establish a Code of Law for the District of Columbia." Vol. 31, United States Statutes at Large, pp. 1189 et seq., approved March 3, 1901.

The petitioner bases his argument upon section 2 of the Corporate Securities Act (Stats. 1917, p. 673), particularly upon subdivision 3(a) of that section. Section 2, subd. 3, reads as follows:

> "The word 'company' includes all domestic and foreign, private corporations, associations, joint stock companies, and partnerships, of every kind, and also trustees, as hereinafter defined; excepting therefrom:
>
> "(a) All national banking associations and other corporations organized and existing under and by virtue of the acts of the Congress of the United States."

The excepting clause just quoted replaced the following language in the Investment Companies Act (Henning Gen. Laws 1920, p. 1199):

> "This act shall not apply * * * to corporations, associations, copartnerships or companies, subject to federal regulation. * * *"

He contends that the language of the excepting clause is clear and unambiguous and that there is no room for the application of the rules of construction recognized by the courts in those cases where it can be fairly said that the language is capable of two different interpretations. He also maintains that the act is highly penal in its nature and that for that reason we must construe it in accordance with its language. He relies upon the rule that "constructive crimes—crimes built up by courts, with the aid of inference, implication, and strained interpretation—are repugnant to the spirit and letter of English and American criminal law." Ex parte McNulty, 77 Cal. 164, 19 P. 237, 11 Am. St. Rep. 257. Petitioner also claims that the amendment of the exception raises a presumption that the Legislature intended by its selection of different words to express a different exception from that originally excluded by the language first used. The Attorney General, on the other hand, maintains that the Corporate Securities Act should receive a liberal construction and that the exemption comprehended by section 2, subd. 3(a), extends only to those corporations organized and existing under and by virtue of the acts of the Congress of the United States which either pertain to the national government and are of public character or are national in the scope of their intended operation, and urges as one of the reasons for this interpretation the argument that if the clause is construed to include corporations organized under the Code of Law for the District of Columbia, there would result such an unwarranted classification and removal of such corporations from the operation of the act as to render the exemption clause unconstitutional.

[1, 2] This argument of the Attorney General commands our most serious attention, for if it be possible to maintain the intent of the people expressed through the legislative branch of the government and yet save the section from danger of attack on the ground of its unconstitutionality, such result is in entire consonance with all of the rules of construction. We cannot, however, apply a rule of construction where there exists no room for construction. We must first of all be convinced that the exemption is fairly subject to two different constructions before applying any rule, and in this particular it should be noted that Congress is nowhere expressly authorized to provide by law for the incorporation of corporate entities, not to create corporations except as the legislative body for the District of Columbia and "all places purchased * * * for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." Section 8, art. 1, U. S. Const. The power which it has and exercises by which corporations are otherwise created is referable to the last subdivision of article 1, § 8, of the Constitution of the United States, as follows:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the

United States, or in any department or officer thereof."

Under this last clause it has been held that Congress has the right to create national banks in aid of the revenue laws, railroad corporations, telegraph companies, and bridge corporations over navigable waters in furtherance of interstate commerce. McCulloch v. State of Maryland, 4 Wheat. 316, 4 L. Ed. 579; Sanford v. Poe, 165 U. S. 194, 17 S. Ct. 316, 41 L. Ed. 683; Osborn v. Bank of United States, 9 Wheat. (22 U. S.) 738, 739, 6 L. Ed. 204; Luxton v. North River Bridge Co., 153 U. S. 525, 14 S. Ct. 891, 38 L. Ed. 808; California v. Central Pacific R. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. Ed. 150; Union Pacific Ry. Co. v. Myers, 115 U. S. 1, 5 S. Ct. 1113, 29 L. Ed. 319, and Pensacola Telegraph Co. v. Western Union Telegraph Co., 19 Fed. Cas. No. 10960, affirmed 96 U. S. 1, 24 L. Ed. 708. These cases just cited are also authority for the proposition that where Congress provides for the establishment of any such corporation in furtherance of some power or authority granted by Congress by the Constitution, that the states are without authority, unless permitted by congressional act, to interfere or impair by taxation, regulation or otherwise the efficiency of such corporations. As was said by Chief Justice Marshall in the case of Osborn v. Bank of the United States, supra:

> "The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court, in the case of McCulloch v. State of Maryland, is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.' It is not an instrument which the government found ready-made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only."

[3] When, however, we come to corporations such as the present one, organized and existing under the Code of Law for the District of Columbia, we are confronted by an entirely different situation. Corporations so organized are not different from those organized in one of the states of the Union. Layden v. Endowment Rank, Knights of Pythias of the World, 128 N. C. 546, 39 S. E. 47, points out the distinction in this language:

> "The line of demarcation between state and federal authority does not depend upon territorial limits, but entirely upon the subject-matter of legislation or judicial construction as defined by the Constitution of the United States. This doctrine applies to the federal government only in its relation to the states, as it is controlled by principles essentially different when dealing with the District of Columbia, or other territories of the United States. Congress is the supreme lawmaking power of all territories, certainly unrestrained by any local authority, and it would seem but indefinitely so even by the federal Constitution. In such cases it seems to us that Congress acts, not in its national capacity, but as a local Legislature, and its acts, unless otherwise clearly expressed, are confined in their binding operation to the jurisdictions for which they were originally intended. We therefore think that corporations, chartered primarily to do business in the District of Columbia, have no right, beyond that of comity, to operate in any of the states, unless expressly authorized by their charters. They therefore stand on the same footing as corporations of other states so far as the act of 1899 is concerned."

See, also, Williams v. Creswell, 51 Miss. 817.

A casual inspection of the other exemptions noted under section 2, subd. 3, of the Corporate Securities Act, and designated as (b), (c), (d), and (e), conveys to our mind the legislative intent to exclude from the definitive words of the section all corporations subject to some other supervisory power of the state and corporations whose purposes are benevolent, religious, social, humane, or the advancement and promotion of the general good without profit. There is nowhere, except possibly in the clause under consideration, the slightest indication to exclude a corporation formed for profit, the securities of which might properly be brought under the supervision of the commissioner except those where the issuance of securities was already under supervision.

[4, 5] From the investigation so far made it seems reasonably clear, regardless of what effect must eventually be given to the words, "other corporations organized and existing under and by virtue of the acts of the Congress of the United States," that the Legislature had in mind the advisability of excluding from its definition and from the operation of the act those corporations which, comparable to national banking organizations, are organized in furtherance of some power or authority vested in Congress and with the operation of which it was without power to interfere. The last statement is the equivalent of saying that it was not the legislative intent to exclude from the operation of the act those corporations over which the state has a perfect right to exercise its regulatory measures to prevent the improper or fraudulent issuance of securities. We are of the opinion that the excepting clause is open to construction and interpretation for the reason that "corporations organ-

ized and existing under and by virtue of the acts of the Congress of the United States" means two entirely distinct and different kinds of corporations: First, There are those similar to national banking organizations of a public character; and, secondly, those organized in the District of Columbia or other territories under general laws providing for the incorporation of private business undertakings. Under this situation we think the rule generally known as the rule of ejusdem generis should apply, and that the general words in question should be construed to mean the same class or general nature of corporations as national banking organizations, to wit, corporations organized in furtherance of some power conferred upon Congress. Pasadena University v. Los Angeles County, 190 Cal. 786, 214 P. 868; 25 R. C. L. 996, 997. Petitioner's contention that this rule has no application in the present instance by reason of the rule that courts favor a construction which will render every word operative rather than one which renders some words nugatory, is not well taken for the reason, as we have seen, that the intent as gathered from the act as a whole is consistent with the application of the rule of ejusdem generis.

[6, 7] The interpretation thus put upon the words is reinforced by the well-recognized rule of interpretation that where a statute is fairly capable of two different constructions the court should give to it that construction which will favor its constitutionality rather than one which might render it unconstitutional. If we should adopt the reasoning of petitioner upon this question, corporations organized in the District of Columbia or under acts of Congress in our territorial possessions, there would seem to be a discrimination in favor of such corporations not supported by any reasonable basis for such classification. It is well settled that a statute which contains exemptions amounting to substantial discrimination, without a reasonable basis therefor, is unconstitutional. Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; In re Raleigh, 177 Cal. 746, 171 P. 950, and cases cited. On the other hand, the interpretation which we have given to the language seems to be entirely free of such objection and in keeping with the whole spirit and intent of the Corporate Securities Act.

Nor do we think that the interpretation which we feel should be given to the words in question can in any sense be said to be a strained interpretation resulting in the creation of a constructive offense as denounced in Ex parte McNulty, supra. The rule thus announced must be founded upon the thought that every person is entitled to know by a reading of the law what offense is denounced therein, and although the language here may be considered capable of two different interpretations according to rules of law, we are of the opinion that an ordinary person reading the Corporate Securities Act as a whole would come to the conclusion that the Legislature had intended to prevent the issuance of securities without permit, of all domestic and foreign corporations, whether organized in a state, territory, or the District of Columbia.

[8, 9] While the language of the exempting clause in the Corporate Securities Act is different from that of the Investment Companies Act of 1913 (St. 1913, p. 715), we do not believe that it is controlling or that it necessarily indicates that a different purpose was intended. Had it been only the language of the exempting clause which was changed it would have greater weight than it has here, because the Corporate Securities Act was in fact rewritten to supersede the Investment Companies Act. The rule is well stated in United States & Canada Land Co. v. Sullivan, 113 Minn. 27, 128 N. W. 1112, Ann. Cas. 1912A, 51, in this language:

> "And though a change in the phraseology of an amendatory statute raises a presumption that a departure from the old law was intended, such a change is not ordinarily or necessarily of particular significance in the case of a general revision or codification, for the new language may be attributed to a desire to condense and simplify the law."

A comparison of the two statutes compels us to the conclusion that the act was rewritten without attempting to change it in this particular, but to arrange it logically and dispense with unnecessary verbiage. Our general conclusion is that we should give effect to the intention of the Legislature to prevent the issuance, without permit, of corporate securities in this state by foreign corporations organized in any other state or territory or the District of Columbia.

The writ is discharged, and the petitioner is remanded.

We concur: WORKS, P. J.; CRAIG, J.

80 Cal. App. 783

PEOPLE v. BEDOY. (Cr. 1348.)

(District Court of Appeal, First District, Division 1, California. Jan. 22, 1927.)

1. Criminal law 🔑829(9)—Where instructions given amply protected accused, it was harmless error to refuse instruction that, if evidence supported both guilt and innocence, jury should acquit.

It was harmless error to refuse an instruction that, if the evidence supported theories of both guilt and innocence, the jury should acquit, where every substantial right of the accused had been protected by instructions as to presumption of innocence, burden of proof, and proof beyond a reasonable doubt.

2. Criminal law 🔑829(3)—Refusal to give instructions separately stating elements of offense and necessity of proving each held not prejudicial, where included in other instructions.

In a prosecution for an alien's possession of a concealable firearm, refusal to give instructions separately stating the elements of offense and necessity of proving each was not prejudicial, where other instructions defined the elements and charged that both his possession and alien character must be proved beyond a reasonable doubt.

3. Criminal law 🔑823(4)—Instruction that merely possession of firearm was necessary to convict alien held not error for omitting statement, elsewhere given, of necessary degree of proof.

An instruction that mere possession, and not ownership, of a concealable firearm was necessary to convict an alien *held* not error for omitting to charge that the facts should be proved beyond a reasonable doubt, when charge as to necessary degree of proof had previously been given.

4. Criminal law 🔑1169(12)—Admission of extrajudicial statements of person accused of being alien possessing firearm held harmless error, where corpus delicti otherwise sufficiently established.

Where the corpus delicti was sufficiently proved by other witnesses, it was harmless error to admit evidence of extrajudicial statements of a person accused by being an alien in possession of a concealable firearm to further support his conviction.

5. Criminal law 🔑517(4)—In prosecution for alien's possessing firearm, foreign nativity of accused must be established by evidence independent of his extrajudicial statements.

In a prosecution for the possession of a concealable firearm by an alien, the foreign nativity of the accused, being an essential element of the corpus delicti, should be proved by evidence independent of his extrajudicial statements.

6. Aliens 🔑17—Alien character and possession of firearm held sufficiently proved by circumstantial evidence.

Since the corpus delicti need not be proved by direct evidence, the alien character of accused and his possession of a concealable firearm was *held* sufficiently proved by circumstantial evidence.

7. Witnesses 🔑380(5)—In trial of alien for possessing firearm, prosecution may not impeach its own witness, though surprised by his testifying contrary to former statements.

In the trial of an alien for possessing a concealable firearm, the prosecution may not impeach its own witness, even though surprised by his testifying contrary to his statements on prior occasions.

8. Criminal law 🔑444—Copy of record of baptism, neither authenticated as copy of public nor verified as copy of private document, held inadmissible in prosecution of alien possessing firearm (Code Civ. Proc. § 1918, subd. 8).

Where the record of a baptism was not proved to be a public document, a copy not properly authenticated as a copy of a public document in manner required by Code Civ. Proc. § 1918, subd. 8, not verified by a witness as a copy of a private document, was *held* inadmissible in prosecution of alien for possession of concealable firearms.

9. Criminal law 🔑1169(2)—Where competent evidence supports conviction of alien possessing firearm, admission of incompetent document and evidence held harmless.

Where competent evidence sufficiently supported a conviction for being an alien in possession of a concealable firearm, the erroneous admission of a copy of the record of a baptism, purporting to show the foreign nativity of accused and of evidence by the prosecution impeaching its own witness, *held* not so prejudicial as to require reversal.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Monico Bedoy was convicted of being an alien in possession of a concealable firearm, and he appeals. Affirmed.

Peckinpah & Carter and Rae B. Carter, all of Fresno, and Barcroft & Barcroft and Joseph Barcroft, all of Madera, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Appellant was charged by an indictment with a felony, to wit, that being foreign-born and unnaturalized he had in his possession a firearm capable of being concealed on the person. The appeal is from the judgment, entered on a verdict of guilty, and an order denying a new trial.

Appellant contends that the trial court erred in giving and refusing certain instructions to the jury and in its rulings on the admissibility of the evidence.

[1] An offered instruction stated in substance that if there should exist in the minds of the jury two different theories, one being consistent with innocence and the other with guilt, and each finding support from the evidence, the former should be adopted, and the defendant acquitted. This was refused.

While it has been held that such an instruction is proper where the evidence is merely circumstantial, and that in such case an instruction declaring the rule should, if requested, be given (People v. Dick, 32 Cal. 213), where, as here, instructions as to the presumption of innocence, the burden of proof, and defining reasonable doubt, were given, and the jury was further instructed that to warrant conviction it is insufficient that the allegations of the indictment be supported by probabilities merely or by a preponderance of the evidence, but that the elements of the offense, which were stated, must be proven beyond a reasonable doubt, every substantial right of appellant was protected. People v. Raber, 168 Cal. 316, 143 P. 317.

[2] The court also refused requested instructions separately stating the elements of the offense and charging the jury that a reasonable doubt as to either made an acquittal necessary. Such refusal was not prejudicial, as the instruction in substance was included in others which defined the elements of the offense and instructed the jury in effect that if they found beyond a reasonable doubt the fact of possession they must further be convinced by the same degree of proof that appellant was an unnaturalized foreign-born person.

[3] It is further contended that an instruction that it was unnecessary for the prosecution to prove ownership of the firearm in question, proof of possession or control being sufficient, was prejudicially erroneous in omitting to state that the facts must be established beyond a reasonable doubt. The jury had been elsewhere instructed as to the degree of proof necessary to convict, and its omission here was not error; nor, as urged by appellant, did the court err in refusing to instruct that the prosecution was bound by certain evidence adduced in support of the charge in the indictment.

[4-6] Evidence of certain extrajudicial statements made by appellant was admitted over his objection that the corpus delicti had not been proved. As held in People v. Juarez, 196 Cal. 404, 238 P. 363, the foreign nativity of the defendant, being an essential element of the corpus delicti, should be established by evidence independent of his extrajudicial statements. According to evidence introduced by the prosecution independent of such statements, the firearm in question was found under the mattress of the bed in a room occupied by appellant and his wife. Two witnesses, both natives of Mexico, one being appellant's younger brother, testified that appellant when a child resided in a certain town in Mexico, and that about the year 1917 he left that country and came to the United States. Though neither was able to testify to the fact of his foreign birth, they agreed in their testimony as to the name of his father and the town in Mexico in which the latter and appellant lived; one of the witnesses, named Viscara, testifying that he knew appellant when the latter was aged about five years and that he then resided in the town mentioned. It not being necessary that the corpus delicti be proved by direct evidence (People v. Alviso, 55 Cal. 230; People v. Wilkins, 158 Cal. 530, 111 P. 612), the testimony mentioned was reasonably sufficient to support the allegations of foreign birth and the possession of the firearm.

[7] As stated, the brother of the appellant was called as a witness for the prosecution. In the course of his examination this witness by a nod of the head responded in the affirmative to a question as to whether he saw on a certain occasion a pistol in the room occupied by appellant, but subsequently answered the question in the negative. Over appellant's objection, but with the permission of the court, the foundation was laid for impeaching his negative testimony by that of a witness who testified that on a previous occasion the same question had been answered in the affirmative. While it was clear that the prosecution was surprised by the second answer, the rule appears to be well settled that the impeaching testimony was not admissible. People v. Dewitt, 68 Cal. 584, 10 P. 212; People v. Creeks, 141 Cal. 529, 75 P. 101; People v. De Martini, 213 N. Y. 203, 107 N. E. 501, L. R. A. 1915F, 601; People v. Purtell, 243 N. Y. 273, 153 N. E. 72; Hickory v. U. S., 151 U. S. 303, 14 S. Ct. 334, 38 L. Ed. 170.

[8] We find no merit in any of the remaining objections made to the rulings of the trial court except the following: There was admitted over appellant's objection a document translated from the Spanish language into English, which purported to be a copy of the record of a baptism at Zallattan, Mexico, on September 22, 1895, of one Monico "Vedoy" by Gregorio Castillio; the latter being described therein as the priest "substituted curate of this parish." The document was certified as a "copy faithfully taken from the original" by Joaquin Briseno Robles, "the prelate in charge," below which appears a certificate by Manuel Alvarado, described as the vicar-general of the arch-diocese of Guadalajara; that the signature and seal which appear on the copy are the ones which the curate "used on official documents." Whether the original document referred to was a public document or record does not appear; nor was it shown that either of the persons whose signatures are in evidence was the legal keeper thereof.

Assuming the competency of the original document as evidence of the matters stated therein, if a public writing, it was essential in order to prove its contents by the copy alone that the latter be authenticated in the manner provided by subdivision 8 of section 1918, Code of Civil Procedure; or, if a private writing merely, that it be established by a witness qualified to say that the copy represented the contents of the original. We are of the opinion that the objection to its admission should have been sustained.

[9] Appellant contends that the errors were sufficiently prejudicial to warrant a reversal of the judgment. It appears, however, from the uncontradicted testimony of two officers, that the firearm was found in the place stated above; and, in addition to the inference supporting the fact of possession reasonably to be drawn therefrom, an inference of his ownership might fairly be sustained by the statements of appellant made subsequent to its discovery by the officers. There also appears the testimony of those who knew him in Mexico which, with his name and the fact that the extrajudicial statements mentioned were made in the Spanish language, reasonably support the conclusion that he was a native of that country. No evidence of naturalization was adduced by appellant (People v. Juarez, supra), and the competent evidence before the jury was sufficient to support the verdict.

We are of the opinion, after an examination of the entire record, that the errors mentioned were not prejudicial to a degree which can reasonably be said to have resulted in a miscarriage of justice.

The judgment and order are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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81 Cal. App. 113

PEOPLE v. NORTH. (Cr. 1399.)

(District Court of Appeals, Second District, Division 2, California. Jan. 27, 1927.)

1. Criminal law 🔑1159(5)—Conviction of robbery on conflicting evidence of identification and alibi will not be disturbed.

In prosecution for robbery of drug store, evidence being conflicting on question of identification and, consequently, that of alibi relied on, reviewing court *held* not authorized to disturb conviction.

2. Criminal law 🔑1175—Accused is not prejudiced by conviction of second degree robbery, where evidence authorized conviction in first degree only (Pen. Code, §§ 211, 211a).

Conviction for robbery in second degree will not be reversed because, under Pen. Code, § 211a, conviction should have been for robbery in first degree, section 211 defining robbery, and permitting conviction for offense less than that charged, and necessarily included in charged offense.

3. Robbery 🔑27(1)—In prosecution for robbery of drug store, defendant held not entitled to instruction directing acquittal of robbery and conviction, if at all, for grand or petit larceny.

In prosecution for robbery of drug store, defendant *held* not entitled to instruction directing jury that they must acquit on charge of robbery and find him guilty, if at all, only of grand larceny or petit larceny.

4. Criminal law 🔑829(1) — Refusal of instruction covered by given instruction held not error.

In prosecution for robbery of drug store, refusal of instruction, covered by given instructions, though given instructions were not couched in language embraced in one refused, *held* not error.

5. Criminal law 🔑655(5), 1186(4)—Unwarranted criticism and reprimand to defense counsel held error, but not reversible, where record disclosed no miscarriage of justice (Const. art. 6, § 4½).

In prosecution for robbery of drug store, reprimands, language, and attitude of trial judge toward defendant's counsel *held* error, but not prejudicial, in view of Const. art. 6, § 4½, providing that case should not be reversed, if, in spite of errors, whole record discloses that there has been no miscarriage of justice.

6. Criminal law 🔑699—Attorney's interest in client does not justify ignoring of court's rulings.

Interest of attorney in client should at no time be recognized as justification for ignoring or disregarding rulings of court.

7. Criminal law 🔑1186(4)—Provision, requiring affirmance, unless whole record discloses miscarriage of justice, is mandatory upon appellate tribunals (Const. art. 6, § 4½).

Const. art. 6, § 4½, requiring affirmance, unless, from whole record, it appears that there has been such miscarriage of justice as to work conviction of innocent person, is mandatory upon appellate tribunals.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Earl North was convicted of robbery in the second degree, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

CRAIG, J. The appellant was convicted of robbery, alleged by information of the district attorney of Los Angeles county to have been committed on or about the 22d day of February, 1926. A motion for new trial was presented, which was denied, and he appeals from the judgment and from the ruling upon said motion.

A witness for the people, named Arthur Niemi, testified that he and the defendant were on the date last mentioned employed by the Liggett Drug Company at Hollywood; that on the night of Washington's Birthday the witness and one Oliver Peterson were closing the front door of the store, as the defendant entered from the rear, wearing a suit of coveralls, and a black cloth over his head, in which cloth two holes had been cut for vision; that North pointed a revolver at Niemi, and said, "Give me the money," to which the latter replied, "There it is, help yourself;" that the defendant then indicated a closet, and said, "Get in there," which Niemi and his companion did. The latter further testified that he heard North open the safe and remove cash boxes, heard money jingle; that, as soon as he ceased to hear any sound, the witness came out, directed Peterson to call the police, and ran to the rear door, but, failing to see North, he returned, replaced the cash boxes in the safe, and locked it.

Peterson was unable to identify the defendant, but corroborated Niemi's testimony as to occurrences, and remembered the greasy condition of the coveralls as described by other witnesses. The manager of the building testified that a strange automobile, which he described as a brougham with a sloping rear top, stood at the back of the store on the night in question, at about 10:40 o'clock. The night manager of a Hollywood automobile service testified that on the night of the 22d the defendant rented a Moon sedan car with curved or rounded top; that he returned at about 11:20 p, m., leaving the machine, walked to the curb, and ran across the street, this witness swore that the car had not been driven more than 12 or 14 miles by North; that only one-half gallon of gasoline had been used from the tank. The engineer of the building in which the drug store was located identified the coveralls as his own property, and testified that he hung them on a rail when he left at about 6 p. m., but that on the following morning he found them on the floor of the cellar. Three officers searched the defendant's home on Sunset boulevard, and testified that they there found a suitcase containing the black mask described by Niemi; that, when arrested, North stated that he had been for a walk, but later said that he rented a car and drove about the city, between Los Angeles and Beverly Hills. The manager of the drug store testified that $2,189.64 was taken from the safe on the night of February 22d; that $195 remained, and that vouchers and money not taken were scattered on the floor.

The defendant testified, denying in toto the evidence introduced by the people, and on the stand abandoned his former statement to the officers, heretofore mentioned, averring that he accidentally met a lady by the name of Joy Warford at a drug store located at Sixth and Hill streets, in the city of Los Angeles, whom he carried to her home in the south part of the city. Miss Warford was sworn, and testified that she "taught ball room" evenings, and cut film at moving picture studios during the daytime, but that on February 22d she had not worked; that previously to meeting the defendant she had been to a small picture show on Hill street near Sixth street; that North drove her home and that he left her at about 11:05 p. m. This latter witness further testified that she had known the defendant about eight months; that she did not remember at what time she went to town, the picture that she saw, or what it was about. She testified, however, that, upon entering her residence to obtain a match for the defendant, she observed that there was a difference of exactly two minutes between her watch and the clock. She was positive that she observed both, and testified, "My watch was 11:07 and the clock was 11:03." The defendant averred that he ate dinner at home on the night in question; that he went out soon afterwards; and that his wife went to the residence of her aunt. This Mrs. North corroborated, but denied any knowledge as to the time of his return.

The defense advanced in this case consists of an asserted alibi. It is denied that North was at the scene of the robbery, or had any knowledge of the crime. It is insisted that from the brief and abrupt commands given Niemi at the drug store it would have been impossible for the latter to identify a person's voice. Niemi swore, however, that he had worked in the same establishment with North for more than a month; that he conversed with him, and heard him talk daily during that time; that he was familiar with his voice, and that he immediately recognized the defendant's voice and general build, and knew that North committed the robbery.

[1] The question of identification, and consequently that of alibi, therefore was but one of fact to be deduced from the conflicting evidence. The testimony was direct, positive, and amply sufficient to warrant the jury in finding a verdict of guilty, and upon such state of the record a reversal of the judgment is not authorized.

[2] The information charged the crime of robbery, but did not specify the degree. The jury returned a verdict of "guilty of robbery, a felony, in the second degree, as charged in the information." It is contended on behalf of the appellant that under such an allegation he could only be convicted of robbery in the first degree, and section 211a of the Penal Code is cited as authority for this proposition. Said section reads as follows:

> "All robbery which is perpetrated * * * by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

Section 211 provides that—

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

In People v. De Verre, 68 Cal. App. 742, 230 P. 197, under facts almost identical with those here presented in so far as they would bear upon the distinction between robbery in the first degree and robbery in the second degree, it was held that a verdict of guilty of robbery in the second degree would not be disturbed; and in Ex parte Colford, 68 Cal. App. 308, 229 P. 63, the petitioner for a writ of habeas corpus contended that under a similar allegation to that before us he should have been convicted, if at all, of robbery in the second degree. It was there held that—

> "The information follows the language of section 211 of the Penal Code, which defines robbery, and is sufficient to support a conviction of either degree of the crime, as defined by section 211a."

Also People v. Church, 116 Cal. 300, 48 P. 125, cited by appellant, clearly upholds the proposition that a verdict of guilty of an offense less than that charged in the information, but necessarily included in it, is proper. In view of the decisions above cited, the verdict and judgment will not be disturbed merely upon the ground that the defendant received punishment less severe than the evidence may have warranted.

[3] Appellant complains of the refusal of the trial court to give a requested instruction defining robbery, grand larceny, and petit larceny, and charging that, if the jury should find that the personal property taken was over $200, they must find the defendant guilty of grand larceny, and, if less than that amount, they must find him guilty of petit larceny, for the reason that larceny is an element of robbery. It is too obvious for argument that the defendant was not entitled to an instruction in effect directing the jury that they must acquit on the charge of robbery and find him guilty, if at all, only of grand larceny or petit larceny.

[4] It is further insisted that the identification of the defendant was so doubtful, and the evidence upon that question so weak, that the trial court erred in refusing to give a requested instruction which is quoted in the briefs. The jury were fully instructed upon the questions of identity, alibi, reasonable doubt, and the credibility of witnesses. The instructions given were not couched in the language embraced in the one which was refused, but we think the issues were covered, and that the action of the court in this respect was not error.

[5] Reprimands by the trial judge, and his language and attitude toward the defendant's counsel during the trial, are assigned as misconduct prejudicial to the rights of the accused. During the cross-examination of the people's witness Niemi the following colloquy occurred:

> "Q. By Mr. Groene: Do you know the direction that the alleged holdup went when he left there?
>
> "The Court: Just a moment. This witness hasn't talked anything about any alleged holdup. Who do you mean, the defendant?
>
> "Mr. Groene: No; the holdup man. I don't know about the defendant. We hold the defendant was not there, your honor.
>
> "The Court: That is the only person he testified it was.
>
> "Mr. Groene: We know it was not the defendant, and I am asking him the question—
>
> "The Court: Just a moment, Mr. Groene. The witness need not answer the question. It is not cross-examination. He has not testified about any person under the name of the alleged holdup man. He has testified to the defendant, and no one else. Consequently this is not proper cross-examination.
>
> "Mr. Groene: Well, may it please the court, we hold that this defendant was not there. We know he was not there.
>
> "The Court: Will you take your seat, please?
>
> "Mr. Groene: And we know—
>
> "The Court: Will you take your seat, Mr. Groene?
>
> "Mr. Groene: Yes; but I—
>
> "The Court: Now, just a moment. I don't want to have to punish you for contempt of court.
>
> "Mr. Groene: No, I don't wish to be.
>
> "The Court: But you are going to jail as sure as you are a foot high if you don't—
>
> "Mr. Groene: But I wish to bring out the evidence.
>
> "The Court: Now, will you please keep quiet? I don't like to have to take extreme measures, Mr. Groene, but I will have to do it if you don't abide by the rulings with the proper attitude and decorum. You will find this is one department where you have got to do that. You will proceed in an orderly way here."

Later, during the same examination, the record contains the following:

> "Q. By Mr. Greone: Now, isn't it a fact that there was another person of the same size, same build?
>
> "Mr. Fricke: Asked and answered. Objected to.
>
> "The Court: Sustained.
>
> "Mr. Groene: No, he has not answered that, your honor.
>
> "The Court: Did you hear the ruling of the court?
>
> "Mr. Groene: I am asking now—
>
> "The Court: Did you hear the ruling of the court?
>
> "Mr. Groene: Yes.
>
> "The Court: I am going to have to deal with you very seriously in a very, very few moments if you don't stop this. The court has ruled, and you know when the court has ruled there is nothing further to be said. Two or three times after I have ruled you have proceeded to make some sort of statement. I don't want that thing to occur again during the trial.
>
> "Mr. Groene: I am asking the question, your honor—
>
> "The Court: Will you please ask another question?
>
> "Mr. Groene: And he has not answered the question yet, and I would like to get an answer. I have asked him this question—
>
> "The Court: Mr. Groene, the court now finds

you guilty of contempt of court for your conduct and attitude in the case and for proceeding to argue matters after the court has already ruled. Have you any reason to offer why the court should not now punish you for contempt?

"Mr. Groene: I think you should not, your honor, for I am within my rights as an attorney defending my client, to the best of my ability, but I would like at this particular time to let the stenographer refer back to his notes and see if he has answered the question I asked.

"The Court: Do you consider it the proper and courteous thing to do to persist in attempting to argue after the court has ruled? If that is your idea, you have something to learn. I won't impose any punishment at this time, because I take it your attitude is very largely due to ignorance of the proper procedure, but I insist it do not occur again, for, if it does, I shall not be lenient another time."

Immediately preceding these last questions, answers, and rulings, the record discloses the following:

"Q. (By Mr. Groene): Isn't it a fact that there was another employee in that same department, the same size, same build? A. But not the same voice.

"Q. I am not asking you about voices. I know you don't know about the voice, but I am asking about the general appearance.

"Mr. Fricke: Just a moment. We take exception to counsel's remark.

"The Court: Yes; that remark is as improper as it possibly could be. If counsel knew anything in the trial of a case about proper courtesy in court he would have known better than to make it."

[6] That the record reveals a clear departure from that courteous decorum emphasized by the trial court, we think cannot be doubted. Besides, a careful examination of the record discloses that the question quoted above, "Isn't it a fact that there was another employee in that same department, the same size, same build?" to which the objection was sustained on the ground that it had been asked and answered, had not in fact been directly answered, and counsel was entirely within his rights in insisting that a direct answer be given by the witness. Attorneys representing defendants in criminal cases are frequently inspired with the justness of their causes to a degreee which prompts undue enthusiasm and persistence. Their interest in a client should at no time be recognized as a justification for ignoring or disregarding the rulings of the court, but experienced jurists, also realizing the propensities of overzealous attorneys in such cases, are often confronted with situations requiring patience, tact, and firm but courteous demeanor, lest those whose life or liberty is in the balance shall suffer through unpleasant controversies over which they have no control. We think the remarks of the court in this instance constituted error, but we are not authorized or impelled to reverse the judgment upon that ground alone, nor do the authorities cited by appellant require or justify such action. In People v. Grider, 13 Cal. App. 703, 110 P. 586, it was held that it is incumbent upon the complaining party to show how his substantial rights have been materially affected by irregularities or misconduct. And in People v. Costa, 24 Cal. App. 739, 142 P. 508, it was said that—

"Such fact, if true, standing alone in the absence of prejudicial error, would not justify a reversal of the case, but merely accentuate the effect of other errors disclosed by the record."

The error here complained of is said to have been humiliating to defendant's counsel, and prejudicial to the defendant in the eyes of the jury. We concur in both assertions, but upon the whole record we do not think, in the absence of other substantial error, that, in view of section 4½, article 6, of the Constitution, we would be justified in reversing the judgment.

[7] Finally, it is asserted that an examination of the entire record requires a reversal under the provisions of the Constitution last mentioned. Said section is mandatory upon appellate tribunals, and, by denying a reversal under the circumstances therein specified, it requires an affirmance, unless from the whole record it appears that there has been such a miscarriage of justice as to work the conviction of an innocent person. People v. Wong Hing, 28 Cal. App. 230, 151 P. 1159; People v. Kizer, 22 Cal. App. 10, 133 P. 516, 521, 134 P. 346. We think the verdict and judgment in this case are abundantly supported by the record, and that no different result would ensue from another trial.

The judgment and order denying the motion for new trial are affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

81 Cal. App. 122

PEOPLE v. GHYSELS. (Cr. 1419.)

(District Court of Appeal, Second District, Division 1, California. Jan. 28, 1927.)

1. Witnesses 🔑269(1) — Refusal to permit cross-examination outside scope of direct examination held proper.

Objection to cross-examination of witness concerning matters outside scope of direct examination *held* properly sustained.

2. Witnesses 🔑363(2)—Refusal to permit defendant to show connection between one of his own witnesses and district attorney's office held not error.

In prosecution for possessing liquor, refusal to allow defendant to bring out an alleged connection between one of his own witnesses and district attorney's office, or to show some element or promise of immunity, *held* not error; there being nothing to show that witness was reluctant, or defendant surprised by his testimony.

3. Criminal law 🔑1172(6)—In prosecution for possession of liquor, instruction referring to statute relating also to manufacture, sale, and transportation, if technically erroneous, held not reversible (National Prohibition Act, tit. 2, § 3 [U. S. Comp. St. § 10138½aa]).

In prosecution for possession only of liquor, instructions referring to National Prohibition Act, tit. 2, § 3 (U. S. Comp. St. § 10138½aa), relating also to manufacture, sale, and transportation of liquor, if technically erroneous, *held* not reversible error.

4. Intoxicating liquors 🔑239(2)—In prosecution for possession, refusal of court to instruct, in words of National Prohibition Act, that act was to be liberally construed, held not error (U. S. Comp. St. § 10138¼ et seq.).

In prosecution for possessing liquor, refusal of court to instruct, in the words of the National Prohibition Act (U. S. Comp. St. § 10138¼ et seq.), that all provisions of the act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented, *held* not error.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

C. Ghysels was convicted of unlawfully possessing intoxicating liquor, and he appeals. Affirmed.

Chas. D. Swanner and Roland Thompson, both of Santa Ana, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James S. Howie, of Los Angeles, for the People.

YORK, J. The defendant was convicted of the unlawful possession of intoxicating liquor, and in the information was also charged with two prior convictions of possession of intoxicating liquor. As to the prior convictions, the defendant, on the day of trial, stated that he had been convicted as charged, but pleaded not guilty as to possession of intoxicating liquor. The defendant's claim was that the liquor was discovered by him near a drainage ditch on his property when he was cutting hay. He admits that he took possession of a gallon jar of the same, but claims that he brought it to his house merely to exhibit to the witness Butler, who had asked him for something to drink as he was "going fishing." There is no direct evidence that defendant offered the liquor for sale. He stated that he brought it to the house intending to turn it over to the officers of the law at a later date. However, he was intercepted by an officer before any delivery was made to witness Butler.

[1, 2] The principal points presented by appellant relate to rulings of the court excluding questions asked by appellant on cross-examination of witnesses, and on direct examination of defendant's witness Butler. The objections to cross-examination of witnesses, that were sustained, were properly sustained, because the questions related to matters which were outside of the scope of the direct examination of those witnesses. The court's refusal to allow appellant's counsel to bring out an alleged connection of Butler with the district attorney's office, or some supposed arrangement whereby he might have received promise of immunity from some of the public officials connected with the prosecution on account of some prosecution in which the witness was apparently involved, was not erroneous. Butler was defendant's witness, and there is nothing to show that he was reluctant, or that appellant was surprised by his testimony.

The defendant took the stand and testified quite fully, but did not directly deny that witness Butler had stated that he was going fishing and that he wanted something to drink, and defendant did not deny that he went out and got the liquor. He does deny that he said he had buried it himself or said that it was good liquor, as was testified to by witnesses Butler and McClellan.

[3, 4] As to the errors that appellant claims were made in instructions given, and the errors that he claims exist by reason of certain instructions refused, on a casual examination these objections would appear to be worthy of discussion because the first portion of the first instruction objected to by the appellant refers to a portion of the National Prohibition Act, tit. 2, § 3 thereof (U. S. Comp. St. § 10138½aa), which makes reference necessarily to the manufacture, sale, transporting, etc., of intoxicating liquor. But it clearly appears from the instructions given that they refer only to the charge that defendant was guilty of the crime of possession of intoxicating liquor. It was unnecessary and inappropriate for the trial court to instruct the jury, in the words of the National Prohibition Act, that—

"All of the provisions of the Prohibition Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

This language merely involves a statement of statutory construction applied to prohibition acts. As was said in People v. Pagni, 69 Cal. App. 94, 230 P. 1001:

> "Juries are not concerned with rules of statutory construction. These are for the guidance of the courts in construing or applying the provisions of statutory enactments, while the sole function of the jury is to consider the facts and formulate a judgment with respect thereto under the guidance of appropriate statements of the law by the court."

It was held in said case that it was not proper to instruct the jury that all of the provisions of the Prohibition Act should be liberally construed. But as was said in the same case at page 104 (230 P. 1005):

> "We are not to be understood as holding that the errors committed in the instructions above considered are of themselves of sufficient gravity to compel a reversal of the case. This question, if passed on, would have to be considered and determined by the light of the record as a whole."

In the case at bar, all of the other instructions are definite as to the fact that the defendant was on trial only for the unlawful possession of intoxicating liquor, and the evidence as to possession was positive and direct, and there was no evidence introduced claiming to show a sale. As we find no errors in the record other than the mere technical error arising from the giving of the single instruction complained of, we cannot say that the error complained of worked any miscarriage of justice. The case was fairly tried, and the evidence clearly shows that defendant was guilty as charged.

The judgment and order herein appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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80 Cal. App. 789

PEOPLE v. McCONNELL. (Cr. 1313.)

(District Court of Appeal, First District, Division 1, California. Jan. 24, 1927.)

1. Criminal law 🔑570(3)—In prosecution for burglary, admitting evidence as to defendant's sanity to rebut evidence of judgment committing him as insane held not error.

In prosecution for burglary, where, to support plea of insanity, defendant had offered evidence of judgment and order of commitment as insane, which was received, admitting medical testimony to effect that defendant was not insane *held* not error; judgment not being conclusive as to defendant's exemption from liability for crime charged.

2. Insane persons 🔑26—Judgment committing person to state hospital for insane does not conclusively determine status as insane person.

As commission established in each county to determine mental condition of person alleged to be insane does not fix status of such persons, but merely determines whether mental condition is such as to warrant detention in asylum for treatment, judgment roll in proceedings for commitment is not conclusive as to insanity.

3. Criminal law 🔑48—Partial or limited insanity does not preclude liability for crimes.

Person, though partially insane with respect to certain subjects, may, nevertheless, have sufficient mental capacity to make him liable for crimes.

4. Criminal law 🔑570(3)—Irresponsibility for crimes is not proved by commitment to hospital for insane.

Commitment of person to hospital for insane does not prove insanity to extent that such person would be exempt from responsibility for his criminal acts.

5. Indictment and information 🔑190 — Jury may find defendant guilty of attempt to commit burglary, though information and evidence had to do only with completed crime.

Defendant informed against for burglary could be convicted of attempt to commit burglary in second degree, where evidence tended to sustain verdict of burglary in first degree; commission of burglary implying attempt to commit it.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Joseph McConnell was convicted of an attempt to commit burglary in the second degree, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, of San Francisco, for the People.

TYLER, P. J. Defendant and one James Kelly were jointly accused by information of the crime of burglary. The alleged offense was charged with having been committed by them on March 27, 1925. Upon arraignment they pleaded not guilty. On the day set for the trial defendant, McConnell, upon the suggestion of his counsel, was ordered placed in the detention hospital for observation as to his sanity, and the trial was continued to October 16, 1925. It appearing upon said day that McConnell was an inmate of Stockton State Hospital for the Insane, the court ordered a severance, and continued the trial of McConnell to a future date. Subsequently, on motion, the case was set for, and trial was had on, December 18th. Briefly stated, the evidence shows that on the morning of March 4, 1925, a police officer observed defendant and another in the doorway of the premises at 330 Eddy street, San Francisco. The officer saw defendant's companion lift him up so as to enable him to climb over the transom After defendant had gained an entrance into the premises, he and his companion were arrested and taken into custody After trial, defendant was convicted of an attempt to commit burglary in the second degree. Motion for a new trial was made and denied, and he was sentenced to the state prison This is an appeal from the order and judgment.

[1, 2] Upon the trial the defenses relied upon were a denial of any burglary or attempt to commit the same, and insanity. In support of his defense of insanity, there was admitted in evidence a judgment and order of commitment of defendant as an insane person to Stockton State Hospital. There was also admitted in evidence under the objection of defendant a certificate of the medical superintendent of said hospital that defendant was not insane, and was discharged on November 3, 1925. Certain medical evidence was also introduced to show that defendant was not insane. Appellant here claims that the trial court erred in the admission of this evidence as to defendant's sanity, as it tended to impeach the judgment of the superior court, which declared the defendant to be insane, such judgment being in full force and effect. There is no merit in this objection. It has been held in this state that, in proceedings for the commitment of a person to a state hospital, there is no judgment roll in the sense that it determines conclusively anything; that the commission established in each county to ascertain the mental condition of one alleged to be insane is purely a creature of the statute, the sole duty of which is to inquire and determine whether the mental condition of the person examined is such as to warrant his detention in the asylum for treatment. It is not intended as a tribunal in which the status of the alleged insane person is fixed. People v. Willard, 150 Cal. 543, 89 P. 124.

[3-5] In the very recent case of People v. Gilberg, 197 Cal. 306, 240 P. 1000, it is said that the court has no disposition to depart from this rule. Conceding the commitment to have been properly received as evidence of defendant's insanity, it was not, therefore, conclusive upon the subject. In criminal cases a partial insanity, or an insanity with respect to certain subjects, is not incompatible with the possession of mental capacity sufficient to make the party liable to punishment for his acts. It does not follow, therefore, because one was so committed in the manner indicated, that the commitment is proof that such person was insane to the extent that the law would exempt him from responsibility for his criminal acts. As was said in People v. Willard, supra, there are many kinds and degrees of insanity, and it is not every kind or degree which will relieve a person from criminal responsibility, and the degree of mental impairment which would authorize his confinement in an asylum for the insane may be entirely different from the degree of mental derangement which will relieve him from responsibility for his criminal acts. One may be insane upon one or several subjects, and for that reason a proper person for confinement in a state asylum to be cared for and treated for his mental disorder, and yet at the same time such person may be perfectly sane upon all other subjects, and entirely responsible under the law for a criminal act committed by him. This subject has recently received consideration in the case of People v. Sloper (Cal. Sup.) 244 P. 362, where what is known as the "right" and "wrong" test is extensively discussed. The testimony of Dr. Catton was therefore properly admitted to show that, while defendant was addicted to the use of narcotics, he fully appreciated the difference between right and wrong, and was not insane in a legal sense. Appellant next complains that the court erroneously instructed the jury that it might find the defendant guilty of an attempt to commit burglary. It is claimed that, since the information contained no charge of any element of an attempt to commit the offense, and the evidence was directed solely to a completed entry, the instruction was erroneous, and the conviction without warrant. A defendant informed against for the crime of burglary may be convicted of an attempt to commit burglary in the second degree, where the evidence tends to sustain a verdict of burglary in the first degree. People v. Lowen, 109 Cal. 381, 42 P. 32.

The commission of burglary implies an attempt to commit it.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CAMPBELL, Justice pro tem.

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81 Cal. App. 137

COOMBS v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.★
(Civ. 5411.)

(District Court of Appeal, Second District, Division 2, California. Jan. 28, 1927. Hearing Denied by Supreme Court March 28, 1927.)

1. Master and servant ⟹417(4¼) Reviewing court cannot consider affidavits contradicting record as to stipulation at hearing of workman's compensation case before referee.

Affidavits contradicting record as to stipulation made at hearing of workmen's compensation case before referee cannot be considered on appeal, as record cannot be changed.

2. Master and servant ⟹416—Industrial Accident Commission may reserve award for surgical and hospital treatment.

Industrial Accident Commission has power to reserve award for surgical and hospital treat-

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★Rehearing denied 253 P. 976. Hearing denied by Supreme Court.

ment, although final judgment if possible should be made covering all matters involved.

3. Master and servant 🔑416—Supplemental award for medical treatment cannot be disturbed after original decision becomes final.

Supplemental award by Industrial Accident Commission for surgical and hospital treatment, in accordance with original decision, cannot be disturbed after such decision becomes final.

4. Master and servant 🔑416—After award leaving open only reasonableness of charge for medical treatment becomes final, employer cannot complain of lack of notice of injury.

Supplemental award for medical treatment cannot be attacked on ground that employer did not receive notice of injury, where original decision leaving open only reasonableness of charge for medical treatment has become final.

Certiorari to Review Order of Industrial Accident Commission.

Proceeding under Workmen's Compensation Act by Oliver J. Musland, claimant, against S. H. Coombs, employer. From an order of the Industrial Accident Commission making a supplemental award for surgical operation and hospital bills, the employer brings certiorari. Award affirmed.

John A. Rush, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

THOMPSON, J. This proceeding for the writ of review seeks the annulment of a supplemental award for a surgical operation and hospital bills amounting to the sum of $94. The original and one supplemental award were heretofore considered by the other division of this court and not disturbed. Coombs v. Industrial Accident Commission (Cal. App.) 245 P. 445. Finding No. 2 of the original findings and award is as follows:

> "The employer is liable for the reasonable cost of the medical, surgical, and hospital treatment as was reasonably required to cure and relieve the employee from the effects of said injury, such cost to be fixed by the commission subsequently and supplemental award entered therefor upon filing of itemized bills therefor, and at the request of any person in interest."

The answer to the application for adjustment of claim sets up only two reasons for disallowance of the claim: First, that the injury was sustained not in the course of employment, but while the applicant was playing baseball; and, second, that the injury was contributed to by a chronic condition inflamed by reason of an injury occurring while playing baseball. There is recited in the return under the heading, "Report of Hearing," as of February 26, 1925, several stipulations, three of which are as follows: (4) That no medical treatment was furnished by the employer; (5) that in the event the employer is found chargeable with the medical expense incurred by or on behalf of the employee the reasonable cost of such treatment may be determined by the filing of itemized bills for such treatment, and the submission of same to the medical department of the commission; (6) that the employer had notice and knowledge of the assertion of a claim of injury as defined by section 15 of said act. The return also discloses that on July 2, 1925, and subsequent to the first supplemental award considered in the opinion mentioned, the petitioner filed an affidavit repudiating the stipulation and averring that he never so stipulated.

With this record and pursuant to the finding which we have quoted and to a request from the employee, the commission on March 9, 1926, made the supplemental award now in question. This the petitioner asserts was in excess of its jurisdiction: First, because there was no evidence of the reasonableness of the charges; and, second, because there was no evidence of notice to the employer of injury sustained in the course of his work prior to the employment of the physician by the employee.

[1-3] We think that petitioner is precluded from raising these objections at this time. It will be noted that they were not originally raised by answer and were in fact raised for the first time in the petition for rehearing after the supplemental award now under attack. In view of section 18 of the Workmen's Compensation, Insurance, and Safety Act of 1917 (Stats. 1917, p. 831), it is extremely doubtful whether objections raised for the first time in a petition for a rehearing can be considered. The import of that section would seem to be that the applicant is entitled earlier to be notified by the employer or insurance carrier of all matters upon which he intends to rely as a defense. Without passing, however, upon that question, we must accept the stipulation as found in the return and disregard the affidavit. As was said in the opinion in Coombs v. Industrial Accident Commission, supra: "We cannot, of course, consider the affidavits in re the stipulation made at the hearing before the referee, as the record of this matter before us cannot be so made up or so changed." Furthermore, the opinion just referred to says: "There are sufficient facts in evidence, or shown by the stipulation, to sustain each and every one of the findings of the commission." So far, then, as petitioner's first contention is involved, we are confronted by a stipulation that the reasonableness of the charges should be determined by the submission to the medical department of the commission of the itemized bills. Such was the procedure adopted in Myers v. Industrial Accident Commission, 191 Cal. 673, 218 P. 11. We are also faced with a finding, which is a

part of the decision involved in the opinion from which we have quoted, that petitioner here is liable for the medical expense, the amount and reasonableness to be determined in accordance with the stipulation. The supplemental return shows that this procedure was followed. While it is true that wherever possible a single final judgment should be made covering all of the matters involved, nevertheless the commission did have the power to reserve, as it did here, the award for surgical and hospital treatment. This was done in the case of McBride v. Industrial Accident Commission, 182 Cal. 407, 187 P. 1050. The supplemental award cannot be attacked on the ground that there was no evidence of the reasonableness of the charge without disturbing the stipulation and the original decision of the case, which cannot be done, because that decision has become final.

[4] And so with the second ground upon which petitioner relies. The finding which we have quoted is that: "The employer" (petitioner here) "is liable for the reasonable cost of the medical, surgical, and hospital treatment." If we were to hold here that no notice had been given, in effect it would be to insert the word "not" before the word "liable." The only thing which was left open by this finding was the reasonableness of the charge to be fixed, in the manner we have already pointed out.

Our conclusion is that, the decision of the commission having become final, the petitioner cannot now be heard to complain of any part of that decision nor to repudiate the stipulation therein contained.

The supplemental award is affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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80 Cal. App. 752

MARSH v. MARSH. (Civ. 5587.)

(District Court of Appeal, First District, Division 2, California. Jan. 22, 1927.)

1. Appeal and error 🔑757(3)—Where appeal is based on sufficiency of evidence, appellant has not met requirements of statute by printing evidence favorable to him alone (Code Civ. Proc. §§ 953a, 953c).

Where appeal is taken under Code Civ. Proc. § 953a, and is based upon question of sufficiency of evidence, appellant has not met terms of section 953c, providing that appellant should print portions of record which he desires to call to attention of court by printing evidence favorable to him alone.

2. Appeal and error 🔑907(2)—Appellate court must assume that finding adverse to appellant is based upon competent evidence, where contrary is not shown.

Where contrary is not shown, appellate court must assume that finding adverse to appellant is based upon competent evidence, on appeal based on question of sufficiency of evidence.

3. Appeal and error 🔑761—Appellate court will not consider point, where no argument or citation of authority is made in support of it.

Where no argument or citation of authority was made in support of point whether no affirmative judgment could be awarded to defendant who filed cross-complaint for divorce in plaintiff's suit for separate maintenance, in view of Civ. Code, § 122, appellate court was not required to consider it.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Suit by Frances Marsh against Thomas Marsh for separate maintenance, in which defendant filed a cross-complaint for divorce. Plaintiff was denied relief on her complaint, and an interlocutory decree of divorce was entered on defendant's cross-complaint, and plaintiff appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Edward E. Leighton, of Los Angeles, for respondent.

NOURSE, J. Plaintiff sued for separate maintenance, charging cruelty. The defendant answered and filed a cross-complaint for divorce on the ground of cruelty. The plaintiff was denied relief on her complaint for maintenance, and an interlocutory decree of divorce was entered on the cross-complaint by the terms of which the plaintiff was awarded the custody of the minor child of the parties, an equal share of the community property, and $30 a month for the support of herself and the child. From this decree the plaintiff has appealed under section 953a, Code of Civil Procedure.

In her brief the appellant has made a brief statement of the facts of the case and has printed excerpts from the testimony of witnesses favorable to her to show that sufficient evidence was offered to warrant a judgment in her favor on her original complaint. The appellant then states as her points on appeal: (1) That the evidence was insufficient to justify a divorce on respondent's cross-complaint; (2) that, in view of her "prima facie" case for separate maintenance, the divorce to respondent was error; and (3) that because of section 122 of the Civil Code the only relief to which respondent was entitled was a denial of relief to appellant on her complaint.

[1, 2] Where an appeal is taken under section 953a, Code of Civil Procedure, it is incumbent upon the appellant to print in the brief or in a supplement thereto such portions of the record as the attention of the court is called to. Section 953c, Code Civ. Proc. Manifestly, when the appeal is based upon a question of the sufficiency of the evi-

dence, the appellant has not met the terms of the statute when he has merely printed the evidence favorable to him alone, because we must assume that when the finding is adverse to him it is based upon competent evidence until the contrary is shown. Thus we are unable to say on an appeal taken in this method whether the evidence is sufficient to support a particular finding unless the briefs disclose what evidence was offered in support of the finding.

[3] As to the second point advanced by appellant, we must assume, in the absence of a contrary showing, that, though the "prima facie" case made out by the appellant was sufficient to justify a finding favorable to her, competent evidence was offered and received sufficient to support the findings and decree adverse to her.

Upon the third point the appellant merely states that because section 122 of the Civil Code provides that recrimination is a showing in bar of plaintiff's cause of action, no affirmative judgment could be awarded to the respondent. No argument or citation of authority is made in support of the point, and we are therefore not called upon to give it further consideration.

We have carefully examined the entire record, notwithstanding appellant's failure to print the essential portions thereof in her brief, and we are satisfied that the action was fully and fairly tried and that no prejudicial error occurred.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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80 Cal. App. 776

HAYNES v. LOS ANGELES RY. CORPORATION. (Civ. 3183.)★

(District Court of Appeal, Third District, California. Jan. 22, 1927. Rehearing Denied Feb. 19, 1927. Hearing Denied by Supreme Court March 21, 1927.)

1. Courts ⚿116(1)—Courts of record have inherent power to correct their records so that they conform to facts and speak truth.

Courts of record have inherent power to correct records so that they conform to facts and speak truth, and likewise correct errors occurring in record through acts of omission or commission of clerk in entering of record the judgments or orders of court, either on own motion, or on motion of interested party.

2. Courts ⚿116(3)—Court cannot, under form of amendment of records, correct judicial error, or make of record an order or judgment not given.

Court, in exercise of its inherent power to correct its records, cannot do more than make its records conform to actual facts, and cannot, under form of an amendment of its records, correct judicial error or make of record an order or judgment that was never in fact given.

3. Courts ⚿116(1)—Trial judge, by certifying bill of exceptions as being correct, was not foreclosed from thereafter causing acts and orders to be correctly recorded.

Trial judge, by certifying bill of exceptions as being correct, was not foreclosed from thereafter entering nunc pro tunc order correcting order granting motion for new trial, where clerk had failed to enter order as instructed.

4. Appeal and error ⚿933(1)—Where record is silent, appellate court will presume that nunc pro tunc order correcting order granting new trial is valid.

Where record was silent as to whether court had directed clerk to specify grounds in order granting new trial, appellate court had to presume that nunc pro tunc order correcting order was valid, since every intendment is in favor of validity and regularity of such order.

5. Appeal and error ⚿440—Appeal from order granting new trial held not to preclude trial court from entering nunc pro tunc order correcting clerical error.

Where appeal was taken from original order granting new trial, trial court did not lose jurisdiction over order and had power to enter nunc pro tunc order correcting clerical error in original order, where substantial rights were not affected.

6. Courts ⚿116(4)—Clerical error in order granting motion for new trial did not have to be corrected within six months (Code Civ. Proc. § 473).

Clerical error or omission, in order granting motion for new trial did not have to be corrected within six months, in view of Code Civ. Proc. § 473, since courts may correct clerical errors or omissions in records at any time.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Action by Kathryne Haynes against the Los Angeles Railway Corporation for damages for personal injuries. Judgment for defendant, and, from an order entered nunc pro tunc correcting order granting motion for new trial, defendant appeals. Affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles (I. C. Powers, of Los Angeles, of counsel), for appellant.

Randall, Bartlett & White, Thos. P. White, and Vincent C. Hickson, all of Los Angeles (A. P. G. Steffes, of Los Angeles, of counsel), for respondent.

PRESTON, Justice, pro tem. This is an appeal by defendant, Los Angeles Railway Corporation, from a nunc pro tunc order made by the superior court of Los Angeles county on August 23, 1924, in the above-entitled case.

The record is brought to this court upon a bill of exceptions, and the facts necessary to a correct understanding of the issue involved are these: The plaintiff, Kathryne Haynes, brought the above-entitled action in the superior court of Los Angeles county to recover

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★Rehearing denied.. Hearing denied by Supreme Court.

damages from the defendant, Los Angeles Railway Corporation, for personal injuries. A trial was had before Hon. Frank R. Willis, judge, sitting with a jury, and the jury rendered a verdict in favor of the defendant, upon which judgment was duly entered. Thereafter, and on the 26th day of June, 1923, the plaintiff, Kathryne Haynes, gave notice of her intention to move for a new trial upon all of the statutory grounds mentioned in section 657 of the Code of Civil Procedure, including "insufficiency of the evidence to justify the verdict." This motion was brought on regularly for hearing on July 21, 1923, and the court, after hearing the arguments of counsel on both sides granted the motion for a new trial, and the bill of exceptions here recites the following:

> "Made and entered the following order, and none other: 'The plaintiff having moved the court for a new trial upon the grounds stated in her notice of intention now on file, and the court having considered the same, it is ordered that the plaintiff's said motion for a new trial be and the same is hereby granted.' "

From this order the defendant regularly appealed to the Supreme Court and prepared and served its bill of exceptions, which was stipulated as correct by the plaintiff and certified by the judge who tried the case to be correct. Thereafter the record, including the judgment roll and bill of exceptions, was printed and stipulated by counsel for plaintiff as correct and filed in the Supreme Court. Thereafter, and within the time allowed by law, and by stipulation of the parties, the defendant prepared, served and filed its opening brief in support of its appeal from said order granting plaintiff a new trial. Thereafter, and on the 12th of June, 1924, the plaintiff served and filed the following notice of motion:

> "You, and each of you, will please take notice that the above-named plaintiff will, on the 18th day of June, 1924, * * * move said court to correct the minutes of said court in the above-entitled cause to conform to the facts, to wit, amend the order granting plaintiff's motion for a new trial to read as follows: 'The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that said motion be and the same is hereby granted upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict is against law.'
>
> "Said motion will be based upon the files and records in this case, and upon the fact that at the time Hon. Frank R. Willis, judge of this court, granted plaintiff's motion for a new trial, he granted the same upon the grounds that the verdict is against law and of the insufficiency of the evidence to justify the verdict, but that the clerk of this court omitted to recite in said minute order that the plaintiff's motion for a new trial was granted upon said grounds of insufficiency of the evidence to justify the verdict and that the verdict is against law. * * *"

This motion, having been regularly continued, was heard on the 18th day of July, 1924, before the same judge who tried the case and granted the new trial. Plaintiff submitted the motion solely upon the minutes of the court and no other evidence was offered in support thereof. Defendant placed in evidence the bill of exceptions, already settled and allowed in the case, to which was attached the stipulation of counsel and the certificate of the trial judge as to its correctness as above referred to.

In support of her motion plaintiff contended that it was within the power of the court to correct the minute order of July 21, 1923, on the recollection of the court. Defendant contended that the court had no power at all, and especially no power on the showing made, to correct or amend the said minute order of July 21, 1923. The court took the matter under advisement and on August 23, 1924, made and entered the nunc pro tunc order here appealed from, which is as follows:

> "In the above-entitled action the plaintiff filed on June 26, 1923, her notice of motion for a new trial on all the statutory grounds, and noticed the same for July 18, 1923, at which time the matter came on for hearing.
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> "Plaintiff, having abandoned the first seven grounds of her motion by failure to file affidavits, and the tenth ground by failure to file specifications of error in law occurring at the trial, the court proceeded to hear said motion upon the two remaining grounds, viz. insufficiency of the evidence to justify the verdict; and that the verdict is against law. The cause was duly called, argued, and submitted, and afterwards on July 21, 1923, the court, being satisfied from the minutes, evidence, and record of the cause that the evidence was insufficient to sustain the verdict and that the verdict was against law, granted plaintiff's motion for a new trial on those grounds and instructed the clerk to enter an order granting plaintiff's motion for a new trial. No written opinion nor order was filed, but the matter was left with the clerk to properly extend the order in the proper book of minute entries. That afterwards the clerk entered said order in the manner and form set forth in the transcript of the case now on file. That afterwards, on June 12, 1924, plaintiff filed herein her notice of motion to correct the minutes of the clerk to conform to the facts in the case, and the matter having been duly noticed, argued, and submitted, it is hereby ordered that the minutes of the court be corrected to conform to the facts of the case and that said minutes be amended to read as follows: 'The motion for a new trial having been heretofore submitted to the court for decision, and the court having fully considered the same, it is ordered that said motion be and the same is hereby granted upon the grounds of the insufficiency of the evidence to sustain the verdict, and that the verdict is against law'—and that said order be entered nunc pro tunc as of July 21, 1923.
>
> "August 23, 1924.
>
> "Frank R. Willis, Judge."

[1] The rule is well settled in this state that every court of record has the inherent

power to correct its records so that they shall conform to the facts and speak the truth, and likewise correct any error or defect occurring in a record through acts of omission or commission of the clerk in entering of record the judgments or orders of the court, and such correction may be made at any time by the court on its own motion, or on motion of an interested party. Brush v. Pacific Electric Ry. Co., 58 Cal. App. 501, 503, 208 P. 997; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; Kaufman v. Shain, 111 Cal. 19, 43 P. 393, 52 Am. St. Rep. 139; Halpern v. Superior Court, 190 Cal. 387, 212 P. 916; Gulf Mail Steamship Co. v. Hammond Steamship Co., 67 Cal. App. 420, 423, 227 P. 938.

[2] It is equally well established that the court in the exercise of this power is not authorized to do more than to make its records conform to the actual facts, and cannot, under the form of amendment of its records, correct a judicial error, or make of record an order or judgment that was never in fact given. The above cited cases are ample authority for this rule, to which, however, may be added: Estate of Potter, 141 Cal. 424, 75 P. 850; Leonis v. Leffingwell, 126 Cal. 369, 58 P. 940; Goatman v. Fuller, 191 Cal. 245, 216 P. 35; Byrne v. Hoag, 116 Cal. 1, 47 P. 775; Takekawa v. Hole, 170 Cal. 323, 149 P. 593; First National Bank of Fresno v. Dusy, 110 Cal. 70, 42 P. 476.

[3] The first question presented for solution is this: Was there any error or omission made by the clerk in entering in the minutes the original order of July 21, 1923, granting the new trial? The defendant contends that the record shows that there was no error of the clerk in entering the original order granting a new trial, and the court could not therefore, by nunc pro tunc order, correct an error in the rendition of a judgment or order. The record defendant relies upon to support his contention is the original order of July 21, 1923, granting the new trial, the judge's certificate to the bill of exceptions, made following the appeal from the original order granting a new trial, to the effect that said bill of exceptions was correct, and the stipulation of counsel as to the correctness of the bill of exceptions, all of which have been heretofore referred to. With this contention we cannot agree. There is nothing in the record to show that the trial judge did not instruct the clerk to enter the order granting the new trial upon the ground of the insufficiency of the evidence, and also upon the ground that the verdict is against law.

The fact that the bill of exceptions above referred to is certified by the trial judge as being correct, and also stipulated as correct by the attorneys for plaintiff, is of little or no moment here, because, in so far as it purports to be a transcript of the record then existing, it was undoubtedly correct. But the trial judge would not, by signing such a certificate to the bill of exceptions, be foreclosed from thereafter causing his acts and orders to be correctly recorded. Dowd v. Superior Court, 69 Cal. App. 4, 230 P. 961.

[4] Furthermore, the court having made the nunc pro tunc order, every intendment is in favor of the validity and regularity of such order, and appellate courts will indulge every presumption, not controverted by the record, to uphold the validity of such an order, and the burden of overcoming this presumption is cast upon the defendant and appellant in this case, which burden it has not sustained. When the record is silent, as it really is in this case when the whole situation is considered, it will be presumed that what ought to have been done was not only done but was rightly done. Brush v. Pacific Electric Ry. Co., supra; Niles v. Gonzalez, 155 Cal. 359, 100 P. 1080.

It seems clear from the record before us that we must presume that the trial court did direct the clerk to specify in the original minute order that the new trial was granted on the ground of the insufficiency of the evidence to support the verdict, and that the verdict was against law, and that the clerk failed to make the proper entry in the minutes.

[5] It is also contended by the defendant and appellant in this case that, an appeal having been taken from the original order granting a new trial, the trial court lost jurisdiction over the order and had no power to thereafter change or alter it. This contention is based upon the theory that the error was a judicial error and not a clerical error, but, as we have already determined that it was undoubtedly a clerical error, there is no merit in this contention. The rule in this regard is well stated by the Supreme Court in Fay v. Stubenrauch, 141 Cal. 573, 75 P. 174, where it is said:

> "Nor is the right of the lower court to amend suspended or impeded by an appeal, where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause, for the purposes of the appeal, but it does not lose jurisdiction of its records. * * * Black on Judgments, § 162; Freeman on Judgments, § 73; People v. Murback, 64 Cal. 372 [30 P. 608]."

See, also, Halpern v. Superior Court, supra. Certainly no substantial rights of the defendant and appellant were affected by the nunc pro tunc order, but the rights of the plaintiff and respondent would be materially affected if the original minute order had not been corrected. The purpose of the correction of the minute order is manifest; for under section 657 of the Code of Civil Procedure, unless the order specifies that the new trial is granted upon the insufficiency of the evidence, on appeal from such order it will be presumed that the order was not based upon that ground.

[6] As we have already determined that the error in the original minute order was a clerical error and not a judicial error, the contention of defendant that it could not be corrected after a lapse of six months is without merit. Clerical errors or omissions can be corrected at any time and are in no way affected by the provisions of section 473 of the Code of Civil Procedure.

We are of the opinion that the nunc pro tunc order made on August 23, 1924, and directed to be entered as of July 21, 1923, should be and it is hereby affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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81 Cal. App. 98

MARSHALL v. FOOTE. (Civ. 5327.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1927.)

1. Master and servant 🔑351—Filing of application for compensation with Industrial Accident Commission is not prerequisite to action for damages against employer failing to secure payment (Workmen's Compensation Act, § 29b).

Under Workmen's Compensation Act, § 29b (St. 1919, p. 921), which provides that if any employer fails to comply with requirements of the act with respect to securing payment of compensation to injured employees, any employee "may proceed against such employer by filing an application for compensation with the commission, and, in addition thereto," he "may bring an action at law against such employer for damages, the same as if this act did not apply," filing of an application for compensation with commission is not prerequisite to commencement of action at law for damages.

2. Master and servant 🔑351—Remedies of injured employee are distinct, and he "may" file application for compensation or sue employer for damages; "must" (Workmen's Compensation Act, § 29b).

Workmen's Compensation Act, § 29b (St. 1919, p. 921), providing employee may file application for compensation with Industrial Accident Commission, "and, in addition thereto," he may sue employer for damages, word "may" being defined in permissive sense and not in sense of "must" and hence does not require employee to prosecute two remedies to recover compensation for same injuries and employer to defend two proceedings, gives injured employee two distinct remedies, either or both of which he may pursue; latter remedy not being dependent on exercise of former.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, May; Must.]

3. Statutes 🔑181(2)—Avoidance of absurd results and adoption of legislative intent is aim in construing statutes.

A construction leading to absurd results, or to a conclusion not contemplated by the Legislature, should not be given to a statute.

4. Statutes 🔑181(2), 208—To determine legislative intent, court must consider context and result of statute.

In construing statutes, court must look at context, and result that would follow, to arrive at legislative intent.

5. Statutes 🔑181(2) — Sound, rather than absurd, construction of statute should be adopted.

If statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and other consistent with justice, sound sense, and wise policy, former should be rejected and latter adopted.

6. Statutes 🔑227 — Word "may" means "must" only when legislative intent clearly appears.

Word "may" can be construed in mandatory sense only when necessary to give effect to clear policy and intent of Legislature.

7. Master and servant 🔑347 — Legislature may authorize courts to fix attorney's fee, as penalty for noncompliance with Workmen's Compensation Act (Workmen's Compensation Act, § 29b; Const. art. 20, § 21).

Workmen's Compensation Act, § 29b (St. 1919, p. 921), to effect that "judgment shall include a reasonable attorney's fee to be fixed by the court," is appropriate legislation under Const. art. 20, § 21, providing that Legislature is vested with plenary powers to create and enforce a system of workmen's compensation; investiture in judicial power of jurisdiction to impose said penalty being a valid exercise of legislative authority.

8. Constitutional law 🔑245 — Provision for penalty in nature of attorney's fee is not unconstitutional where it operates uniformly (Const. U. S. Amend. 14; Workmen's Compensation Act, § 29b).

Workmen's Compensation Act, § 29b (St. 1919, p. 921), providing for fixing of attorney's fee by court, when employer has not brought himself within the act, is not violative of Const. U. S. Amend. 14, as an arbitrary discrimination; such provision operating uniformly upon all who stand in same relation to it.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

Action by Elizabeth Marshall against Lillian P. Foote for damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Guy Eddie, H. J. Fish and Wm. F. Adams, all of Los Angeles, for respondent.

KNIGHT, J. The plaintiff herein was employed as a nurse in a hospital owned and operated by the defendant, and during the course of such employment was injured as a result of falling down a flight of stairs into the basement in one of the hospital buildings. At the time of the accident defendant had not complied with the requirements of the Workmen's Compensation Act with respect to securing payment of compensation to injured employees, and consequently plaintiff availing herself of the provisions of section 29 (b) of said act, brought this action for damages and recovered a judgment for $1,090, plus the sum of $250 attorney's fees, from which judgment the defendant appeals.

Said section 29 (b) provides, in part, as follows:

> "If any employer shall fail so to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, *and, in addition thereto*, such injured employee or his dependents may bring an action at law against such employer for damages, the same as if this act did not apply; * * *" and after granting to the employee the right of attachment and providing for the allowance of a reasonable attorney's fee, declares "that if as a result of such action for damages a judgment is obtained against such employer in excess of the compensation awarded under this act, the compensation awarded by the commission, if paid, or if security approved by the court be given for its payment, shall be credited upon said judgment. * * *" Stats. 1919, pp. 921–922. (Italics ours.)

As grounds for reversal defendant contends that, under the provisions of the section just referred to, the filing of an application for compensation with the Industrial Accident Commission is prerequisite to the commencement of an action at law for damages; that such application was not filed, and that since the six months' period fixed by section 11 of said act as the time within which the same might have been filed was allowed to elapse, the remedy of an action for damages afforded under said section is barred.

[1, 2] Defendant did not plead as a defense the failure of plaintiff to file such an application, nor does the record disclose that it was not in fact filed; the appeal herein having been taken on the judgment roll alone. But even assuming that defendant may now raise the point, upon the theory that the filing of such an application constitutes a jurisdictional fact relating to the subject-matter of the action which plaintiff should have alleged in her complaint, and that the failure to allege such fact may be taken advantage of by demurrer, as defendant did here, and also at any later stage of the proceedings (2 R. C. L. p. 88), we are of the opinion that the contention that an injured employee may not commence or maintain an action at law for damages, under said section 29 (b), without first having filed an application for compensation with said commission, cannot be sustained. Such section does not so declare in terms, as doubtless would have been the case if such prerequisite had been contemplated; nor does the language of said section fairly imply that such was the intention. On the contrary, the wording of the section, reasonably construed, means, we think, that upon failure of the employer to comply with the provisions of the act relating to securing payment of compensation for injuries to employees, an injured employee is given two distinct remedies, either or both of which he may pursue; the language used being that he "may" file an application with said commission "and in addition thereto * * * *may* bring an action at law * * * for damages" (italics ours), nothing contained in said section indicating that the two remedies were intended to be interdependent or that they must be exercised concurrently, in order to maintain the latter.

In the case of Ferguson's Estate v. Gentry, 206 Mo. 203, 104 S. W. 108, in giving interpretation to the term "in addition to curtesy," as used in the probate law of that state, the court held that said term "does not mean that the right therein given the surviving husband is conditioned on his having curtesy; if he have curtesy this is given him in addition, if he have not curtesy it is given him anyway." And so here, the exercise of the latter remedy afforded by section 29 (b) is not conditioned nor made dependent upon having exercised the former; if the employee, under the circumstances there stated, shall have filed his application for compensation with the commission, the remedy of an action at law is given him "in addition thereto"; or if he shall not have filed such application, the remedy of an action at law is given him anyway.

[3-5] "A construction should not be given to a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the Legislature." Merced Security Savings Bank v. Casaccia, 103 Cal. 641, 37 P. 648. The court must look at the context, and the result that would follow, in order to arrive at the legislative intent (Stockton School District v. Wright, 134 Cal. 64, 66 P. 34); and if a statute be fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected and the latter adopted. In re Mitchell, 120 Cal. 384, 52 P. 799.

In order to adopt defendant's proposed construction of said section 29 (b), it would be necessary to judicially correct the word "may" as used in connection with the filing of said application to read "must"; and it would follow, to be consistent, that the word "may" as afterwards used in relation to the commencement of the action at law should also be read as "must." Evidently the effect of such construction would lead to the singular situation of compelling an injured employee, in every case where there was a failure of the employer to comply with the law, to prosecute two remedies to recover compensation for the same injuries, even though he were content with the adequacy of the relief to be afforded through one; and it would also operate to the detriment of a nonsecuring employer, because in every such case he would be compelled to defend two proceedings, and if unsuccessful therein, be obliged to pay two allowances for attorney's fees. Such construction, we think, would be a strained one, for it would impose additional burdens upon both employee and employer which apparently were never contemplated nor intended. "While the courts have never hesitated to construe 'may' as 'must' or 'shall' when the context and the policy of the law demanded that interpretation, the legislative intention must plainly appear before such judicial correction will be made." Ostrander v. City of Richmond, 155 Cal. 468, 101 P. 452.

[6] Aside from the question of the possible consequence of compelling the exercise of two remedies in every case, and considering the meaning of said section from another viewpoint, no good reason appears for compelling an injured employee to file an application for compensation with the commission, where he has elected to sue at law for damages. Nowhere does the section suggest that the result of the action at law shall be made contingent or dependent upon the result of any proceedings taken before said commission; but, on the contrary, provides that the injured employee may bring said action for damages "the same as if this act did not apply." Neither has it been shown that any beneficial result would inure to either the employer or the employee by requiring the filing of such an application as a condition to the commencement of the action at law. It is only where it is necessary to give effect to the clear policy and intent of the Legislature that the word "may" can be construed in a mandatory sense, and, where there is nothing in the connection of the language or in the sense and policy of the provisions to require an unusual interpretation, its use is merely permissive and discretionary. Kemble v. McPhaill, 128 Cal. 444, 60 P. 1092.

The effect of construing the word "may" in the ordinary permissive sense in which it is written in the statute does not nullify the provisions therein permitting the filing of an application for compensation with said commission, for, as already pointed out, under such construction, the injured employee may, at his option, pursue the single remedy before the commission, or the single one at law for damages, or both.

[7] We find no merit in the contention of defendant that the provision contained in said section 29 (b), to the effect that "such judgment shall include a reasonable attorney's fee to be fixed by the court," is not appropriate legislation under article 20, § 21, of the state Constitution. Said constitutional provision in terms declares that "the Legislature is hereby expressly vested with plenary powers, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation," which shall include "full provision for adequate insurance coverage against liability to pay or furnish compensation; * * * full provision for otherwise securing the payment of compensation; * * *" and acting under the authority thus granted, the Legislature has provided by way of penalty that upon failure of the employer to secure payment of compensation as in said act required, the employee shall be given the remedy of an action at law for damages, wherein the trial court shall include in its judgment an allowance for attorney's fees. Under such circumstances, the investiture in the judicial power of the state of jurisdiction to impose said penalty is a valid exercise of the legislative authority. E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611.

[8] Nor do we believe, as defendant contends, that the provisions of said section 29 (b) manifest a hostile discrimination against employers as a class and are therefore violative of the Fourteenth Amendment of the federal Constitution. Defendant relies mainly in support of this point upon the case of Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712, the decision therein being based largely upon the decision in the case of Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255, 41 L. Ed. 666. In the case of Engebretsen v. Gay, 158 Cal. 30, 109 P. 880, 28 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 690, however, it was held that there is nothing in either of the cases mentioned to suggest that attorney's fees may not be allowed a successful plaintiff in certain classes of cases, the court saying that—

> "The right to classify in this respect, as long as the classification is 'based upon some difference bearing a reasonable and just relation to the act in respect to which the classification is attempted,' was conceded by the opinion in Gulf, etc., Ry. Co. v. Ellis, 165 U. S. 150, 17 S. Ct. 255 [41 L. Ed. 666] (see Atchison, etc., R. R. Co. v. Matthews, 174 U. S. 96, 19 S. Ct. 609 [43 L. Ed. 909], and is recognized by all the authorities."

In other words, it is held that a law is not to be declared unconstitutional where it operates uniformly and in the same manner upon all who stand in the same category or in the same relation to the law (City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Selowsky v. Superior Court, 180 Cal. 404, 181 P. 652; In re Zhizhuzza, 147 Cal. 328, 81 P. 955); or where the distinction drawn is founded upon constitutional or natural differences (Builders' Supply Depot v. O'Connor, supra).

The classification of cases under said section 29 (b) to which the provisions for the allowances of attorney's fees is made to apply is based entirely upon the classification of the legal relationships established by the Workmen's Compensation Act, such provision authorizing the allowance of said fees being incorporated in the act itself; and in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398, it was held that the legislative classification of such legal relationships was deemed to be founded in reason and based on rational grounds of differentiation, and did not evidence an arbitrary discrimination; that consequently such classification was not violative of the Fourteenth Amendment of the federal Constitution, but was a valid legislative exercise of the police power.

For the reasons stated in the case last cited, and those set forth in Engebretsen v. Gay, supra, in sustaining the constitutionality of the law there under consideration, we conclude that no part of said section 29 (b) is open to the constitutional objections made by defendant.

The judgment is affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

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81 Cal. App. 40

HELFER v. GLAZE. (Civ. 3177.)★

(District Court of Appeal, Third District, California. Jan. 25, 1927. Hearing Denied by Supreme Court March 24, 1927.)

1. Municipal corporations 🔑819(4)—Evidence held to support finding awning fell from building and injured pedestrian on street sidewalk.

Evidence *held* to support finding that frame of awning fell from building and struck and injured pedestrian walking along street sidewalk.

2. Municipal corporations 🔑819(1)—Evidence held to warrant finding that awning injuring pedestrian was negligently maintained.

In pedestrian's action for personal injury from being struck by falling awning, frame of which became loosened from building, evidence *held* to warrant finding of maintenance of awning in negligent manner.

3. Trial 🔑252(8)—In action for pedestrian's injury from falling awning, failure to instruct that premises were leased held under evidence not error.

In action by pedestrian for personal injuries from awning which fell from hotel building, in view of defendant's evidence that he owned hotel and everything therein, and that manager was employed to inspect and of his instruction as to joint maintenance of hotel, failure to instruct that premises were leased by defendant at time of injury was not error.

4. Damages 🔑132(3)—$6,000 for permanent injuries from being struck on head by falling awning held not excessive.

Where pedestrian was injured by being struck on head by falling awning, verdict of $6,000 for injuries *held* not excessive, in view of showing of permanency, and that $1,812 thereof was traceable to special damages for medical attendance and loss of earnings.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Marie Helfer against Dr. J. M. Glaze. From judgment for plaintiff, defendant appeals. Affirmed.

Earl L. Wisdom, of Los Angeles, for appellant.

Goodwin J. Knight, of Los Angeles, for respondent.

PLUMMER, J. This action was tried before a jury, resulting in a verdict in favor of the plaintiff in the sum of $6,000. From the judgment entered thereon the defendant appeals.

The complaint alleges that on or about the 14th day of July, 1923, the defendant owned, maintained, and controlled the Merritt-Jones Hotel in the city of Santa Monica, state of California; that the defendant, by his agents and employees, kept and maintained over a large window fronting on Marine avenue, a public street in said city, a large awning for the purpose of shading said window; that the frame of said awning was maintained in such a careless and negligent manner that it became loosened, and on or about the 14th day of July, 1923, while so negligently and carelessly maintained, fell without warning, and struck the plaintiff upon her head; that the plaintiff, without any negligence or carelessness on her part, was walking along the sidewalk adjoining said street, and over which said awning was so carelessly and negligently maintained by the plaintiff, and that, while so walking along said sidewalk, the frame of said awning, in its fall, struck her upon the head; that the suddenness and force of the blow of the iron frame of said awning felled her to the ground, rendering her unconscious. The plaintiff further alleges that by reason of said injury plaintiff was rendered sick and sore throughout her whole body, suffering concussion of the brain and traumatic neurosis (a nervous trouble in this case arising from a wound upon the head). The complaint then proceeds to allege certain special damages, such as loss of compensation for her services, and that she had been unable to engage in her usual employment for a long period of time, that she had incurred certain expenses for medical attendance, medicines, and also certain expenses for the attendance of nurses.

The defendant denied: (1) The alleged careless and negligent manner of maintaining the awning in question, denied that it fell upon the plaintiff, and, as a special defense, alleged that the premises in question were under lease to other parties.

★Hearing denied by Supreme Court.

Upon this appeal the defendant presents for our consideration four questions: (1) The insufficiency of the evidence to warrant a finding that plaintiff was injured by the falling awning; (2) that the evidence is insufficient to warrant a finding of negligence; (3) that the court erred in not instructing the jury that the premises were leased; and (4) that the damages awarded are excessive.

[1] In support of the first assignment the appellant lays the premises of his argument upon the statement that the awning which fell, and by the falling of which the plaintiff alleges she was injured, was maintained over the northerly, instead of over the southerly one of two large windows in front of said hotel building, and was so far away as not to be within the range of vision of two witnesses seated nearby in a bootblack stand in the recess adjoining the front of said hotel building adjoining the sidewalk along which the plaintiff was walking. An examination of the exhibits and of the testimony in this case shows that the appellant is in error in laying down the premises for his argument. The awning that fell is shown beyond any reasonable contradiction to have been the one maintained over the southerly window of the front of said hotel and within a very few feet of the bootblack stand, readily visible to any one seated thereon while having his shoes shined. There is some doubt left in the testimony as to whether the southerly or the northerly end of the irons which fell came nearest to the ground. This difference in the testimony of the several witnesses, however, is utterly immaterial, because whether it was the iron supporting the southerly end or the northerly end of the awning which came closest to the sidewalk, if either struck the plaintiff upon the head, as alleged by her, the witnesses seated in the bootblack stand, as stated by them, had a sufficiently clear vision to see what was taking place, if by any means their attention was called thereto. The awning was stretched on canvas with the roller at the top, upon which the canvas was rolled up when the awning was raised, and having an iron tube or iron rod around the lower portion thereof to give the canvas extension out over and far enough from the window to give shade and protection from the summer sun. Some of the witnesses described this iron rod or pipe as being three-fourths inch in diameter. There seems to be no question raised as to the fact that the iron pipe used in the lower portion of the awning to give extension thereof was of sufficient weight to strike a very severe blow in the event of its fall.

The witnesses L. B. Farman and J. J. Hartman testified as to seeing the awning in its fall strike the head of the plaintiff. Hartman's testimony is, in substance, as follows:

"I know where the Merritt-Jones Hotel is situated. I know the cigar stand next door to it. I have friends in that neighborhood. During the past six years I have been frequently in the neighborhood of the hotel. I know the location of the shoe-shining stand. It is next door to the hotel. I worked at the hotel when it was being built, have known the owners and operators of the hotel from time to time. The picture shown me is a fair representation of the front portions of the Merritt-Jones Hotel on Marion avenue. The large window is in front of the café. I was sitting on the shoe-shining stand somewhere between 3 and 4 o'clock on the afternoon of July 14, 1923, first chair from the street. I could see all the front part of the awning. I was looking up toward the Pacific Electric car. I saw the plaintiff, Miss Helfer, on that day. I saw her and another woman coming down the street. Just as they got at that corner, the awning fell on them. I saw the awning just as it struck the woman's head. There was no man with Miss Helfer. No one pulled the awning down. There was no one near the awning except those two women."

The witness Farman testified that he saw the awning frame strike the plaintiff on the top of the head; that, after the injury, he saw the awning frame torn loose from the building; that no one pulled the awning down; that the plaintiff was in the position of a passerby on the street.

This witness testified that he was looking at the two women when they walked along the sidewalk; that, when they came in front of the Merritt-Jones Hotel, he saw the awning fall and hit the plaintiff on the head; that it was the awning frame that hit the plaintiff. The witness then identified the window from which the awning fell; that the plaintiff was looking down toward the beach at the time she was struck by the falling awning. In view of this testimony, it seems unnecessary to consider further appellant's argument that there is no testimony to support the finding by the jury that the plaintiff was struck by the falling awning.

[2] Upon the question of the awning being maintained in a negligent manner, the witness D. B. Young, called by the defendant as an awning expert, on cross-examination, testified that, when the awning is maintained in a normal manner or condition, it would not come down below a distance of eight feet from the sidewalk; that it would not be possible to come down to within about four feet of the sidewalk, if maintained in a normal condition; that it cannot come down to within four feet of the ground if in good condition.

The defendant's witness Seeley, the engineer for the hotel building, testified that he was called to attend to the awning; that the awning was in front of the dining room; that he found it running down on an angle, one end right up as it would be, and the other was down to four feet, and was drawn away from the side of the building. The slide that goes up and down, that holds the awning, was torn. The awning covering was partly torn off; that he took the awning frame down, and put it in the basement; that he did not pull it up because it was practically torn off; that he had orders to take it down, one end of it was practically torn off. It was not in a normal condition. "I got my orders from the superintendent of the building, I did all the repairs to the hotel. It is my duty to make inspections, my duty was to inspect everything, the rooms, bathroom, down stairs, engineer's room and everything around in general, including the awnings."

The witness R. A. Worthy, on cross-examination, testified that he was familiar with the awning in front of the café; that he tried to get the awning down; that something held it, he did not know what; that, when he found it would not work, he just left it there; that he did not look any further when it did not come down.

The defendant's witness, Mead, on cross-examination testified that he saw the awning some time between 3:30 and 3:45 p. m.; that the end of the awning nearest the ocean was normal, the one nearest the hotel door had dropped about two feet, the canvas was torn on this end of the awning, and it had dropped as much as the pipe, of which it was constructed, would allow, that is, the flexibility of this pipe would allow one end normally to drop lower than the other.

H. P. Knight, a witness for the defendant and manager for the hotel, likewise testified that he saw the awning in front of the cafe the afternoon in question; that, when he saw it, it was out of place, one corner hanging down, looked like somebody had run into it; it was the corner nearest the café door; that he did not notice the canvas covering at the time; that the end he was speaking of was down to about four or five feet from the sidewalk, the other end was at an angle running up. "As soon as I saw the condition, I thought it had better be taken down, gotten out of the way; somebody might run into it; I went down stairs and told the engineer to have it removed."

Mr. Hoegee, a witness for the plaintiff, testified that he had seen the awning and the roller on which it operated; that he would regard the frame and awning as in a dangerous condition; that awnings of this kind fall when they are not taken care of; that the awning was not in first-class condition, it was pretty old. It had not been taken care of; it was rusted from the salt air.

We do not need to follow the testimony any further to show that plaintiff's second contention is without merit.

[3] As to the third ground of appeal that the premises were leased and were not under the management of the defendant, the record shows, among other things, the following (testimony of William Seeley):

> "I am the engineer of the Merritt-Jones Hotel. I was working in that capacity in July, 1923. I know the awning in controversy. I had been working for the hotel for over two years. I did all the repairs around the hotel. It was my duty to make all the inspections. I was employed by Dr. Glaze. He paid my salary. It is my duty to inspect the awnings every day. I was always around the hotel outside and inside. It was my duty to look after the repairs. I took the awning frame down and put it in the basement. I took it down because the awning was practically torn off. I had orders to take it down. I got my orders from the superintendent, Mr. Knight."

Mr. Knight, a witness for the defendant, testified as follows:

> "I was manager of this hotel for Dr. Glaze. Mr. Worthy was operating the café. A percentage of the receipts was paid to Dr. Glaze which was operated under that kind of an agreement, there was no lease."

The evidence of Mr. Worthy was to the effect that Dr. Glaze was the owner of the café, owned the tables, silverware, etc.; that Dr. Glaze had a certain percentage of the net receipts.

Dr. Glaze, the defendant, testified that he owned the hotel and everything herein referred to. This testimony clearly shows that the jury had a right to conclude that the defendant Glaze controlled, operated, managed, and had the general supervision of everything involved in this action, and that the cases which turn upon the liability of a landlord for the negligence of his tenants are inapplicable, and need not to be reviewed in this opinion.

At the request of the defendant, the court gave the following instructions to the jury:

> "Instruction No. 13: If you find that the awning in this case was, at the time of the alleged injury, under the exclusive care and control of another person, not the servant or agent of the defendant, then you must find on the issues for the defendant."
>
> "Instruction No. 14: If you find that the awning in this case was, at the time of the alleged injury, under the joint care and control of another person with the defendant, then you must find, if any negligence existed at the time of the alleged accident in its maintenance, whether or not such negligence can be imputed to the defendant, and, if not, then that he is not liable."

We do not need to inquire whether the second of these instructions is correct, because it was given at the request of the defendant, and the two instructions taken together certainly presented the law as favorably to the defendant as he could ask under the theory that he was not responsible for the condition of the awning.

[4] The fourth assignment of error involves the amount of the verdict. Before considering the question of whether the verdict is excessive, we may state that the testimony shows sufficient to justify the jury in finding the following special damages, to wit: Expenses for attending physicians in the sum of not less than $282, medicines $70, loss of earn-

ings at the lowest figure of $100 per month, given as the earning capacity of plaintiff, eleven months, $1,100, and attendance of nurses, $350.

Thus we have slightly over $1,800 direct and readily ascertainable losses on the part of the plaintiff. The verdict is for the lump sum of $6,000, which, excluding the items which we have mentioned, leaves a trifle less than $4,200 to cover the physical injuries suffered by the plaintiff

The trial was had twelve months after the injury. At that time the plaintiff testified that she had not yet been able to do any work; that she was suffering a great deal from headache and from nausea or fainting spells; that she suffered considerably from dizziness or fainting spells; that since the injury she had not been able to attend to her usual employment; had not been able to go out anywhere; that she had suffered relapses; that her nervous condition did not seem to improve; that she had had several severe nervous attacks; that she suffered at times from loss of memory.

Dr. J. Mather, her attending physician, testified that he found the plaintiff in a semiconscious condition when he first called; that he found she was suffering from traumatic neurosis; that she was suffering from fainting spells, had a great deal of pain in her head, fainting spells, and nausea; that the plaintiff at the time of the trial was not a well woman; that in cases of traumatic neurosis symptoms in some may appear much greater than in others, "though the condition of traumatic injuries is this that comes from the exhaustion; there is a functional nerve condition of the general system; that may be some better; sometimes they have a relapse, have a great deal of excitability;" that in this case the concussion was an injury to the brain. The witness further testified: "In considering the fact of the number of months that have elapsed since the injury, I believe the injury to a large extent to be permanent." To the same effect was the testimony of Dr. Parkin.

In respect to the suggestion of the defendant was shamming her nervous injuries, both these witnesses testified that in their opinion and experience with the patient such was not the case. Both these doctors also testified that the injury which the plaintiff had suffered was very similar to what is called shell shock suffered by soldiers in the World War.

Dr. Parkin also testified that, while patients recovered from this injury, "the majority recover so as to be able to work, but, on the other hand, that same majority are subject to relapses under stresses, strains, that formerly would have been inadequate to have produced any disability"; that it is necessary for such patients to take precautions against strains or anything which would tend to bring on a relapse.

As tending to combat this testimony, the defendant introduced the testimony of Dr. Harding to the effect that the injury was slight; that there was no permanent injury; and that, when he was called to examine the patient, she emitted no groans indicating pain; that he called the evening after the accident, but did not see her again until the time of the trial; that this was a case susceptible of complete recovery, and that in his opinion the condition did not resemble that of shell shock; that he had never had a case of traumatic neurosis where the injury was to the brain.

Mrs. Margaret Eicholz testified that the plaintiff was compelled to remain in bed about two months after the accident; that she was very nervous, could not control herself; and that her head shook considerably as though she had the palsy; that she suffered from nausea or fainting.

Miss Kate Hegel testified as to the nervous condition of the plaintiff; that she could not sleep and had fainting spells; that was her condition in January after the injury in July; "I took care of her for some time."

We think the foregoing testimony shows a substantial injury to the plaintiff, and also justified the jury in coming to the conclusion that the injury suffered by the plaintiff is, as stated by one of the physicians, one of a permanent character. Our attention has not been directed to anything in the case which would indicate that the jury was actuated by any malice or prejudice, or under anything whatever, other than a desire to reach a just and correct conclusion. Excluding the $1,812 covering items which we have mentioned, the remainder of the verdict allowed to cover the damages suffered by the plaintiff on account of her physical injuries does not impress us as being excessive, or indicate that the jury was actuated by any improper motives. Much learning has been expended, and much time consumed, in writing opinions as to when appellate courts may or may not interfere with the verdict of jurors on the ground that the award of damages is excessive. It would serve no useful purpose to restate the law on that subject. This court recently, in the case of Rocca v. Tuolumne County Light & Power Co., 245 P. 468, had occasion to go into this question very carefully, and it is sufficient to refer to the authorities there cited showing that there is nothing in this case which justifies interference with the verdict of the jury on the ground that the award is excessive.

No other questions being tendered for our consideration upon this appeal, it follows from what we have said that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; BUCK, Justice pro tem.

81 Cal. App. 61

PHŒNIX ASSUR. CO., LIMITED, OF LONDON, et al., v. TEXAS HOLDING CO.★
(Civ. 3124.)

(District Court of Appeal, Third District, California. Jan. 26, 1927. Hearing Denied by Supreme Court March 24, 1927.)

1. Explosives 🔑8—Evidence held to sustain finding of negligence in maintaining oil storage tanks and furnace.

In action for loss by fire of motor trucks, standing on street near oil tanks, which exploded, evidence *held* sufficient to show that explosion was caused by gas traveling from tanks to nearby open furnace, and to support finding of negligence of defendant in manner of maintaining tanks and furnace.

2. Evidence 🔑7—It is common knowledge that oil storage tanks do not ordinarily explode, in absence of negligence.

It is a matter of common knowledge that oil storage tanks do not ordinarily explode or ignite, in the absence of some negligent act or omission on the part of those in charge of the operation and maintenance of such tanks.

3. Explosives 🔑8—Absence of evidence of proper care held not to preclude finding of negligence in maintaining oil tanks and furnace.

Absence of evidence, showing what would have been proper care under the circumstances, *held* not to preclude a finding of negligence in defendant's maintenance of open furnace in proximity to oil storage tanks.

4. Explosives 🔑8—Evidence that others maintained oil storage tanks similarly situated held inadmissible.

In action involving alleged negligence of defendant in maintaining open furnace in proximity to oil storage tanks, exclusion of questions tending to show that others than defendant maintained equipment similarly situated *held* not error, in view of court's offer to receive testimony tending to show proper practice and defendant's conformity thereto.

5. Negligence 🔑4—"Ordinary care" varies according to circumstances.

"Ordinary care" is a relative term, and the standard by which it is to be measured varies with the circumstances attending each particular case.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ordinary Care.]

6. Negligence 🔑5—Custom cannot make due care out of conduct in fact negligent.

Mere custom or usage cannot make due care out of conduct that is, in fact, negligent, under the circumstances disclosed by the evidence.

7. Appeal and error 🔑1078(4)—Errors assigned but not discussed by appellant need not be discussed by appellate court.

It is not incumbent on the appellate court to discuss alleged errors in instructions not discussed by appellant.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by the Phœnix Assurance Company, Limited, of London, and another against the Texas Holding Company to recover for loss of certain motor trucks destroyed by fire. Judgment for plaintiffs, and defendant appeals. Affirmed.

Carnahan & Clark, Oliver O. Clark, Charles R. Nelson, and Dan V. Noland, all of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for respondents.

PLUMMER, J. The period given for the filing of additional briefs herein having expired and no additional briefs having been filed, it is assumed that the parties have elected to stand upon the briefs already on file.

During all the times mentioned herein, the defendant was in possession of and operating certain oil property situate at Huntington Beach, in the county of Orange, state of California. This property was located on Crystal street between Summit and Garfield streets. On the property was an oil well and certain tanks for the reception and storage of crude petroleum. For some time prior to the 24th day of February, 1923, the defendant had been producing crude petroleum and storing the same in the tanks just mentioned. These tanks were located in close proximity to Crystal street. Crystal street was a much traveled public highway. On the 24th day of February, 1923, an explosion occurred on the premises occupied by the defendant, and burning oil from the tanks referred to was thrown over and upon Crystal street and over and upon three automobile trucks, then and there being, belonging to the copartnership of Shaffer & Best, and destroying said trucks by fire. This action is for the value of said trucks. The insurance company paid the insurance policies on the trucks in question and took an assignment of the right of action against the defendant herein. Judgment was awarded plaintiffs, and the defendant appeals.

The action is based upon the alleged negligent manner in which the defendant maintained its oil tanks and conducted its oil-producing operations. As stated, the oil tanks were maintained in close proximity to the public highway known as Crystal street. The evidence set forth in the transcript shows that manholes or openings were maintained in the tanks, and that a boiler used in the operation of its pumping machinery was located approximately thirty feet from the nearest oil tank; that this boiler was so erected that the fires maintained thereunder would flash up along the rear end of said boiler from two to six feet.

The appellant alleges four grounds as rea-

★Hearing denied by Supreme Court.

sons for reversal herein, to wit, insufficiency of the evidence, erroneous rulings of the court in the rejection of evidence, erroneous instructions given to the jury, and error in refusing instructions requested by the defendant. In support of the alleged insufficiency of the evidence, the appellant sets forth that there was an entire absence of any testimony showing that the tanks, appliances, equipment, and other instrumentalities and methods of handling oil and gas by the defendant was negligent; that is, that no witness actually testified that the manner in which the defendant maintained its instrumentalities and conducted its business operations was negligent.

[1] Before discussing this misconceived statement of what we think the law is, we will set forth the testimony bearing upon the issues involved. Before doing so, however, we will state that the testimony adduced was for the purpose of showing that crude oil, as taken from the wells and stored in tanks, generates inflammable gases; that this gas in foggy weather will drop to the ground and move along the ground with the wind, if any is blowing, in the same direction with the wind; that at the time in question there was a rather brisk wind blowing from the direction in which the tanks were situated toward the place where the furnace and boiler herein mentioned were maintained, and that this wind moved the gases along from one of the tanks to the furnace where it was ignited by the exposed blaze of the fire under the boiler. With this in view, we will quote from the transcript, which, we think, amply justifies the conclusion reached by the jury and the trial court.

J. W. Hankins, a witness called for the plaintiffs, testified that the storage tanks were located upon the property of the Texas Holding Company; they were in the northeast corner, about four feet apart; the tanks were about six feet from Crystal street; the tanks were of about 1,200 barrels capacity; they were about fifteen feet tall and twelve feet across.

H. G. Best, a witness called for the plaintiffs, testified as to the location of the tanks and placed them at about six or eight feet from the line of Crystal street.

George Shaffer, a witness called for the plaintiffs, testified as to the location of the tanks and as to the burning of the trucks, locating the tanks about the same distance from Crystal street and the trucks in the street a short distance from the tanks.

The witness Albert testified that there was heavy traffic on Crystal street. The witness Hankins further testified that there was oil on fire in the tanks; that one of the tanks was full when the fire started; that the south tank was about two-thirds full; after the fire there was some oil left in the tanks; after the fire there was nothing left of the trucks, except junk, iron and ashes; that there was a manhole around the intake pipe of the tank; that they were not covered.

Eugene A. Whitten, an expert witness, testified that crude petroleum gives off gas shortly after being taken from the well.

L. N. Shaffer, a witness called for the plaintiffs, testified that the fire was burning in the open furnace about thirty feet from the nearest uncovered storage tank; that he saw fire burning in the vicinity of the tanks immediately before the explosion; that he saw the fire burning under the boiler; it was coming out at the back end of the boiler. The fire came out around the boiler and out of the back end of it, as it was not bricked up over the back end. It was open; an open-end boiler, so to speak; that there was a sump ten or fifteen feet distant.

The witness Ashburn testified that the boiler was not bricked up; it was what you would call a tubular boiler bricked up around the outer edge and half way up on the back was open; that the flames would jump up four to six feet out of the back of the boiler.

The witness Hankins further testified that he would approximate the distance between the furnace and the nearest tank at about thirty to forty feet; that the boiler was used for making steam and that the back end of the boiler was open; that every once in a while the flames would shoot up from two to six feet high.

The witness Height testified that the fire was coming out of the back of the boiler and going approximately three or four feet high.

The witness Best testified that there was a fire under the boiler at the time of the explosion and also as to the fire blowing out the end of the boiler.

The witness Hankins, on cross-examination, testified that gas would travel with the wind, never against the wind; that there was a good stiff breeze at the time of the explosion; that the wind was blowing directly from the south; that oil, freshly produced, gives off gas.

W. T. Wallace, a witness called for the plaintiffs, testified that he noticed the direction in which the wind was blowing at the time in question. It was from the southeast to the northwest; that the wind was blowing from eight to twelve miles per hour.

George Shaffer, a witness for the plaintiffs, testified that natural gas was permeating the atmosphere all around the premises in question; that there was some fog.

Eugene A. Whitten, an expert witness, further testified that he had observed the effect of weather conditions upon gas that is given off from petroleum; that fog and night air will cause the gas to lie on the ground; that the gas tends to creep along the ground in the direction of the wind; damp air has the same effect; that the sump referred to had oil in it; that the gas would naturally go with the wind from the tanks toward the furnace; would naturally go right along with the wind. "I have seen gas travel along the ground as far as one hundred to one hundred and fifty feet. The fog has a tendency to hold the gas closer to the ground. The wind blowing toward the north would mean that the gas would drift toward the furnace; when the explosion occurred the oil was thrown across the road over toward the east.

Mr. Sistrunk, a witness called for the plaintiffs, testified that the trucks were on the street opposite the tanks; that the explosion seemed to be right in among the tanks; "it just seemed to be in under the tanks; that is, where I was, the flash and the explosion I heard came from that point."

The witness L. N. Shaffer testified there was just a flash and the fire and then there was an explosion and the fire and oil came right across the road, blew onto the trucks across the road. "The first I saw was a flash of fire. It seemed to be right in between the tanks. It just seemed to come up all around them."

The witness Hankins further testified:

> "I was sitting there looking toward the trucks and all at once saw a puff of smoke and flash come up from the tanks. When I first saw the flame it was between the tanks; we had been checking up the drill stem; there was a great light and right in about a second or so I heard the explosion; there was a flash followed by an explosion and fire."

Other witnesses testified as to the burning oil being thrown from the tanks across the road and over upon the trucks and that the trucks were burned by the burning oil.

This testimony shows the circumstances and conditions upon which the jury based its conclusions as to the origin of the explosion, and seems to us to lead irresistibly to the conclusion that the explosion was occasioned by the gas being propelled along the ground over the intervening space between the tanks and the open end of the furnace and there ignited by the exposed flames. The commonly known fact that gas is inflammable and explosive required no testimony. It is true that the transcript discloses no testimony that anybody actually saw the flaming gas run from the furnace to the tanks, but the distance was so short that there could be only, as the witnesses describe, a flash preceding the explosion. To hold in this case that the evidence is insufficient to support the conclusion that the fire and explosion occurred by the creeping gas being ignited by the exposed flame, we would have to hold that, as a matter of law, no jury could reasonably have found that the origin of the explosion was in the ignition of the creeping gas; also, we would have to hold that no jury could reasonably find that it was negligence to maintain a fire where the flames were exposed within such proximity to oil tanks, from which gases were being given off. In so far as our attention has been called to the testimony, it is uncontradicted that fresh oil discharges gases which are inflammable. Instead of being insufficient to support the conclusion as to the origin of the explosion and fire, we think the only reasonable inference to be drawn from the surrounding circumstances is that the explosion and fire came about just as detailed by these witnesses, and that it came about by the exposure of the flames of the fire maintained under the boiler. We also think it is beyond question that the jury had a right to draw the inference of negligence from the maintenance of an exposed fire in close proximity to oil tanks discharging gases, and that it had a right to conclude that, under the circumstances, it was only a matter of time when the prevailing winds would come from the right direction to propel the gas of the tanks to the exposed flames and lead to the results described herein. The explosion and fire which caused the damage occurred on premises under the exclusive control and management of the defendant.

[2] It seems to be conceded also, as a matter of common knowledge, that storage tanks do not ordinarily explode or ignite in the absence of some negligent act or omission on the part of those in charge of the operation and maintenance of such tanks. As said in Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146:

> "The real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care."

And further:

> "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care."

As stated by this court in Hallawell v. Union Oil Co., 36 Cal. App. 672, 173 P. 177:

> "We do not think plaintiffs were required to show with absolute certainty that the fire which originated at the stills through what we regard as an act of negligence on defendant's part, * * * was communicated to the asphalt shed and was the proximate cause of the death of these two men."

The evidence in that case simply showed the circumstances by which inflammable gases rising from the oil were carried along by the air currents of the strong wind then blowing. And further on, in describing inferences that may be drawn from the circumstances, the court in that case said:

> "Respondents contend that having shown the circumstances surrounding the fire sufficient appears to justify the invocation of the res ipsa loquitur doctrine, and that in the absence of explanation by the defendant, the circumstances afford reasonable evidence that the accident

arose from want of care" (citing Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146, 40 P. 1020; O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Van Horn v. Pac. Refining, etc., Co., 27 Cal. App. 105, 148 P. 951). "We think this doctrine may be urged with more than plausibility. Everything in the present case which in any way contributed to the accident was under the management of the defendant; the thing which caused the injury was shown to have been under the management of the defendant, and that in the ordinary course of things the accident would not have happened if those having the management had used proper care."

[3] Appellant also urges that there is no showing what would have been proper care under the circumstances, and therefore the jury was not authorized in coming to the conclusion that the defendant negligently maintained a fire in close proximity to the oil tanks. The answer to this contention is well set forth in plaintiffs' brief, which we will paraphrase: If such testimony is necessary, what function has the jury to perform? If the ultimate fact of negligence is for witnesses, why the necessity of a verdict by the jury? The circumstances being shown, the ultimate fact is for the jury and for the jury exclusively in these matters. The law is thus stated in Redfield v. Oakland C. St. Ry. Co., 112 Cal. 220, 43 P. 1117:

> "All the circumstances from which the ultimate fact of negligence upon the one hand, or due care upon the other, must be found were established by unconflicting evidence, and such ultimate fact was a matter to be inferred by the jury from the evidence."

This case quotes from Shafter v. Evans, 53 Cal. 32, where it is said:

> " 'The ultimate fact of negligence in such a case is not one to be established by the mere opinion of witnesses called to testify. The evidence of experts is not admissible.' * * * In applying circumstantial evidence which does not go directly to the fact in issue, but to facts from which the fact in issue is to be inferred, the jury have two distinct duties to perform: First, to ascertain the truth of the fact to which the evidence goes, and thence to infer the truth of the fact in issue. When this experience is of such a nature that it may be presumed to be within the common experience of all men of common education moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference."

And further on:

> "If the circumstances out of which the negligence is said to arise have been established by proof, or can be shown, the ultimate fact of negligence is an inference to be drawn by the jury, and is not to be established by the opinions of others."

As stated in respondents' brief:

> "Surely, it was not necessary to inform the jury, through oil experts, of all possible consequences to be anticipated from the presence of exposed quantities of natural gas and oil in close proximity to an open fire."

See, also, Arnold v. California, etc., Cement Co., 161 Cal. 522, 119 P. 913, and Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 P. 767. As stated in County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398:

> "If the finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence. For a finding of fact based upon reasonable inference drawn from facts proved with legal sufficiency is as much and as completely as is any other finding of fact a finding based upon good and sufficient evidence. It is the peculiar and exclusive province of the trial court or trial jury in the first instance to make such finding of fact, and it is the especial right of every litigant to have all facts so determined by court or jury, this court sitting only to review the findings and being empowered to set them aside as matter of law only when not sustained by adequate evidence" (citing Ryder v. Bamberger, 172 Cal. 799, 158 P. 756).

Notwithstanding the fact that the reporter's transcript of the testimony in this case covers some 800 pages of typewritten matter, the appellant has not called our attention to any insufficiency of the evidence to support the verdict other than the mere statement that no witness testified before the jury that the appliances maintained and operated by the defendant were maintained and operated in a negligent manner. An examination of the testimony, however, brief excerpts of which we have set forth, sufficiently discloses the fact that the jury had ample information upon which to base its conclusion, without the aid of either expert or opinion testimony.

In support of appellant's allegations of the insufficiency of the testimony are cited the cases of Webber v. Bank of Tracy, 66 Cal. App. 29, 225 P. 41, Marovich v. Central Cal. T. Co., 191 Cal. 295, 216 P. 598, and Perara v. Panama-Pac. Int. Exp. Co., 179 Cal. 63, 67, 68, 175 P. 454. An analysis of these cases shows, however, that they are inapplicable. The case of Webber v. Bank of Tracy, supra, rests upon contract, where the relation of bailor and bailee existed. In that case it was held that the bank engaged in the business of maintaining safe deposit boxes was held to no higher degree of care than the fair average of those engaged in a like occupation, and as conducted by the average prudent man. The bank was not an insurer and could not be held to any stricter accountability than that which was reasonably exercised by others engaged in the same occupation. It is there said:

> "The standard of ordinary care is established by competent testimony upon the custom and

general usage of the business. Absolute protection against bank burglary, in small communities, is unattainable."

The question really presented in the Webber Case was as to the reasonable sufficiency of the safe deposit boxes, vaults, and building to safeguard the property of the plaintiff. It differs from the facts of the case at bar in that the question really presented here is, Was or was not the defendant maintaining and operating an obviously dangerous contrivance? In the one case, the question of safe deposit boxes, vaults, and building maintained by other banks would indicate the standard of care ordinarily considered to be sufficient. In the case before us, the circumstances are such as to call only for the exercise of the common judgment of reasonable men as to whether an exposed and unguarded furnace, the flames from which, from time to time, would leap from two to six feet in the air, distant some thirty feet from the oil tanks, exuding gases, was or was not a continuing menace to life and property and constituting self-evident facts, from which a jury could reasonably draw all proper conclusions. Likewise, in the Marovich Case it was a question of whether certain additional appliances were reasonably necessary, in that case a rear-end mirror in a one man car, not whether the appliances and equipment of the car were essentially hazardous or dangerous to life and property in and of themselves. In the Perara Case the question involved was that of whether care in the guarding of jewelry, where the defendant occupied no position of liability or responsibility other than that imposed upon a bailee, and in that case we may here state that testimony as to the custom or manner in which jewelers protected their property was held to be inadmissible. Ordinary common knowledge would indicate that a jury need not be told that gas, when exposed to a flame of fire, will explode.

[4] Appellant also relies upon certain alleged rulings of the trial court, excluding testimony as to the character of the tanks and appliances used by other people operating in the Huntington Beach oil field. We quote the questions and the rulings of the court:

"By Counsel for Appellant: Now, these tanks that I have called your attention to were just the ordinary storage tanks that are used in the Huntington Beach field? A. Yes, sir.

"Q. There are hundreds of them all around there, aren't there?

"Counsel for Plaintiff: We object to that as irrelevant and immaterial and not cross-examination.

"The Court: What is the purpose of that?

"Mr. Clark: Why, they are charging us with negligence. They have described the tanks. We want to find out if there was anything negligent about the kind of a tank we had.

"The Court: Well, I don't think it would affect your negligence if these tanks either were or were not the same kind of tanks that other people used. Objection sustained.

"Mr. Clark: And are there any other open boilers in that field that you know of? A. Yes.

"Mr. Ashburn: Move to strike out the answer.

"The Court: It will be stricken out.

"Mr. Clark: Well, was your description that you gave a description particularly applying to the Texas Holding Company property or one that applied to the whole field? A. Not exactly, but there is other property—there were other leases just as bad as theirs.

"Mr. Ashburn: I move to strike out the statement about the other leases on the ground it is irrelevant and immaterial and not responsive.

"The Court: Yes; the latter part, 'there were other leases just as bad,' will be stricken out as not responsive and a conclusion of the witness.

"Q. Have you seen the boilers on other leases in the Huntington field as they were used at and immediately prior to the fire? A. Oh, yes.

"Q. I wish you would describe the manner in which those boilers were placed upon the other leases that you have seen down there in the Huntington Beach field.

"Mr. Ashburn: Objected to as irrelevant and immaterial.

"The Court: Objection sustained.

"Mr. Clark: Can you tell whether other oil storage tanks in the Huntington Beach oil field at and immediately prior to the fire were covered or open?

"Objected to. Objection sustained."

Other like questions were asked and objections thereto sustained by the court, and the court then said:

"Now, I am not precluding you by showing from this or any other witness properly qualified what was considered among oil men good and safe practice, and then from introducing evidence to show whether or not the proper implements, including tanks upon the lease of the defendant company, comported with such proper and good practice, but I don't think the kind of implements that somebody else was using has the slightest materiality. To illustrate: If, for instance, A. is using implements that are improper and the use of which is negligence, the fact that B., C., D., E., and F. and the rest of the outfit are also using the same kind of implements does not make his negligence any the less. And, on the other hand, if he is using implements that are good practice to use and proper in the same trade or calling, then also the fact that others in the same trade or calling are using similar implements is immaterial."

In support of its contention that the ruling of the court in excluding the proffered testimony was erroneous, appellant cites the Webber Case, where the relationship of master and servant existed, and contends that it should have been permitted to show the kind of tanks that others were using in the same field and also the kind of boilers and furnaces being maintained and operated in said field. In the Webber Case, as we have shown, contractual relations existed, and in other cases relied upon by appellant, where the relationship of master and servant was found to exist, there arose also the question of assumption of risk. In all such cases the master is held to furnish appliances reasonably safe and the servant to assume the risks incident to the employment, etc. It is evident that these cases have no application where such relationships do not exist, and where it is a matter or question of whether the defendant has been guilty of obvious negligence, and not whether some one else is also likewise guilty

As stated by respondent, the question specifically is, In an action for damages caused to the property of another by the alleged negligence of the defendant in the operation and maintenance of its premises, may the defendant, to rebut the charge of negligence and to show its freedom therefrom, introduce evidence of the practices of others of the vicinity who are engaged in similar operations? In answering this question, it is to be noted that the court did not prohibit the appellant from introducing testimony tending to show proper practice, but only excluding testimony as to practices of particular individuals conducting oil-producing operations. It is to be noted that there is a marked distinction between cases having to do with negligence where the relationship of master and servant is involved, and, also, of cases where there exists contractual relations, and in cases like the one at bar, where there is no assumption of risk, no contractual relationship, and only the application of the ordinary legal maxim that all persons are in duty bound to so conduct their own business as not to injure the lives or property of others. The standard by which liability is to be measured in the latter case is that of ordinary care.

[5] This term "ordinary care" is a relative one, and the standard by which it is to be measured varies with the circumstances attending each particular case. That which may be sufficient under one set of circumstances may be wholly inadequate under changed conditions. The care must be in proportion to the danger to be avoided and the consequences which may reasonably be anticipated as the result of the conduct, and the circumstances may be such that far greater care is exacted from one party to an action than from the other. 19 California Jurisprudence, 579, § 24, and, as stated in the same volume, section 138, p. 729:

> "In most cases the law has fixed no standard of care other than the general one that it must be such as a reasonably prudent man would exercise under the particular circumstances. Whether a party's conduct measures up to this standard presents a question of fact which ordinarily should be submitted to the jury under proper instructions as to the law. In determining this question, the jury and not the witnesses should apply the standard; so it is improper for an expert to testify that certain acts do or do not amount to a want of ordinary care, or that certain defects could be discovered with reasonable diligence. However, if it appears from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in like positions, or that the necessity of doing a particular act is apparent, and the custom of performing such act under certain circumstances is universal and relied upon, negligence may be declared, as a matter of law."

[6] That a mere custom or usage cannot make due care out of conduct that is, in fact, negligence, under the circumstances disclosed by the evidence, has been stated a number of times by the courts of this state, as well as of other states. Likewise, that the standard of care required is not to be established by proof that others have been in the habit of acting in the same manner, and, as cited with approval in the case of Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124:

> "Not even a general custom can be deemed a relevant fact, in an action for negligence respecting any noncontractual duty which is not performed under fixed conditions."

And, as stated in a citation from Utah, hereinafter set forth:

> "Local customs, when reasonable, uninterrupted, and uniform, in a locality or district, and not contrary to public policy, may affect the interpretation of contracts made in their locality, by raising a presumption that such contracts were made with respect to them; but such custom cannot change the law of negligence."

And, further, as said in one of the Texas cases herein cited:

> "While it is true that an established custom may be looked to, in many cases, for the purpose of determining what parties really intended by a given contract, and what acts in the performance of it will satisfy it, it may well be questioned whether in any case in which, in the absence of contract express or implied, negligence as an element, is the foundation of a right, custom may be set up for the purpose of showing that negligence does or does not exist."

Without analyzing the various cases, it is sufficient to state that the following authorities all hold that where no contractual relations exist, and, further, where there is no assumption of risk, as is the case where the relation of master and servant is concerned, the specific practice of others cannot be admitted in testimony as an excuse for the alleged negligent act of the defendant. County of Alameda v. Tieslau, 44 Cal. App. 332, 186

P. 398; Bosqui v. Sutro R. Co., 131 Cal. 390, 63 P. 682; Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124; Pulsifer v. Berry, 87 Me. 405, 32 A. 986; Jenkins v. Hooper Irrigation Co., 13 Utah, 100, 44 P. 829; Wright v. Boller et al., 42 Hun (N. Y.) 77; Illwaco Railway & Navigation Co. v. Hedrick, 1 Wash. St. 446, 25 P. 335, 22 Am. St. Rep. 169; Metzgar v. Chicago, Milwaukee & St. Paul Ry. Co., 76 Iowa, 387, 41 N. W. 49, 14 Am. St. Rep. 224; G. C. & Santa Fé Ry. Co. v. Evansich, 61 Tex. 3; Grand Trunk Railway Co. v. Richardson, 91 U. S. 454, 23 L. Ed. 356.

The substance of the foregoing cases may be epitomized in the following quotation taken from one of them:

> "It would seem that the question whether negligence exists must be determined by the facts in the very case in which the question arises."

We might also call attention to the fact that the case of Standard Oil Co. v. Swan, 89 Tenn. 434, 15 S. W. 1068, 10 L. R. A. 366, relied upon by the appellant, does not support its contention. In that case it was held that the manner in which individual dealers in the vicinity store and handle gas and oil was inadmissible. The court did say that custom and usage of well-appointed and managed companies engaged in the business of storing oil would have been competent evidence on the question of negligence in the proper conduct of the business. This, of course, is simply dicta. No question there was raised as to what constitutes well-appointed and well-managed concerns. There is no evidence in the case at bar as to well-appointed and managed concerns, although the court did offer to permit the appellant to introduce testimony along that line.

We are not called upon to state whether we agree or disagree with the court's statement in this particular from the fact that no testimony was offered under the permission granted by the trial court.

[7] Appellant assigns as error the giving by the court of instructions Nos. 1, 2, 8, 9, 12, 14, 15, and 17, but no reasons are set forth or authorities cited showing in what particular the giving of any of said instructions constituted error. Under such circumstances, we do not think it incumbent upon the court to discuss alleged errors not considered worthy of discussion by appellant We will state, however, that we have read the foregoing numbered instructions and do not find in them, or any of them, any errors prejudicial to the appellant.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; PRESTON, Justice pro tem.

CALIFORNIA REPORTER

253 PACIFIC REPORTER

200 Cal. 396

McKEAN et ux. v. ALLIANCE LAND CO. et al. (S. F. 11457.)

(Supreme Court of California. Feb. 9, 1927.)

1. Appeal and error 🔑1011(1)—Findings of trial court on conflicting evidence are conclusive.

Where the evidence is contradictory, findings of trial court are conclusive.

2. Injunction 🔑195—Award of damages instead of requiring removal of part of brick and tile building projecting part of inch over lot line held proper.

Where brick and tile building extended only part of inch onto adjoining lot and there was no direct evidence of actual damages, *held* award of $10 damages instead of requiring removal of encroachment was proper.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by T. A. McKean and wife against the Alliance Land Company and others. From an adverse judgment, plaintiffs appeal. Affirmed.

John S. De Lancey, of Oakland, and Clarence De Lancey, of San Francisco, for appellants.

R. M. Wright, of San Jose, and Fitzgerald, Abbott & Beardsley, of Oakland, for respondents.

PRESTON, J. Plaintiffs own the northern one-half of lot 9, Alice Park property, Oakland, Cal. Defendants own lot 10, adjoining. Plaintiffs claim the common boundary between said lots is located 1,182.84 feet from the point of intersection of Twelfth and Harrison streets; defendants contend it is located 1,182 feet from the same point, and, relying upon this contention, caused to be erected upon their property a brick and tile garage building, which building upon completion, according to the testimony of their own witness, Mr. Prather, encroached beyond the boundary claimed by them a distance of from one-half to five-eighths of an inch.

Plaintiffs sued to enjoin defendants from depriving them of their property, being the said .84 of a foot, more or less, in dispute, and for abating said building as a nuisance; also for damages in amount of $5,000.

There is a conflict in the evidence. Clifford H. Boardman, and experienced surveyor, gave testimony in support of plaintiffs' contention. Plaintiffs also introduced certain old city ordinances in an effort to prove that subsequent to the filing for record of the map of Alice Park there has been a change made of about one foot in the monument line of Twelfth street and certain old maps purporting to show a variation of one foot in the location of Twelfth street. None of these exhibits showed a difference of .84 of a foot, and at most they appear to be but proof of inaccuracy in the surveys.

On the other hand, E. C. Prather, also an experienced surveyor, gave testimony fully supporting defendants' claim, and they further introduced evidence showing that every conveyance of lot 9 and lot 10 from 1868 to date of the trial gave the distance from Twelfth street or Fourteenth street, in accordance with the filed map distance and as found by the court. Mr. Prather stated he had first surveyed the tract in question six years prior to commencement of this action, that at the request of defendants he surveyed lot 10 in December, 1921, and again went over the survey after construction of the garage; that as his initial point he took the northerly line of Twelfth street, as fixed by the city monuments, at its intersection with the easterly line of Harrison street; that he found the distance along Harrison street from said point to the point of intersection with the southerly line of lot 10 to be 1,182 feet. This distance is corroborated by the map of Alice Park and is .84 of a foot less than the distance testified to by Mr. Boardman. It is conceded that Mr. Prather's survey is right, and Mr. Boardman's wrong, if the northerly line of Twelfth street is located now where it was in 1868. In other words, it is a disputed question of fact as to whether the monument line of Twelfth street was changed subsequent to 1868. Mr. Prather testified that he never knew it was changed. Counsel for appellants then asked him if he would say that it was not changed after the filing of the map of Alice Park property, and objection to this question was sustained on the ground that it was not the proper way of showing a change of location of streets, not the best evidence, but a matter of opinion. From the record it appears that no convincing proof of such change was given.

Mr. Prather further testified that upon his survey after erection of the garage building he found it had been so constructed that it encroached on lot 9 half an inch at one end, increasing to five-eighths of an inch at the other.

The trial court found that the boundary line was, as claimed by defendants 1,182 feet from the above-described point of intersection, and found further that defendants' building encroached from one-half to five-eighths of an inch on plaintiffs' lot, by reason of which encroachment plaintiffs had been damaged in the sum of $10, and no more, and gave judgment accordingly.

On appeal plaintiffs complain: First, that the findings, and particularly finding No. 4 placing the damage at $10, were not supported by the evidence or the facts; and second, that the judgment of the trial court awarded damages instead of requiring removal of the encroachment.

[1] It is well settled that where the evidence is contradictory, the findings of the trial court are conclusive. "The rule adverted to above, that the jury is ordinarily the sole judge of the weight of evidence and credibility of witnesses, applies with great force in a case of conflict. It is the duty of the trier of facts to reconcile, if possible, any apparent conflict, whether such conflict is developed upon the whole case or in the testimony of an individual witness, and to give effect to all the evidence, when the nature of the case will admit of such a disposition, or, if the conflict is irreconcilable, to affix their own value to the contradictory evidence. * * * It is a cardinal doctrine often enunciated that where, upon a question of fact, the testimony in the court below involves a substantial conflict, the action of the court below will not be disturbed. It is to be presumed that the trial judge reconciled and accounted for to his own satisfaction any and all inconsistencies which might be made to appear in the testimony." 10 Cal. Jur. pp. 1171, 1172, §§ 382, 383, citing Adkins v. Brett, 184 Cal. 252, 193 P. 251; Welch v. Alcott, 185 Cal. 731, 198 P. 626; People v. Weber, 149 Cal. 325, 86 P. 671; Waer v. Waer, 189 Cal. 178, 207 P. 891; Union C. Co. v. Madera, etc., Irr. Co., 179 Cal. 774, 178 P. 957, and many other cases.

[2] On the question of awarding damages instead of ordering removal of the encroachment, we find Rothaermel v. Amerige, 55 Cal. App. 273, 203 P. 833, in point. There the foundation of defendant's building encroached 1½ inches on plaintiff's land. The circumstances were such that the foundation footings could not be removed without great inconvenience and damage. Ownership and possession of the disputed 1½ inches had been placed by a judgment of the court in plaintiff. The court awarded to plaintiff nominal damages of $1 for the withholding of the property by defendant. In the opinion the following citation from Ruling Case Law, vol. 14, pars. 14–57, is quoted with approval:

> "It is also true, as a general rule, that the court should not interfere by way of mandatory injunction, * * * where the injury is so slight as to bring it within the maxim de minimis, or full compensation can be made in damages. If there is an adequate remedy at law, no relief will be granted, especially where there is no appreciable damage, and its issuance would require the performance of an act which would be difficult, and involve a considerable expense."

Here the correct boundary line is established protecting the rights of appellants. The court further specifically found that "a judgment for said sum of $10 is an adequate remedy for said damage and will afford said plaintiffs, and each of them, full, complete, and adequate relief." There was no direct evidence that the encroachment of from one-half to five-eighths of an inch caused any actual damage to plaintiffs, and to our mind the award of the trial court is both wise and just.

Judgment affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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200 Cal. 403

WESSELS v. SUPERIOR COURT IN AND FOR MENDOCINO COUNTY et al.

(S. F. 12406.)

(Supreme Court of California. Feb. 10, 1927.)

Prohibition ⚷3(3)—Prohibition will not lie to prevent commitment of petitioner for contempt, in view of remedy by certiorari or habeas corpus.

Prohibition will not lie to prevent commitment of petitioner for contempt; proper remedy being to present defense on hearing of contempt proceedings, and then, if found guilty, to apply to higher court for certiorari or habeas corpus.

In Bank.

Application of A. L. Wessels for a writ of prohibition, prayed to be directed to the Superior Court in and for Mendocino County, H. L. Preston, Judge, to prevent commitment of petitioner for contempt. Writ denied.

Chas. A. Shurtleff, of San Francisco, and W. D. L. Held, of Ukiah, for petitioner.

WASTE, C. J. The application for a writ of prohibition herein is denied. The remedy of the petitioner is to first present his defense upon the hearing of the contempt proceedings, and then, if found guilty of the contempt, to apply to a higher court for a writ of certiorari or habeas corpus. Commercial Bank v. Superior Court, 192 Cal. 395, 397, 220 P. 422; Drew v. Superior Court, 43 Cal. App. 651, 655, 185 P. 680.

200 Cal. 316

HULSE v. DAVIS et al. (L. A. 9522.)

(Supreme Court of California. Jan. 31, 1927.)

1. Appeal and error ⚷458(1)—Supersedeas may be granted only to restrain enforcement of judgment or order by court below or its officers pending appeal.

Writ of supersedeas may be granted in proper case only to restrain and prevent enforcement of judgment or order by court below or its officers pending appeal therefrom.

2. Appeal and error ⚷458(2)—No supersedeas is allowed where judgment or order appealed from is self-executing.

Where judgment or order appealed from is self-executing and no process is required to be issued for its enforcement, no supersedeas is allowed.

3. Execution ⚷163 — Where execution is quashed, levy made pursuant thereto falls with it, and title to property in sheriff is defeated.

Where an execution is quashed, any levy made pursuant thereto falls with it, and any title to property vested in sheriff by levy is defeated.

4. Appeal and error ⚷458(2)—Writ of supersedeas could not be issued pending appeal from order quashing execution.

An order quashing execution is self-executing, and no process is required for enforcement of such order, and therefore, pending appeal therefrom, writ of supersedeas cannot be issued.

In Bank.

Action by B. F. Hulse against Sesa Davis and others. Judgment for plaintiff. On application by plaintiff for writ of supersedeas to be directed to the Superior Court of Los Angeles County, Albert Lee Stephens, Judge, to stay proceedings pending appeal from an order quashing writ of execution. Writ denied.

Alfred J. Smallberg and Philip Cohen, both of Los Angeles, for petitioner.

William A. Anderson, of Los Angeles, for respondents.

PER CURIAM. Application for a writ of supersedeas. The applicant herein instituted an action against the above-named respondents on July 19, 1915, in the superior court of the county of Los Angeles. Judgment was entered in said action in favor of the applicant on January 28, 1916. On May 10, 1916, execution issued upon said judgment and was thereafter returned partly satisfied. No further proceedings were had or taken in the action until September 3, 1926, at which time, on an ex parte motion of counsel for the applicant and apparently without prior notice thereof having been given to the respondents, an order was made by the court below for the issuance of a second execution upon the judgment theretofore entered. Pursuant thereto a writ of execution was duly issued and levied. Thereafter, and on September 23, 1926, a temporary restraining order was entered by said court, on motion of the respondents, enjoining any further action or proceedings under and by virtue of said writ of execution. On October 5, 1926, the lower court made and entered an order vacating the prior order for the issuance of a writ of execution, recalling and quashing the writ issued pursuant thereto, and denying further process of said court for the enforcement of the judgment. In accordance with this latter order the sheriff on October 9, 1926, released and discharged the property of respondents theretofore held in custodia legis. The applicant has appealed from the order quashing the writ of execution, and pending the determination of said appeal a writ of supersedeas is sought "staying all proceedings in the above-entitled matter" and directing "that if the said sheriff has released from levy the property of the defendant * * * to relevy thereon and keep the same intact until the determination of this appeal."

The respondents oppose the application on the ground that this is not a proper case for the issuance of a writ of supersedeas.

[1, 2] This court in the case of Imperial Water Co. v. Hall (Cal. Sup.) 250 P. 394, recently had occasion to consider the nature, scope and purpose of a supersedeas. A reading of the opinion in that case and the authorities cited and quoted from therein reveals that a writ of supersedeas may be granted in a proper case only to restrain and prevent the enforcement of a judgment or order by the court below or its officers pending an appeal therefrom. If the judgment or order appealed from is self-executing and "no process is required to be issued for its enforcement, no supersedeas is allowed." Tyler v. Presley, 72 Cal. 290, 12 P. 289, 13 P. 169; Dulin v. Pac. Wood & Coal Co., 98 Cal. 304, 33 P. 123; Imperial Water Co. v. Hall, supra.

[3] In the instant case the order appealed from is complete and final in itself and no process of the court below is required to be issued for it enforcement, for it is settled that "when an execution is quashed, any levy made pursuant thereto falls with it, and any title to the property vested in the sheriff by the levy is defeated." Wellington v. Sedgwick, 12 Cal. 469, 475; Buffandeau v. Edmondson, 17 Cal. 436, 442, 79 Am. Dec. 139. See, also, 11 Cal. Jur. 61, § 18. If the sheriff, in violation of the court order, continues in possession of the property, he does so unlawfully and without right, in the absence of some other process in his hands which would justify his action.

[4] It is apparent, therefore, that an order quashing execution has an intrinsic effect and

is self-executing. Process is not required for the enforcement of such an order, and pending the determination of an appeal therefrom a writ of supersedeas may not properly be issued.

For the foregoing reasons the application for a writ of supersedeas is denied, and the temporary stay heretofore granted by this court is hereby terminated and ended.

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200 Cal. 284

GENERAL MOTORS ACCEPTANCE CORPORATION v. GANDY. (Sac. 3664.)

(Supreme Court of California. Jan. 21, 1927.)

1. Pleading 🔑165—Special defense need not be answered.

Plaintiff need not answer special defense set up by defendant.

2. Estoppel 🔑110—Plaintiff may prove estoppel without pleading it as against guarantor's plea that guaranty did not apply to subject-matter.

Plaintiff may prove estoppel without pleading it as against guarantor's plea that guaranty had no application to contract and notes giving rise to action.

3. Estoppel 🔑116—Burden rests on person asserting estoppel to prove all elements constituting it.

Existence of estoppel is question of fact, and burden rests on party asserting estoppel to prove all elements constituting it.

4. Estoppel 🔑54—Actual ignorance of material facts arising from false representation and concealment is essential to estoppel.

False representation or concealment of material facts is essential to estoppel, and party to whom such representation or from whom such facts are concealed must have been ignorant, actually and permissibly, of truth.

5. Estoppel 🔑118—Estoppel must be established with nothing left to surmise or questionable inference.

Estoppel must be so established as to leave nothing to surmise or questionable inference.

6. Guaranty 🔑36(3)—Partner, indemnifying against loss in purchasing firm notes, held not estopped to deny liability on notes of corporation of same name organized by him.

Where firm partner contracted to indemnify partnership against loss in purchasing firm notes, etc., and subsequently organized a corporation under same name to engage in similar business, and both entities were operated at same place, defendant was not estopped to deny liability under guaranty on notes purchased from corporation, where these were executed to the corporation, and plaintiff's subsequent letters concerning notes were addressed to corporation.

7. Guaranty 🔑36(1)—Contract of indemnity for benefit of partnership, providing that benefits and obligations should extend to successors and assigns, held not extended to corporation subsequently organized.

Contract of guaranty executed for benefit of partnership *held* not, because of provision that benefits and obligations should extend to and bind heirs, administrators, and assigns of respective parties, to extend to obligations of corporation of same name organized by guarantor, since such corporation was not the successor or assign of partnership; both entities existing at same time and conducting different business operations.

In Bank.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by the General Motors Acceptance Corporation against C. W. Gandy. Judgment for plaintiff, and defendant appeals. Reversed.

A. J. Carlson, of Modesto, for appellant.

Charles W. Haswell, of San Francisco, for respondent.

LANGDON, J. A petition for hearing in this court was granted in the above cause after decision by the District Court of Appeal, Third Appellate District. In said petition it was urged by the respondent that an important provision of the contract upon which the action was founded had been overlooked in the decision of the District Court of Appeal. No reply was made to this petition by the appellant. After careful consideration of the entire record we are of the opinion that the decision of the District Court of Appeal, Third Appellate District, written by Mr. Justice Hart, correctly states the law of this case and considers every material legal element involved therein, with the exception of one additional feature urged by the respondent upon its petition for hearing in this court, which we shall discuss hereinafter. Accordingly we accept and adopt the said decision of the District Court of Appeal as follows:

"This action was brought by plaintiff to recover the sum of $3,063.65 alleged to be the amount due on a contract of guaranty executed by the defendant for the purpose of indemnifying the former against any loss which it might incur by reason of taking over by purchase certain notes or other evidences of indebtedness accruing in favor of a certain partnership with which the defendant was connected as a copartner. The cause was tried by the court, sitting without a jury, and plaintiff was awarded judgment for the sum of $1,668.70, from which this appeal is prosecuted by the defendant upon a record made up in pursuance of the provisions of section 953a of the Code of Civil Procedure.

"The plaintiff, a corporation, as its name to an extent implies, is what is known as an acceptance corporation, engaged in the business of buying and discounting conditional contracts of sale of motor vehicles and promissory notes and other written evidences of indebtedness given to dealers in such vehicles by those purchasing the same on credit.

"The defendant, at the time he executed the contract of guaranty upon which the plaintiff declares, and one J. A. Anderson, were, as copartners and under the firm name of 'Modesto Motors Company,' engaged, in the city of Modesto, in the business of selling the Oakland, the Davis, the Paige, and the Haynes automobiles. The Oakland automobile was manufactured by a corporation known as the 'General Motors Corporation.' The copartnership arranged to discount its automobile paper—notes, conditional contracts of sale, and other written evidences of indebtedness owing to it by purchasers of the automobiles from it on time credit—and to perfect said arrangement, and, in pursuance of a demand by plaintiff therefor, the members of the partnership (defendant and Anderson) executed and delivered to plaintiff, on the 8th day of April, 1920, although the instrument was dated March 30, 1920, the contract of guaranty upon which this action is predicated. The said guaranty provides as follows:

" 'In consideration of General Motors Acceptance Corporation, hereinafter called the "corporation," hereafter extending credit at any time and to any extent to Modesto Motor Company, hereinafter called the "dealer," or to any one at the request or for the benefit of said dealer, through issuing, drawing, accepting, indorsing, discounting, purchasing, or acquiring any draft, note, acceptance, bill of exchange, letter of credit, or other instrument or obligation, for the account or the behalf of said dealer, or hereafter refraining to any extent from enforcing any rights under any contract or arrangement entered into by said dealer, and of other good and valuable consideration, the undersigned agrees to hold the corporation harmless from, and does hereby unconditionally at all times guarantee the performance and payment at maturity of each and all drafts, notes, acceptances, bills of exchange, letters of credit, negotiable instruments, and agreements and other obligations between the dealer and the corporation heretofore or hereafter issued, drawn, accepted, executed, entered into, indorsed, discounted, purchased, or acquired by the corporation for the account or in the behalf of said dealer, including all costs, expenses, and attorney's fees heretofore or hereafter incurred by said corporation in connection with the default of said dealer.

" 'This is a contract of continuing guaranty and, until canceled as hereinafter provided, shall not be limited to any amount, and shall at all times include the full indebtedness of the said dealer to the said corporation.

" 'The liability of the undersigned, for any unpaid balance, shall not be affected by any indulgence, compromise, settlement, extension of credit, or variation of terms effected by or with the dealer or any other person interested, nor by the amount of dealer's obligations outstanding at any one time, nor by payments previously made by the dealer or the undersigned, nor shall it be necessary for the corporation to procure the consent of the undersigned or give any notice in reference thereto.

" 'The undersigned hereby does expressly waive and dispense with notice of acceptance of this guaranty, notices of nonpayment and nonperformance, notices of amount of indebtedness outstanding at any time, protests, demands and prosecutions of collection, foreclosure, and possessory remedies.

" 'This guaranty is to remain in full force and effect until written notice of the withdrawal of the same has been served by the undersigned upon the corporation at its principal office at New York City, provided that such withdrawal shall in no case be effective except as to new transactions subsequent to the actual receipt of such notice. The obligation of all parties signing this guaranty, where more than one, shall be joint and several. The benefits and obligations hereof shall extend to and bind the heirs, administrators, successors, and assigns of the respective parties hereto. This guaranty and the performance thereunder shall be construed and determined according to the law of the state of New York.'

"Gandy testified that the partnership held the agency in Modesto and adjacent territory of the Oakland, the Davis, the Paige, and the Haynes cars; that the General Motors Corporation, as seen, manufacturer of the Oakland cars, finally objected to the partnership 'handling so many other makes of cars,' and it was hence decided by the partnership, or Gandy and Anderson, the sole members thereof, to organize a corporation and to transfer to such corporation the agencies in Modesto of the Oakland and Davis automobiles; that in pursuance of this decision a corporation was by said parties formed on the 11th day of June, 1920—approximately two months after the above contract of guaranty was executed—under the name of Modesto Motor Company. The articles of incorporation were filed in the office of the county clerk of Stanislaus county on the 21st day of June, 1920. A short time after the organization of said corporation, so defendant continued to testify, the partnership transferred to the corporation the agencies for the Oakland and Davis cars and certain personal assets of the former to said corporation, consisting of 'certain personal property and some automobiles.' As a consideration for such transfer the stock of the corporation was issued to the copartners in the partnership; Gandy, the defendant, receiving, approximately, two-thirds of the stock, Anderson one-third, and one Bryan Milton one share thereof. Defendant testified that immediately upon the organization of the corporation he became president and his copartner in the said partnership, Anderson, became vice president thereof. The Modesto Motor Company, partnership, and the Modesto Motor Company, corporation, occupied the same premises—that is, there were two buildings, Gandy testified, on one lot, but connected together; the entire premises being in the possession and under the control of the partnership, the front building, however, occupied by the corporation and the rear by the partnership. Both the Modesto Motor Company, a partnership, and the Modesto Motor Company, a corporation, were doing business on the same premises at the same time.

"The defendant, having been called by the plaintiff as a witness under section 2055 of the Code of Civil Procedure, a number of times stated that he severed his connection with the corporation some time in the fall of the year 1921. When testifying as a witness for himself, however, he stated that it was some time in the fall of 1920 that he severed his connection with said corporation by selling his stock therein to one Knorr, who became president thereof, and another party whose name he was unable to recall. The Modesto Motor Company, partnership, continued to carry on business on the same premises that were occupied by the corporation of the same name until the month of January, 1921, when the Gandy Motor Company, a corporation organized by defendant, took over the business of the Modesto Motor Company, partnership.

"Gandy, further testifying, stated that in the month of October, 1920, after the corporation was formed, and he had sold and relinquished all interest he had in the said corporation, he and the Mr. Knorr spoken of above as the party succeeding to the presidency of the corporation, called on the manager of plaintiff in San Francisco, and that he, in the presence of Knorr, informed said manager that he (defendant) had disposed of his interest in the agency of the Oakland car; that Mr. Knorr was the president of the Modesto Motor Company, Inc., and that Knorr or said corporation would handle the Oakland cars from that time on in Modesto; that his partner, Anderson, would remain with the corporation, while he would control the Modesto Motor Company, partnership, until he discontinued the same, as he then contemplated, and turn over its business and the Paige and Haynes agencies in Modesto to a corporation he intended to organize under the name of Gandy Motor Company. Defendant stated that the plaintiff's manager asked him why 'we called it (the corporation) the "Modesto Motor Company, Inc.," under the same name as our company. I told him because we were going to discontinue the Modesto Company, a copartnership, and that I was going into the Gandy Motor Company, and that the agencies for the Paige and the Haynes would be turned over to the Gandy Motor Company, and that Mr. Anderson was going to continue with the Modesto Motor Company, Inc., but I was leaving it altogether.' Defendant further testified that on the same occasion he asked plaintiff's manager 'to check up the contracts that were outstanding, and I told him I would personally see that the terms were carried out, but wouldn't go any further because I had nothing to do with the company'; that the manager gave him a statement of the status 'of the contracts that were outstanding, and I checked up my books and I followed each contract out to see that it was taken care of—that is,' he continued, 'I had the books and in a good many cases I collected the money and sent it in to the General Motors Acceptance Corporation. * * * The contracts that have been offered in evidence here (those upon which this action is founded), numbered "Exhibits 2 to 8," inclusive, were not in existence at that time.'

"Certain letters passing between plaintiff and the Modesto Motor Co., Inc., after the corporation was formed—those from the latter being signed by Knorr as president of said corporation—were introduced in evidence. The letters to plaintiff from the corporation were upon sheets of paper containing the following at the top thereof: 'Modesto Motor Co., Inc., 1204 Ninth Street, Modesto, Cal.' One of the letters from the plaintiff to the corporation, dated October 10, 1921, called for a guaranty covering contracts which might hereafter be taken over by plaintiff, and in said letter it was suggested that the guaranty, the form of which was inclosed with the letter, be executed by 'all the officers of the corporation.' The guaranty thus requested was executed by the officers of the corporation on the 4th day of November, 1921, and was forwarded to plaintiff with a letter from the corporation, dated November 7, 1921. Under date of October 9, 1920, the corporation addressed and mailed to the plaintiff the following letter or card:

" 'GMAC Form No. 517.

" 'Name Modesto Motor Co., Inc.

" 'Address 1204 9th St., Modesto.

" 'Dated Oct. 9, 1920.

" 'To General Motors Acceptance Corporation:

" 'Below find signature of those authorized until further notice to execute and/or indorse, in behalf of the undersigned, notes, acceptances, contracts, and all other instruments or assignments thereof used in connection with your wholesale and retail financing plans. In the absence of special instructions, signature of any one individual may be accepted.

" 'A. S. Hinckley, President.
" 'E. L. Callander, Vice Pres.
" 'Secretary.
" 'Treasurer.

" 'Yours truly,
" 'Name Modesto Motor Co., Inc.,
" 'By A. S. Hinckley, President.'

"The defendant's testimony that the contracts for the sale of automobiles which plaintiff took over, and which are the bases of this action, were made by and between the Modesto Motor Company, Inc., and the purchasers, is not contradicted; in fact, the contracts themselves show this to be true. One of these contracts was dated and therefore presumptively executed, on the 11th day of December, 1921, seven days after the guaranty last hereinabove spoken of was executed.

"The complaint, after setting out in hæc verba the contract of guaranty of April 8, 1920, alleges that 'plaintiff, on the faith of said guaranty, extended credit to the said Modesto Motor Company, a corporation, the principal named in said guaranty, by accepting, purchasing and acquiring certain notes, acceptances, and conditional sales contracts, which said instruments were duly set over by the said Modesto Motor Company, a corporation, to the plaintiff herein, for a valuable consideration, and were purchased and acquired by the said plaintiff in the regular course of business with the said Modesto Motor Company, a corporation, and indorsed by said Modesto Motor Company, a corporation, through and by its duly authorized officers,' etc.; that the said notes, or the respective balances thereof, are now due and payable, but that the makers thereof, although demanded by plaintiff to do so, have 'wholly refused, neglected, and omitted to pay the said balances,' etc.

"A demurrer, on both general and special grounds, was interposed by the defendant and the same overruled. Thereupon defendant filed an answer specifically denying the averments of the complaint, and also affirmatively declaring that 'the contract of guaranty in said complaint set forth does not apply to or include or cover any of the contracts or notes referred to in plaintiff's complaint'; that he (defendant) 'is not responsible for the payment of any of the items or outstanding balances referred to in the complaint or set out in "Exhibit A of said complaint,"' which exhibit involves a bill of particulars setting forth in detail the balances respectively due on the promissory notes referred to in the complaint.

"The court found the existence of the partnership between Gandy and Anderson under the name of the 'Modesto Motor Company' during the period above mentioned, the organization of the corporation by the same parties under the same name, and that the two entities were operated for the period of time above indicated at the same time and place, and then found as follows: 'That the defendant, C. W. Gandy, did not serve any notice upon said General Motors Acceptance Corporation of the existence of a corporation known as the Modesto Motor Company, Inc., or advise the said plaintiff, General Motors Acceptance Corporation, of any distinction between the Modesto Motor Company, a copartnership, and the Modesto Motor Company, a corporation; that, by reason of the premises, the said plaintiff, General Motors Acceptance Corporation, purchased certain notes, conditional sales contracts, and evidences of indebtedness from the Modesto Motor Company, Inc., a corporation, relying upon and believing that in truth and in fact it was the same firm or entity and described as Modesto Motor Company as set forth in the said contract of guaranty executed by the defendant herein; that the said defendant, C. W. Gandy, by reason of permitting the Modesto Motor Company to operate under the same identical name both as a copartnership and a corporation and at the same place of business, and interchanging the assets of the said copartnership to the corporation, caused the plaintiff, General Motors Acceptance Corporation, to rely and believe that the said Modesto Motor Company, either as a partnership or as a corporation, was the same entity as described as Modesto Motor Company in the contract of guaranty executed by the defendant herein; that, by reason of the foregoing acts on the part of the said defendant, C. W. Gandy, the court further finds that the contract of guaranty was intended to, and did, guaranty all obligations of the Modesto Motor Company, either as a copartnership or as a corporation, and that the defendant, C. W. Gandy, is, by reason of the premises, estopped to deny the obligations incurred under the said contract of guaranty by the Modesto Motor Company, a corporation; that the said contract of guaranty provided that the same should be in full force and effect until revoked in writing to the office of the said plaintiff, General Motors Acceptance Corporation, in the city of New York, state of New York; that the said contract of guaranty was not revoked within the terms and in accordance with the conditions of the said contract, but was in full force and effect at all times herein mentioned.'

"The theory upon which the plaintiff tried its case below and presents it on this appeal embraces several hypotheses, and may be stated as follows: (1) That the organization of the Modesto Motor Company, a corporation, was not effectuated for the purpose of dissolving or terminating the partnership, but that the corporation was formed by the parties constituting the partnership as a mere agency for the purpose of the more conveniently carrying on the partnership business, and that, therefore, the acts of the corporation within the scope of the partnership purposes and business were those of the partnership (see 6 Cal. Jur. § 201, p. 338, for a statement and an application of the rule by which the proposition stated is supported); (2) that defendant is estopped from denying his liability upon the contract of guaranty sued on for the reason that, assuming that said contract was in any way affected or impaired by reason of the formation of the corporation, his conduct and acts with reference to the organization of said corporation were such as to have had the effect of misleading plaintiff, or rather leading it to the belief that the Modesto Motor Company was, at all times during the subsistence of the contract of guaranty, a single entity, as to the legal form or status of which the plaintiff had no knowledge until the month of November, 1921, when, for the first time, plaintiff received information that a corporation under said name had been organized independently of the partnership existing and conducted under the same name; (3) that, assuming that the corporation was formed for the purpose only of acting as trustee or agent for the partnership in carrying on of the latter's business transactions, the defendant was bound and would remain bound to the terms of his guarantyship until he revoked the contract of guaranty in the mode prescribed thereby, to wit, by serving upon the plaintiff, at its principal office, at New York City, his withdrawal from said guaranty.

"The general contention of the defendant that the findings vital to the legal integrity of the judgment derive no support in the evidence necessarily involves an attack upon the position of the plaintiff, as above specifically pointed out, since, as will be noted, the theory of the findings is in accord with the theory upon which the plaintiff evidently presented its case below and presents it on this appeal.

"Although, as we have above pointed out, several different propositions are advanced here in support of the appeal, still the real problem the solution of which is decisive of the case is reducible to the simple question whether, as the court found, the defendant, upon the facts and circumstances characterizing the transactions culminating in this controversy, must be held to be estopped from claiming immunity from the obligations of the contract of guaranty pleaded in the complaint; in other words, the plaintiff's case, as we view the record, can only be sustained upon the theory that the circumstances attending the formation of the corporation—the part taken by defendant therein, his interest in both the corporation and the partnership, the fact that both the partnership and the corporation bore, substantially, the same name, and the asserted concealment from the plaintiff by him of the fact that the partnership and the corporation represented two separate and independent entities—were such as legally to foreclose in him the right to deny his liability upon the contract of guaranty, regardless of whether the promissory notes discounted and acquired by plaintiff were executed and delivered to the partnership or to the corporation.

[1, 2] The plaintiff did not plead an estoppel. Its case, as made by its pleading, rests entirely upon the contract of guaranty, and thus it had the right to proceed. It was not required to anticipate any defense that might be pleaded or relied upon by the defendant. Under our system of pleading, unlike that of the common-law system, whereby, if necessary, a series of pleadings by the respective parties were required and could be resorted to in order to accomplish a joinder of issue upon any particular or other matter, the law answers for the plaintiff any special defense set up in the answer by the defendant. Therefore the plaintiff here was entitled to introduce or rely upon the proof of any fact or facts which would impeach any special defense which the defendant by his answer has interposed, and this either by evidence directly contradicting the facts constituting such defense or by evidence of facts which, assuming the existence or truth of the facts upon which the special defense is predicated, will tend to avoid the legal effect thereof. Hence the plaintiff here was at liberty to prove, if it could, an estoppel as against the defendant upon his plea that the contract of guaranty has no application to the contracts and the notes giving rise to the present litigation, and that, consequently, as a guarantor on said guaranty, he was not legally 'responsible' for the defaults of the makers of said notes in the payment thereof. The important question, then, is: Does the evidence warrant the finding that the defendant is estopped by reason of his conduct with respect to the several transactions involved herein from denying his liability upon the contract of guaranty?

[3] The existence of an estoppel is a question of fact, and the settled rule as to the proof of equitable estoppel is that the burden rests upon the party asserting such estoppel to prove all the elements constituting it 'by evidence having some reasonable tendency to establish the fact.' 10 Cal. Jur. p. 656, § 31. See, also, cases cited in the footnotes to said section. The plaintiff, it appears clear to our minds, failed to sustain this burden. In the first place, it is to be noted that the evidence, without conflict, shows that the Modesto Motor Company, a partnership, and the Modesto Motor Company, a corporation, were two separate and independent entities; the partnership, from and after the formation of the corporation, being the agent for and dealing in certain kinds of automobiles, and the corporation the agent for and dealing in other kinds of automobiles. It is also undisputed and, indeed, indisputable, that the guaranty declared upon by plaintiff was executed and in operative effect some two months before the corporation was formed. In the second place, it is to be observed that, save and except the testimony of Wm. Robb, the assistant credit manager of plaintiff, and the only witness introduced by the latter, that he did not know, when the contracts and the notes directly concerned herein were taken over by the plaintiff, that the Modesto Motor Company was incorporated, the plaintiff made no affirmative showing in support of an estoppel, nor did it make any attempt to do so. Aside from said testimony of Robb, it relied entirely for the support of an estoppel upon facts brought out upon the examination of defendant under section 2055 of the Code of Civil Procedure and on his cross-examination, the fact that the partnership and the corporation bore the same name, and the asserted fact that it was not informed by defendant or any other person connected either with the corporation or the partnership or any other party to the contract of guaranty, prior to its acquisition of the contracts and the notes involved herein, that the corporation had been formed and that the automobile agencies with which said contracts and notes were alone concerned had been transferred to said corporation. This, as stated, embraces the entire foundation for the claim and the support of the estoppel.

The testimony of defendant on his examination by plaintiff under section 2055 of the Code of Civil Procedure was substantially the same as that given by him when he testified as his own witness or in his own behalf, both upon direct and cross-examination. Attention, however, may here be called to the testimony of the defendant that, within a brief time after the formation of the corporation and the transfer to the latter by the partnership of the agencies of the Oakland and Davis automobiles, and prior to the time at which, respectively, the contracts and the notes involved herein were acquired by plaintiff, he called at the offices of the plaintiff, and, in the presence of Knorr, informed its manager (a Mr. Warner, he believed to be the name of the manager) that the corporation had been formed, and that the Oakland and Davis agencies had been transferred by the partnership to said corporation, and that he had severed his connection with the latter concern; that said manager stated to him (defendant) that the notice thus given was sufficient, and that it was not necessary for him to transmit to and file with the main office of the plaintiff in New York City the written notice required by the contract of guaranty where the guarantors desire to withdraw therefrom as such guarantors. As before stated, this testimony of the defendant was not directly contradicted. Neither plaintiff's manager at San Francisco nor any other official of the plaintiff was called by the latter to give testimony in rebuttal of the defendant's testimony, if, indeed, any such adversary showing could have been made by the plaintiff. Nor was any explanation vouchsafed for the failure of plaintiff to call the said manager as a witness. But it may be conceded that the court as the trier of the issues of fact, in the exercise of a sound legal discretion, hedged by those tests which constitute the criterion by which the credibility of a witness may be determined, and therefore the weight and the probative value of his testimony may be determined and appraised by the jury or the court by which the questions of fact are tried, was legally at liberty to disbelieve and so disregard the defendant's testimony. In support of the finding as to an estoppel, such would be the presumption. But, this being so, or at least assumed, it follows that there is no testimony remaining in the record as to the knowledge of the plaintiff of the fact of the formation of the Modesto Motor Company, a corporation, prior to the acceptance by the former of the contracts and the notes involved herein, other than the documentary evidence consisting of the contracts themselves and the letters passing between plaintiff and the Modesto Motor Company, a corporation, after the latter was formed, and the testimony of Robb to the effect that he did not know of the existence of the Modesto Motor Company as a corporation. The letters from the plaintiff to the Modesto Motor Company, a corporation, after the acquisition by the former of the contracts and the notes themselves, show beyond all question that plaintiff then had full knowledge of the fact that the Modesto Motor Company with which it was dealing as to said contracts and notes was a corporation. And, in this connection, it is important to note that there is absolutely no testimony in this record that the plaintiff did not know, at the time the contract of guaranty was executed and delivered to it, that the Modesto Motor Company with which it was then dealing was a partnership. But further consideration of the evidence need not be pursued, since the problem presently before us is not one whose solution is to be controlled so much by a consideration of the rule as to evidentiary conflicts as upon a consideration of the question whether the estoppel claimed is the necessary effect of the facts and circumstances from which it must have arisen, if at all.

[4-6] Among the dominant essentials of equitable estoppel or estoppel in pais are that there must have been a false representation or a concealment of material facts of the matter as to which the estoppel is claimed, and the party to whom such representation is made or from whom such facts are concealed must have been ignorant, actual, and permissibly of the truth of the matter. As a rule, manifestly, an equitable estoppel must be proved by oral testimony; hence the rule that certainty is essential to all estoppels is peculiarly applicable to estoppels in pais. The estoppel must be so established as to leave nothing to surmise or questionable inference; in other words, the representation, whether express or implied from the conduct of the party against whom the estoppel is sought to be invoked, must be such as to justify a prudent man in acting upon it, and must be plain and not doubtful. Bigelow on Estoppel (5th Ed.) pp. 570–578, inclusive. Clearly, the estoppel claimed here does not measure up to the requirements of the above rules relating to the establishment of equitable estoppel. The testimony of Robb that he did not know at the time material here that the Modesto Motor Company, Inc., was in existence and the entity with which plaintiff was dealing with respect to the contracts and the notes in question is contradicted by the documentary evidence, and, indeed, by the plaintiff's own pleading. Assuming, though, that personally he had no knowledge of that fact, certainly it cannot be denied that he and other officers of the plaintiff were familiar with facts and circumstances sufficient to put them on notice as to the existence of two separate entities under the name of the Modesto Motor Company, and that the plaintiff in the transactions involved here was dealing with the corporation of that name.

"It is hardly necessary to suggest that the contract of guaranty had no relation to or connection with the Modesto Motor Company, Inc. That instrument applies solely to the partnership of that name, and therefore the requirement of said contract that a withdrawal therefrom by one or all of the guarantors could be effected only by a written notice filed in the New York office of plaintiff to that effect has no bearing upon any transactions had with the Modesto Motor Company, Inc."

After the foregoing opinion was filed by the said District Court of Appeal, respondent petitioned for a rehearing of said cause, which petition was by said court denied and an opinion filed in response to said petition, in which it was pointed out that the contracts purchased by the plaintiff from the Modesto Motor Company, Inc., which are the basis of defendant's alleged liability, showed upon their face that they were between purchasers of automobiles and Modesto Motor Company, Inc., and not with the partnership of that name.

[7] The only question raised by respondent's petition for a hearing by this court which has not been answered by the foregoing opinions of the District Court of Appeal is predicated upon the language of the guaranty as follows:

> "The benefits and obligations hereof shall extend to and bind the heirs, administrators, successors, and assigns of the respective parties hereto."

It is contended that under this provision the defendant was bound to guaranty the obligations of the corporation as the successor or assign of the partnership. The contention seems worthy of but brief consideration. First, according to the record, the corporation was not the successor or assign of the partnership. Both entities existed at the same time and conducted different business operations. Second, the parties to the contract of guaranty were the plaintiff and the defendant, and not the Modesto Motor Company. The record, therefore, presents no question involving the heirs, administrators, successors, or assigns of the respective parties to the contract of guaranty.

The judgment is reversed.

We concur: WASTE, C. J; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; SHENK, J.; CURTIS, J.

200 Cal. 389

FIRST NAT. BANK OF OAKDALE v. BRASHEAR et al. (Sac. 3774.) *

(Supreme Court of California. Feb. 8, 1927. Rehearing Denied March 3, 1927.)

1. Chattel mortgages ⚷127 — Bank, taking mortgage on crops to be sown during following year, had no lien where cropper abandoned lease prior to sowing crop.

Mortgagee, taking chattel mortgage from cropper covering crops to be raised during succeeding year, had no interest in crop where mortgagor abandoned land and lost interest therein prior to sowing crop, as lien of crop mortgage attaches only to interest which mortgagor may have in crops after they have come into being by planting of seed from which they are grown.

2. Husband and wife ⚷265—Cropper, who signed lease without wife's joining, could transfer and abandon his interest therein without wife's consent.

In action by bank to foreclose mortgage on crop, sought after mortgagor abandoned his interest in lease as cropper, cropper's written surrender of interest *held* effective, though not signed by wife, where lease was executed by husband alone, lease being merely chattel real with which husband had full power to deal, and where cropper and wife abandoned premises.

3. Husband and wife ⚷265—Interest of husband as cropper under lease is "chattel real," over which wife has no control.

Interest of cropper in lease is "chattel real," with which husband has full power to act by way of transfer or abandonment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chattels Real.]

4. Landlord and tenant ⚷325 — Interest of cropper in lease is chattel real.

Cropper's interest in lease to premises to be cropped is chattel real.

5. Chattel mortgages ⚷127—Cropper's abandonment of lease and premises, of which landlord resumed possession, destroyed interest of cropper's mortgagee in crops sown after abandonment.

Where cropper executed chattel mortgage on crop to be grown during following year and thereafter executed written surrender of interest and abandoned possession of premises to landlord's assignee, who seeded land to crop, mortgagee had no interest in premises or in crops due to mortgagor's abandonment prior to planting thereof.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the First National Bank of Oakdale against E. E. Brashear and others, to foreclose a chattel mortgage. Judgment limiting plaintiff to recovery on its note, and plaintiff appeals. Affirmed.

Griffin, Boone & Boone and Edward T. Taylor, all of Modesto, for appellant.

T. B. Scott, W. H. Hatton, Vernon F. Gant, and Thomas M. Anaya, all of Modesto, for respondents.

RICHARDS, J. This appeal is prosecuted by the plaintiff in an action wherein the latter sought to foreclose a chattel mortgage which had been executed to it by the defendants E. E. Brashear and Marie Brashear on October 22, 1921, to secure a promissory note for the principal sum of $6,300, also then executed, and which note provided for interest and future advances. The mortgage in question was in form a crop mortgage, by the terms of which the Brashears mortgaged to the plaintiff the crops growing and to be grown during a series of succeeding years upon a certain tract of land consisting of 1,000 acres, which had been subleased to said E. E. Brashear during the year 1920 by two certain parties, named Collins and Cathey, who were in turn, the lessees of a much larger tract of land, which embraced the above acreage, from the Turlock irrigation district, the owner thereof. The sublease to E. E. Brashear provided that the latter should summer fallow at least 300 acres of said subleased land each year, and that, in the event of his failure so to do, his lease should become null and void. It was while he was the holder of said sublease that E. E. Brashear and his wife executed and delivered to the plaintiff the note and mortgage above mentioned, and which mortgage purported to cover two-thirds of the crops grown and to be grown upon said land.

In July, 1920, said Collins and Cathey assigned their lease of the larger tract to one J. T. Denton, and upon the date thereof the irrigation district executed a new lease to Denton covering the same property for a lengthened term of years and at a reduced rental. Upon the same date Denton executed a new sublease to Brashear for the remainder of the term covered by his former lease and containing the same clause relative to summer fallowing during the term thereof of 300 acres of the subleased land. During the spring of the year 1922 and while the defendant E. E. Brashear and his wife were in possession of the premises thus subleased, he proceeded to summer fallow approximately 400 acres of said land preparatory to planting the same with grain during the proper planting season of that or the following year. After having done so, and being apparently much involved financially, Brashear applied to the plaintiff for further credit; which application being rather coldly received, Brashear concluded to surrender his sublease to his immediate landlord, Denton, and abandon the premises, and he accordingly, on or about September 21, 1922, executed and caused to be recorded a formal surrender of said sublease to said Denton, and shortly thereafter Brashear and his wife abandoned said premises and went to live elsewhere.

Thereupon said Denton went into possession of the premises thus surrendered and abandoned, and subsequently thereto and on October 22, 1922, made and entered into an agreement with the defendant Huddleson, which agreement was in the form of a cropping lease covering about 360 acres of said 1,000-acre tract, wherein it was provided that said Huddleson was to plant and cultivate a crop or crops of grain upon said land which had theretofore been summer fallowed, and was upon the harvesting thereof to deliver to Denton one-fourth of the crops thus sown and harvested. Huddleson, under this agreement, went into the possession of said 360 acres of land and proceeded to plant, cultivate, and harvest a crop of grain thereon, while Denton proceeded to plant and harvest a crop of grain upon some 50 acres of said already summer fallowed land of which he retained possession.

In August, 1923, while the crops so seeded and cultivated by defendants Huddleson and Denton were in process of being harvested, the plaintiff herein commenced this action, making Brashear and his wife and also Denton and Huddleson defendants therein, seeking to foreclose its aforesaid crop mortgage upon the crops thus grown upon said land. A receiver was appointed in said action, who took possession of the crops and harvested and sold the same under order of said court and deposited the proceeds of such sale with the clerk of the court to await the outcome of said action. The case, when the issues were made up, was first brought to trial before a jury, but the trial court presently concluded that the action was equitable in its nature, and after discharging the jury proceeded to hear and determine the same. By its findings of fact and conclusions of law, the trial court found and concluded that the plaintiff was entitled to judgment against E. E. Brashear and his wife upon their promissory note to it for the amount remaining due thereon, but that, as to the crops and the proceeds thereof grown and harvested by Huddleson and Denton upon said premises, the plaintiff was entitled to no relief. From the judgment which followed to the same effect, the plaintiff has prosecuted the present appeal.

[1] The sole question presented to the court for consideration upon this appeal is as to whether or not the crop mortgage, which had been given by the Brashears to the plaintiff, had become so far effective upon the summer fallowing work upon said premises which had been done by the Brashears in the spring of 1922 as to entitle the plaintiff to enforce its crop mortgage against the crops thereafter sown and grown upon said premises, when it appeared that the same had been sown and grown thereon after the surrender and abandonment of said premises and of his sublease thereof by said Brashear, and when the possession of said premises had been resumed by Denton and a new cropping agreement had been entered into as between himself and the defendant Huddleson, and when the latter, in pursuance thereof, had sown and grown the crops which were sought to be subjected to the lien of the plaintiff's mortgage. It is the contention of the appellant that, when the summer fallowing of that portion of the said premises had been done by the Brashears, a sufficiently decisive step had been taken in the direction of the planting and growing of the crop or crops of grain thereon as would suffice to entitle the plaintiff to assert the lien of his mortgage against such crops as were thereafter grown upon said summer fallowed premises, even though the Brashears had surrendered the possession of said lands to their lessor, who had, in turn, executed a new cropping lease to the succeeding tenant Huddleson, by whom the crops sought to be subjected to said mortgage had been actually sown and grown.

We are unable to agree with this contention, for while it is true that a crop mortgage may be made to cover the crops thereafter to be sown and grown upon leased land, as was held by this court in the case of Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718, and while it is true, as stated in that case, that such a mortgage has a potential existence during the period prior to the actual planting of the seed in said land upon which the crops to be subjected to said mortgage are to be grown, our attention has been called to no case, either in this or in any other jurisdiction, which goes so far as to hold that such a crop mortgage shall pass the point of such potential existence at any time prior to the actual planting with seed of said land. The rule applicable to this class of securities may seem to be an arbitrary one, but it has nevertheless been given universal application and has never, so far as we have been advised by the appellant or have investigated the authorities upon our own account, been extended to a case wherein the land, although plowed or summer fallowed by the tenant, has passed, through his surrender of his lease, back to his landlord or into the possession and control of others who have thereafter undertaken to plant and grow the crops thereon. The case of Isbell v. Slette, 52 Mont. 156, 155 P. 503, presents a practically identical situation to the case at bar. The Montana statutes relating to crop mortgages are similar to our own. The Supreme Court of Montana, after citing the case of Arques v. Wasson, supra, proceeded to hold that the crop mortgage in that case could not be held to attach to the crops planted and grown upon the leased premises after the lessee had parted with his possession and leasehold interest therein. A similar ruling was made by the Supreme

Court of Minnesota in the case of Simmons v. Anderson, 44 Minn. 487, 47 N. W. 52, and a like holding was made by the Supreme Court of Iowa in the case of Gammon v. Bull, 86 Iowa, 754, 53 N. W. 340. The text-writers recognize and state the general rule to be that the holder of a crop mortgage has no interest in or lien upon the land, but that the lien of such mortgage attaches only to the interest which the mortgagor may have in the crops after they have come into being by the planting of the seed wherefrom they are grown (6 Cyc. p. 1048; 11 Corp. Jur. at page 444), in which latter authority the foregoing cases from Montana and Minnesota are cited with approval.

[2-4] The appellant, however, further contends that the written and recorded surrender of his lease by Brashear was void for the reason that the writing evidencing such surrender was not signed by the wife of Brashear. The theory of the appellant in making this contention is apparently that the leasehold interest of said Brashear was community property which the husband could not transfer without the written consent of his wife. This contention has no merit for the reason that the lease of the premises by Brashear was executed by himself alone, his wife not joining therein, and that the same amounted in law merely to a chattel real with which the husband had full power to deal. But even were it otherwise, the undisputed evidence disclosed that, after such written surrender of his said lease by Brashear, both he and his wife abandoned said leasehold premises and their immediate landlord accepted such surrender and abandonment and resumed possession of the premises. All interest of the Brashears therein was thus terminated, and with such termination all rights of their mortgagee as to crops not yet planted upon the premises came to an end, under the authorities above referred to.

[5] It follows necessarily that the plaintiff retained no interest whatever in the premises, or in the crops thereafter to be sown and grown thereon, and the trial court was not, accordingly, in error in holding that the plaintiff had no lien upon the crops planted upon said premises by the defendants Denton and Huddleson, and hence no right to receive any portion of the proceeds thereof which had resulted from the harvesting and sale of said crops by the receiver and the deposit of the proceeds thereof with the court to abide the result of the judgment in said action.

No appeal having been prosecuted from said judgment by the defendants E. E. and Marie Brashear as to that portion thereof which bound them to the payment of their promissory note to the plaintiff, it follows that said judgment as to the respondents Denton and Huddleson should be and the same is hereby affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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200 Cal. 310

In re LEE'S ESTATE. (S. F. 12036.)★

(Supreme Court of California. Jan. 29, 1927. Rehearing Denied Feb. 18, 1927.)

1. Divorce 🔑172—Unimpeached judgment of divorce is conclusive as to jurisdiction of parties and cause, and that they had been married, and that sufficient grounds were alleged and proved (Civ. Code, § 60; Code Civ. Proc. §§ 1908, 1916, 1917).

On claim to decedent's estate as his daughter, where divorce between claimant's mother and decedent was not impeached on legal ground, under Code Civ. Proc. §§ 1908, 1916, 1917, jurisdiction over cause and parties and finding that ceremony in which parties participated resulted in marriage, that they were married persons when case was tried, that sufficient grounds for divorce had been alleged and proved, must be assumed, regardless of Civ. Code, § 60, prohibiting marriage between white persons and those of other races.

2. Divorce 🔑7—Divorce proceeding in relation to marriage status and termination thereof is one "in rem."

Divorce proceeding, in so far as it relates to marriage status, is one "in rem," brought to establish judicially such status and for dissolution thereof on finding that it exists.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Rem.]

3. Divorce 🔑168, 172—Divorce is binding on all world as to determination of marital status, and is immune from collateral attack, except on statutory grounds (Code Civ. Proc. § 1916).

Judgment of divorce is one in rem, binding on all world as to determination of marital status, and is immune from collateral attack, except on grounds specified by Code Civ. Proc. § 1916.

4. Bastards 🔑3—Child born in wedlock is presumed legitimate, and entitled to estate of deceased father, and divorce of parents makes presumption conclusive as to persons other than husband or wife, or descendants (Civ. Code, §§ 193, 195).

Judgment of divorce between mother of claimant of estate as heir of decedent and decedent was conclusive determination of existence of marriage between them, and child born during such marriage was entitled to presumption of legitimacy, under Civ. Code, § 193, which opposing parties, who were not husband or wife, or descendants of either, under section 195 could not dispute, and such child was entitled to decedent's estate.

5. Trial 🔑396(2)—Finding that claimant was not heir of decedent, based on inadmissible evidence, held erroneous.

Finding that claimant was not heir of decedent, based on inadmissible evidence of her

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★Rehearing denied.

illegitimacy, *held* erroneous as not supported by any competent evidence.

6. Judgment ⚷305—Where complete findings were made showing claimant was entitled to estate, motion to set aside judgment denying claim and to enter new judgment should have been granted.

Where trial court made sufficient findings based on competent evidence to entitle claimant to estate of decedent, her motion to set aside judgment denying her claim, based on incompetent evidence of her illegitimacy, and to enter new and different judgment on same findings, should have been granted.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

In the matter of the estate of Robert S. Lee, deceased. Action by Josephine Marie Lee Wrynn against Kitty Tooty Johnson and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

See, also, 241 P. 851.

Chas. N. Douglas, of San Francisco, for appellant.

W. W. Watson and Joseph T. Curley, both of San Francisco (Charles S. Peery, of San Francisco, of counsel), for respondents.

SHENK, J. Robert S. Lee died on the 20th day of September, 1922, in the city and county of San Francisco, leaving an estate therein consisting of real and personal property of the appraised value of $17,784.35. On the next day his will, bearing date December 31, 1918, was filed with the clerk of the superior court in and for said city and county. After proceedings duly taken the will was proved and admitted to probate. Bequests of $100 each were left to some 15 different institutions and individuals, including Kitty Tooty Johnson, who was also made residuary devisee and legatee. None of the persons named in the will was related to the decedent. The first and final account of the executor was settled and allowed and the court postponed distribution of the estate until it was determined to whom distribution should be made pursuant to the issue of heirship tendered by the petition of Josephine Marie Lee Wrynn, who claimed to be the daughter of the decedent and a pretermitted heir, and who prayed that the entire estate be distributed to her. Upon the trial of the issue the court found that the petitioner was not the child or any heir at law of the decedent, and therefore not entitled to any portion of said estate. From a judgment entered accordingly Mrs. Wrynn prosecutes this appeal.

The court found that Robert S. Lee, the decedent, and Marie Dierse, engaged in a marriage ceremony on the 16th day of May, 1895, in the city and county of San Francisco; that they lived together until they separated about three years thereafter; and that the decedent commenced an action for and was, on March 26, 1903, granted a divorce from Marie Dierse Lee in the superior court of the city and county of San Francisco. The appellant was born on July 5, 1895, and it is undisputed that she was the daughter of Marie Dierse Lee, the same person who engaged in the marriage ceremony with the decedent and who was divorced by the decedent about eight years thereafter. It also appears as an undisputed fact that the appellant was not named in said will.

The appellant bases her claim to heirship first upon the presumption of legitimacy declared by section 193 of the Civil Code that "all children born in wedlock are presumed to be legitimate." She then contends that under section 195 of the Civil Code "the presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them," and that none of the parties to the present proceeding belongs to any of the classes of persons entitled to dispute her legitimacy.

Over the objection of the appellant evidence was introduced by the respondents to prove, and the court found, that the decedent was a mulatto; that the mother of the appellant is a white woman; that the mother was pregnant about seven months before she knew or became acquainted with the decedent; and that a white man was the father of the appellant. From the facts so found the trial court concluded that the deceased and Marie Dierse were never legally married; that the claimant was not the child of the decedent, and therefore not a pretermitted or any heir of the decedent. It is insisted by the respondents, first, that the said marriage was void under section 60 of the Civil Code, which provides that "all marriages of white persons with negroes, Mongolians, or mulattoes are illegal and void," and, secondly, that since it appears that the decedent was not the father of the appellant the latter was not the "issue" of said void marriage so as to entitle her to the benefit of section 1387 of the Civil Code, which provides that "the issue of all marriages null in law * * * are legitimate."

It is argued by the appellant that evidence to the effect that said marriage was illegal and that her natural father was a white man was inadmissible to establish her alleged illegitimacy under the facts here presented. The determination of this question depends upon the effect to be given the decree of divorce granted March 26, 1903. It is the contention of the appellant that the effect of that decree was judicially to establish the relationship or status matrimonially of the parties to said action and that such determination was and is conclusive under the provisions of section 1908 of the Code of Civil Procedure, which provides:

> "The effect of a judgment * * * before a court or judge of this state * * * having jurisdiction to pronounce the judgment * * * is as follows: (1) In case of a judgment * * * in respect to the personal, * * * or legal condition or relation of a particular person, the judgment * * * is conclusive upon * * * the condition or relation of the person."

The respondents dismiss the point with the statement that it is unworthy of consideration. We are satisfied that the contention may not be so or at all dismissed.

[1] The judgment of divorce was not impeached, nor was it sought to be impeached by the respondents on any legal ground. Section 1916, Code Civ. Proc. In the absence of such impeachment it must be assumed that the court had jurisdiction over the cause and over the parties. Section 1917, Code Civ. Proc. It must further be assumed that the court found in that action, among other things, that the ceremony in which the plaintiff and defendant participated resulted in their marriage; that they were married persons when the cause was tried; that sufficient grounds for divorce were alleged and proved; and that the plaintiff, the decedent herein, was entitled to a judgment dissolving the bonds of matrimony theretofore and since the 16th day of May, 1895, existing between the parties.

[2, 3] A divorce proceeding, in so far as it relates to the marriage relation of the parties to the action and the termination of the marriage status, is a proceeding in rem. In re Newman, 75 Cal. 213, 16 P. 887, 7 Am. St. Rep. 146. Such an action is brought for the purpose of establishing judicially the matrimonial status of the parties, and, if it be found that a matrimonial relation exists, then for the purpose of a dissolution of that relation. Gridley v. Boggs, 62 Cal. 190, 202; De la Montanya v. De la Montanya, 112 Cal. 101, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165. As a judgment in rem it is binding upon all the world as to the determination of the marital status of the parties and is immune from collateral attack (People v. Perris Irrigation District, 132 Cal. 289, 64 P. 399, 773; 15 Cal. Jur. 239), except on grounds specified by the Code (section 1916, Code Civ. Proc.), none of which is urged here.

[4] The judgment here under consideration was a conclusive determination of the status of the parties to said action as husband and wife from May 16, 1895, to the dissolution of that relation by the judgment of divorce on March 26, 1903. Said judgment was and is binding upon the parties to the present proceeding and constitutes a judicial determination of a state of "wedlock" existing between the parties to said action when the appellant was born on July 5, 1895. Since the appellant must therefore be held to have been born in wedlock, she was and is entitled to the presumption of legitimacy declared by section 193 of the Civil Code, and, since none of the respondents nor any person named in said will is included within the class enumerated in section 195 of the Civil Code as entitled to dispute the legitimacy of the appellant, all question as to her alleged illegitimacy is here foreclosed. In re Madalina, 174 Cal. 693, 164 P. 348, 1 A. L. R. 1629.

The respondents rely on Estate of Gregorson, 160 Cal. 21, 116 P. 60, L. R. A. 1916C, 697, Ann. Cas. 1912D, 1124, where it was said:

> "A marriage prohibited as incestuous or illegal and declared to be 'void' or 'void from the beginning' is a legal nullity and its [in]validity may be asserted or shown in any proceeding in which the fact of marriage may be material."

Assuming that the foregoing statement was necessary to the decision and that it correctly declared the general rule, the question of a prior judgment of divorce as affecting the marital status was neither involved nor considered in that case and cannot be deemed determinative under the facts here presented. Other authorities cited and relied upon by the respondents are likewise not in point in the state of the record.

[5] As the evidence relating to the alleged illegitimacy of the appellant was inadmissible and the finding and conclusion of the court that she was not an heir of the decedent were predicated thereon, it follows that said finding and conclusion were not supported by any competent evidence in the case. Under the evidence material to the controversy the appellant was entitled to a judgment declaring that she was and is the sole heir of the decedent and as such entitled to the distribution of said estate.

[6] Sufficient findings were made by the court, based upon competent evidence, and there is none to the contrary, to entitle the appellant to a decree of distribution. After entry of judgment in the trial court appellant made a motion to set aside the judgment and to enter a new and different judgment on the same findings. This motion was denied. We think the motion should have been granted.

It is ordered that the judgment be and the same is hereby reversed, and the cause is remanded, with directions to enter a judgment on the findings declaring the appellant to be the sole heir of the decedent and distributing to her the property constituting said estate.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

200 Cal. 374

WAYBRIGHT et al. v. ANDERSON et al.
(L. A. 8433, 8434.)

(Supreme Court of California. Feb. 4, 1927.)

1. Dismissal and nonsuit 🔑81(5) — Opening judgments of dismissal held not abuse of discretion, where delay in amending complaints, after demurrers were sustained, was based on verbal stipulation thought to allow indefinite time (Code Civ. Proc. § 473).

Setting aside judgments of dismissal in two actions involving identical parties *held* not abuse of discretion, where failure of plaintiffs' attorneys to amend complaints within time allowed after sustaining demurrers was due to verbal stipulation under which attorneys understood indefinite time was to be allowed, and where notice of motion to vacate was served within month after entering judgment, as judgment was taken through mistake or excusable neglect of plaintiffs; Code Civ. Proc. § 473, providing that judgment so taken may be set aside on application made within reasonable time.

2. Appeal and error 🔑957(1)—Judgment 🔑139—Order setting aside default judgment is discretionary and will not be disturbed except on clear showing of abuse of discretion.

Motion to set aside default judgment is addressed to sound discretion of trial court, and court's order setting aside judgment will not be disturbed by appellate court except on clear showing that discretion has been abused.

3. Appeal and error 🔑957(1)—Appellate court will listen more readily to appeal from order refusing to set aside default, than where motion has been granted.

On appeal, court will affirm order setting aside default, where result is to compel trial upon merits, more readily than where result would be to allow judgment by default to stand, as policy of law is to favor hearing on merits.

4. Judgment 🔑143(1)—Statute providing for setting aside judgments, taken against party through mistake or excusable neglect, should be liberally construed (Code Civ. Proc. § 473).

Code Civ. Proc. § 473, providing for setting aside judgments, taken against party through mistake, inadvertence, surprise, or excusable neglect, should be liberally construed so as to dispose of cases upon merits.

5. Judgment 🔑143(17) — Whether judgments were taken through plaintiffs' excusable neglect depended on whether counsel reasonably believed verbal stipulation gave extension for amending complaints (Code Civ. Proc. § 473).

In determining whether judgments should be set aside, under Code Civ. Proc. § 473, for excusable neglect, where excuse was verbal stipulation postponing time for filing amended answer, whether sufficient excuse existed depended on reasonable belief of plaintiffs' counsel as to verbal stipulation.

6. Appeal and error 🔑1024(4)—On appeal from order setting aside judgment, decision on conflicting affidavits of counsel held conclusive.

On appeal from order setting aside judgment, decision of lower court was conclusive on appeal in so far as affidavits of counsel were in conflict as to understanding regarding time of filing of amended complaints.

7. Appeal and error 🔑946—Abuse of discretion by trial court is not shown by fact that appellate court would have decided otherwise.

That appellate court would, upon same showing, have reached opposite conclusion does not indicate that trial court abused discretion.

8. Judgment 🔑143(17) — Delay in amending complaints based on verbal stipulation with opposing counsel held excusable, warranting setting aside of judgments of dismissal (Code Civ. Proc. §§ 283, 473).

Though stipulation of counsel cannot generally be enforced unless put in writing or entered in minutes of court, under Code Civ. Proc. § 283, delay of plaintiffs' counsel in amending complaints after demurrers were sustained and time for filing had expired *held* excusable, under Code Civ. Proc. § 473, allowing judgments to be set aside when taken through party's excusable neglect, where plaintiffs' counsel understood by verbal stipulation with opposing counsel that time was indefinitely extended.

9. Judgment 🔑143(12)—Mistake of plaintiffs' counsel in failing to amend complaints within time allowed held not inexcusable, preventing setting aside judgments of dismissal (Code Civ. Proc. § 473).

Mistake of plaintiffs' counsel in failing to amend complaints within time allowed after demurrers had been sustained *held* not inexcusable mistake, requiring reversal of order setting aside judgments of dismissal, in accordance with Code Civ. Proc. § 473.

10. Judgment 🔑143(2) — Whether judgment should be set aside for mistake depends upon whether mistake of person, against whom judgment was taken, was inexcusable (Code Civ. Proc. § 473).

Whether party, against whom judgment was entered, is entitled, under Code Civ. Proc. § 473, to have judgment set aside depends on whether mistake, through which judgment was taken, was inexcusable.

11. Judgment 🔑158—Plaintiffs, against whom judgments were entered, were not required to file affidavits of merits, where verified amended complaints were served and filed.

On motion to vacate judgments, taken through mistake or excusable neglect of plaintiffs in failing to amend complaints within time allowed after sustaining of demurrers, serving and filing of verified amended complaints rendered unnecessary presentation and filing of affidavits of merits.

12. Appeal and error 🔑876—Whether verified amended complaints, filed and served on motion to vacate judgments, stated causes of action held for trial court.

On appeal from order setting aside judgments of dismissal after demurrers to complaint had been sustained, whether verified amended complaints stated causes of action *held* for decision of trial court.

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13. Judgment ⚷153(1)—Application to vacate judgments by notices of motion within month of entry and notice thereof held seasonable (Code Civ. Proc. § 473).

Where, within one month of entry of default judgments of dismissal and notice thereof, plaintiffs' attorneys served and filed notices of motion to vacate, applications *held* presented within reasonable time, as required by Code Civ. Proc. § 473.

In Bank.

Appeals from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Actions by John S. Waybright and another against W. O. Anderson, E. S. Babcock, Warren C. Wolf, and another. Judgments of dismissal, entered against plaintiffs in both actions, were ordered set aside and vacated, and the two defendants first named appeal. Affirmed.

A. B. Shaw, Jr., and I. W. Stewart, both of Los Angeles, for appellants.

Moote & Patterson, of Los Angeles, for respondents.

PER CURIAM. The above-named appellants have prosecuted appeals from two orders of the superior court of the county of Los Angeles, setting aside and vacating judgments of dismissal entered against the plaintiffs in two actions involving the same parties. A stipulation that the two appeals may be consolidated and considered upon one set of briefs is on file herein.

The first of said actions was instituted on June 5, 1924, and is founded upon an alleged extortion. On the following day a second action was commenced and had for its purpose the recovery of a treble penalty. A demurrer to each of said complaints was interposed and sustained on the ground of defect of parties plaintiff. The time within which the plaintiffs might amend their complaints expired on August 4, 1924, without their having so amended. Thereafter and on August 12, 1924, a judgment of dismissal was entered in each of said actions on motion of the defendants. On the next succeeding day the plaintiffs attempted to serve their amended complaints, and were thereupon, for the first time, informed of the entry of the judgments of dismissal. Subsequently, and on September 10, 1924, the plaintiffs served and filed in each action a notice of motion to set aside the judgment theretofore entered therein. An affidavit of counsel and a copy of an unverified amended complaint accompanied each notice of motion. On October 1, 1924, and before final hearing on said applications, the plaintiffs served and filed in each action a new notice of motion to vacate and attached thereto copies of new and verified amended complaints. A hearing on each of said applications was had on October 8, 1924, at which time the judgments of dismissal were set aside by the trial court and the verified amended complaints ordered filed. As already indicated, it is from the orders setting aside the judgments of dismissal that the appellants have appealed.

[1, 2] Preliminary to a consideration of the propriety of the trial court's action in the instant cases it may be stated that the authorities uniformly declare that a motion to set aside a default judgment is addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse in the exercise thereof, an appellate court will not disturb the order of the court below. Downing v. Klondike Min. Co., 165 Cal. 786, 788, 134 P. 970; Alferitz v. Cahen, 145 Cal. 397, 398, 78 P. 878; O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105; McGowan v. Kreling, 117 Cal. 31, 35, 48 P. 980; Harbaugh v. L. & W. Co., 109 Cal. 70, 72, 41 P. 792; Sampanes v. Chazes, 54 Cal. App. 612, 613, 202 P. 462; Porter v. Bryson, 35 Cal. App. 688, 691, 170 P. 1068; Watson v. Col. Basin Dev. Co., 22 Cal. App. 556, 561, 135 P. 511.

[3] Moreover, it is the policy of the law to favor, wherever possible, a hearing on the merits, and appellate courts are "much more disposed to affirm an order when the result is to compel a trial upon the merits than it is when the judgment by default is allowed to stand, and it appears that a substantial defense could be made." O'Brien v. Leach, supra; Downing v. Klondike Min. Co., supra; Porter v. Bryson, supra. This is clearly indicated in the case of Berri v. Rogero, 168 Cal. 736, 740, 145 P. 95, 97, wherein it is stated that:

> "The policy of the law is to have every litigated case tried upon its merits, and it looks with disfavor upon a party who, regardless of the merits of his case, attempts to take advantage of the mistake, surprise, inadvertence, or neglect of his adversary. * * * A broad discretion is allowed to courts in granting relief against default, and it is in cases only where the lower court has abused its discretion that the appellate court will reverse its action."

[4] Section 473 of the Code of Civil Procedure is a remedial provision and is to be liberally construed, so as to dispose of cases upon their substantial merits, and to give to the party claiming in good faith to have a subsisting cause of action or a substantial defense thereto an opportunity to present it. It is for this reason that appellate courts more readily listen to an appeal from an order refusing to set aside default than where the motion has been granted, since in such case the defaulting party may be deprived of a substantial right. Nicoll v. Weldon, 130 Cal. 666, 63 P. 63.

The affidavits of counsel, presented to the trial court upon the hearing of the applications herein, show that a telephone conversation was had between opposing counsel at a time subsequent to the expiration of the period within which the plaintiffs were to have amended their complaints; that a verbal stipulation or understanding of some sort was entered into whereby the plaintiffs were to be permitted to thereafter file their amended complaints; and that there was a misunderstanding or divergence of opinion between counsel as to the effect of their verbal stipulation. Respondents' counsel in his affidavit in support of the motions to vacate asserts, in part, that:

> He "felt absolutely assured the filing of the amended complaint upon any day that it might be ready would be satisfactory to the defendant. Absolutely no statement was made by Mr. Shaw [counsel for appellants] to the effect that it would have to be filed on any day certain or that default would be taken. If such had been our understanding, a written stipulation would have been obtained, a court order extending our time secured or the pleading would have been duly filed. * * * The defendants' attorneys did not notify us of their intention to disregard our verbal stipulation or inform us that our default would be taken if said complaint was not in within a given period of time. Our office had at all times acted upon and relied upon such verbal understanding in good faith."

The counter affidavit of appellants' counsel states, in part, that in their telephone conversation respondents' counsel said:

> "He would see to it that said amended complaint was served and filed by Friday, August 8, 1924, to which affiant responded, 'All right.' That said Mr. Patterson [counsel for respondents] did not state that 'the amended complaint would be served and filed in a few days,' or at any indefinite time, and affiant did not say to him, in words or in substance, nor did affiant orally or otherwise stipulate, that plaintiffs' attorneys might have an indefinite or uncertain time, or such time as they desired, or any other time than up to and including said Friday, within which to serve and file said amended complaint."

[5-7] As indicated in the affidavit of respondents' counsel, he interpreted the agreement with opposing counsel as leaving the date or time open within which amended complaints might be served and filed, and he further believed that judgments of default or dismissal would not be entered in the interim. In our opinion, this belief was not, under the circumstances, unreasonable, and "it is his belief and the reasonableness thereof that controls the question." Savings Bank v. Schell, 142 Cal. 505, 76 P. 250. The decision of the court below is conclusive on appeal, in so far as the affidavits of counsel are in conflict. Savings Bank v. Schell, supra. That an appellate court would have, upon the same showing, reached a conclusion opposed to that of the trial court is not indicative of an abuse of discretion upon the part of said lower court. Alferitz v. Cahen, supra.

[8-10] We are familiar with the general rule that a stipulation of counsel cannot be enforced unless put in writing, or entered in the minutes of the court (section 283, Code Civ. Proc.), but the courts have been indisposed to give this otherwise general rule application to default judgments (McGowan v. Kreling, supra; Johnson v. Sweeney, 95 Cal. 304, 306, 30 P. 540; McGillivray v. Owen, 30 Cal. App. 763, 765, 159 P. 452). Under the circumstances presented herein, the neglect or delay of respondents' counsel—for it would not have been neglect if his belief in the effect of the verbal stipulation had been well founded—was excusable, within the meaning of the statute which requires a default to be set aside, where the same was taken through the excusable neglect of a party. In so declaring, we are not unmindful that appellants urge that:

> "The law requires the excuses for negligence to be shown."

Aside from our opinion that the affidavits filed herein sufficiently explain and excuse the respondents' delay in pleading, it may be said that:

> "In view of the settled disposition of the appellate courts in viewing the action taken under section 473 of the Code of Civil Procedure, * * * the question is rather as to whether the affidavits show that the mistake was inexcusable, and that we are not prepared to hold." Porter v. Bryson, supra.

The order of a trial court vacating a default judgment has been sustained on appeal where the failure to seasonably plead resulted from an erroneous office filing by counsel (Downing v. Klondike Min. Co., supra); also, where counsel erroneously assumed service of summons had been had in the county wherein his client resided (O'Brien v. Leach, supra); and where counsel made entry of a wrong date of trial in his diary (Hagenkamp v. Equitable L. Assur. Soc., 29 Cal. App. 713, 717, 156 P. 520). These authorities sufficiently illustrate that, in the absence of a clear showing of abuse in the exercise of its discretion, the order of the lower court setting aside a default will not be disturbed on appeal. There has been no showing herein that the court below abused its discretion.

[11, 12] What has been said adequately disposes of the first two contentions urged by the appellants on this appeal. As a third contention it is asserted that "no proper showing of merits was made." It is true that affidavits of merits were not filed herein, but, under the doctrine of Sampanes v. Chazes, supra, the service and filing of verified amended complaints rendered unnecessary the presentation and filing of affidavits of merits. We are not prepared to hold that said verified amended complaints fail to state causes of action, as urged by the appellants,

for this question is primarily one to be decided by the trial court.

[13] Nor can we agree with the appellants' final contention that respondents' applications to set aside the judgments of dismissal were not made within a reasonable time. The entry of the default in each action was brought to the knowledge of respondents' counsel on August 13, 1924, whereupon he served and filed notices of motion to vacate the same on September 10, 1924, and made application in open court on September 22, 1924. Under the provisions of section 473, Code of Civil Procedure, a motion to vacate and set aside a judgment must be presented within a "reasonable time," not exceeding six months. The applications herein were, in our opinion, seasonably made.

For the foregoing reasons, the orders appealed from are affirmed.

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81 Cal. App. 1

PEOPLE v. DENAULT.

Ex parte LUNA.

(Cr. 1382, 1460.)

(District Court of Appeal, Second District, Division 2, California. Jan. 24, 1927.)

1. Criminal law 🔑90(2)—Justice courts have no jurisdiction of high grade misdemeanors.

Justice courts do not have jurisdiction in case of high grade misdemeanors.

2. Criminal law 🔑88—Jurisdiction vested in municipal court is exclusive of like jurisdiction in superior court (Const. art. 6, §§ 1, 5, 11; St. 1925, p. 658, § 28; Pen. Code, § 1462, as added by St. 1925, p. 948).

Under Const. art. 6, §§ 1, 5, 11, whatever jurisdiction is vested in municipal courts by St. 1925, p. 658, § 28, and Pen. Code, § 1462, as added by St. 1925, p. 948, is exclusive of a like jurisdiction in the superior court.

3. Constitutional law 🔑56—Legislature may not vest jurisdiction in municipal courts over high grade misdemeanors committed in parts of county lying outside city boundaries (Const. art. 6, § 11).

Under Const. art. 6, § 11, Legislature has no authority to vest in municipal courts jurisdiction over high grade misdemeanors committed in parts of county lying outside boundaries of city within which municipal court has been established.

4. Courts 🔑26—Grant of jurisdiction over matters some of which are local confers only local jurisdiction, in absence of specific provision for extraterritorial jurisdiction.

Where a grant of jurisdiction to a court over various matters is made by a single sentence, and jurisdiction over some of them is necessarily local, entire grant confers only local jurisdiction, unless it be specifically provided in the grant that as to some of the matters mentioned an exercise of extraterritorial jurisdiction is intended.

5. Courts 🔑52—Grant of jurisdiction, formerly residing in superior court, to municipal court, must be strictly construed.

A grant of jurisdiction to municipal court which jurisdiction formerly resided in the superior court must be strictly construed, since municipal courts are inferior to superior courts, in that the superior may entertain appeal from municipal court.

6. Courts 🔑472(1)—Court is not ousted of jurisdiction by subsequent legislative enactment conferring jurisdiction on another court, unless intention is plainly manifested.

A court is not ousted of jurisdiction which it possesses over a subject by subsequent legislative enactment conferring jurisdiction on another court over the same subject, unless such intention is plainly manifested either by word of statute or by necessary implication therefrom.

7. Constitutional law 🔑12—Principles for construction of statutes apply to Constitutions.

General principles governing construction of statutes apply also to construction of Constitution.

8. Criminal law 🔑88—Constitution held not to authorize Legislature to confer jurisdiction on municipal courts over misdemeanors in territory lying outside city (Const. art. 6, §§ 1, 11).

Const. art. 6, § 11, authorizing Legislature to provide for jurisdiction of municipal courts except as otherwise specified, *held* not to authorize grant of jurisdiction under section 1, to municipal courts over misdemeanors committed in territory of county lying outside of limits of cities in which municipal courts were created, and jurisdiction as to such offenses resides in superior court.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Jack Denault was convicted of a high grade misdemeanor, and he appeals, his appeal being considered together with an application for habeas corpus by Felipe Luna, prayed to be directed to the sheriff of Los Angeles county to secure release of petitioner after conviction of high grade misdemeanor. Conviction of defendant Denault affirmed, writ of habeas corpus discharged, and prisoner remanded to custody.

In case No. 1382:

W. W. Judd, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

In case No. 1460:

A. T. Folsom, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

WORKS, P. J. The facts presented on the appeal and those alleged in the petition in the original proceeding are so similar (hereafter to be stated) that they present the same legal questions. Disposition of those questions, therefore, may be made by a single opinion and upon a statement alone of the few material facts presented upon the appeal.

[1] There are in the county of Los Angeles two municipal courts. Appellant was convicted of what is termed a high grade misdemeanor. The alleged offense was committed in territory of the county which lies outside the territory of the cities within which, respectively, the municipal courts hold their sessions. The ultimate question presented for decision is whether the superior court had jurisdiction of the offense. It is conceded by the parties—and correctly so—that a justice's court has no jurisdiction of such misdemeanors as that with which appellant was charged.

Section 28 of the act of the Legislature concerning municipal courts (Stats. 1925, p. 648) provides:

> "Each municipal court shall have original jurisdiction in all criminal cases amounting to misdemeanor, punishable by fine or imprisonment in the city or city and county, or county jail, or punishable by fine or such imprisonment where the offense charged was committed within the county in which the municipal court is established."

Section 1462 of the Penal Code as added by St. 1925, p. 948, reads, in part:

> "Whenever a municipal court shall have been established, * * * such court shall have exclusive jurisdiction of all misdemeanors punishable by fine or by imprisonment, or by both such fine and imprisonment, committed in the city, * * * where such municipal court is held. * * * In each city wherein a municipal court shall have been established, such courts shall also have jurisdiction over any misdemeanor committed in the county in which such city is located."

These enactments of the Legislature, if they do not infringe the provisions of the Constitution, confer upon the municipal courts a jurisdiction over such offenses as that with which appellant was charged, laying aside for the moment the question whether the jurisdiction so attempted to be conferred is exclusive, or whether it is concurrent with a jurisdiction resting in the superior court. The jurisdiction over such charges was without doubt vested in the latter courts before the passage by the Legislature of the enactments mentioned.

Sections 1, 5, and 11 of article 6 of the Constitution are material to a discussion of the questions which arise upon the appeal.

Section 1 reads:

> "The judicial power of the state shall be vested in the senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts, such municipal courts as may be established in any city or city and county, and such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county." Stats, 1923, p. 1678.

Section 5 provides, in part:

> "The superior courts shall have original jurisdiction * * * in all criminal cases amounting to a felony, and in all cases of misdemeanor not otherwise provided for. * * *" Stats. 1923, p. 1678.

Portions of section 11 follow:

> "In any * * * city which is governed under a charter * * * containing a population of more than forty thousand inhabitants, * * * a municipal court may be established as in this article provided, anything in this Constitution to the contrary notwithstanding. * * * Municipal courts shall have original jurisdiction, * * * in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less, and in all criminal cases amounting to a misdemeanor punishable by fine and imprisonment in the city * * * or county jail, or punishable by fine or such imprisonment [which offenses include what are known as high grade misdemeanors]. * * * The Legislature shall provide by general law for the Constitution, regulation, government and procedure of municipal courts, and for the jurisdiction thereof except in the particulars otherwise specified in this section, and for the establishment of municipal courts in cities [of the size and character above specified]. * * * Upon the taking effect of such general law, a municipal court may be established in any such city [upon the completion of certain preliminary steps]." Stats. 1923, p. 1679.

[2] If it be conceded for the moment that the above-quoted provisions of section 28 of the act of 1925 and of section 1462 of the Penal Code are not in excess of the terms of the Constitution upon grounds later to be discussed, it seems plain that the jurisdiction attempted to be conferred upon the municipal courts by them is exclusive and that the sections have ousted the former jurisdiction of the superior courts over the same matters. So much is apparent from Green v. Superior Court, 78 Cal. 556, 21 P. 307, 541. In that case it appeared that jurisdiction over certain offenses had been vested by the Constitution (article 6, § 5) in the superior court when "not otherwise provided for." Jurisdiction over the same offenses was later conferred by statute upon the police court of the city and county of San Francisco, which court was created by the Legislature under appropriate provisions of the Constitution. Green was indicted in the superior court in and for the city and county of San Francisco for the commission of one of those offenses.

He asked the Supreme Court for the writ of prohibition to halt proceedings under the indictment, and contended that the statute conferring jurisdiction on the police court vested an exclusive jurisdiction in that tribunal. The Supreme Court upheld the contention in the following language:

> "The evident purpose of the constitutional provision as evinced by its language, is that the jurisdiction of the superior court shall be conditioned upon the establishment of other courts upon which the same jurisdiction shall be conferred, and when that condition happens, and the jurisdiction is by the Legislature conferred upon such inferior courts, from that time the Constitution itself transfers such jurisdiction from the superior court and vests it in the inferior courts. From that time the jurisdiction is 'otherwise provided for,' and the jurisdiction of the superior court at once ceases."

That part of section 5 of article 6 of the Constitution which is above quoted is substantially the same as the language of the same section as it stood when it was construed in Green v. Superior Court. We are therefore of the opinion that whatever jurisdiction was vested in the municipal courts by section 28 of the act of 1925 and by section 1462 of the Penal Code is exclusive of a like jurisdiction in the superior court.

[3] The most disturbing question which is now before us is whether the Legislature was empowered by the Constitution to vest in the municipal courts a jurisdiction over high grade misdemeanors committed in parts of a county which lie outside the boundaries of any city in the county within which a municipal court has been established. It is contended that this question is concluded by the decision in Green v. Superior Court, but we think it is not. The police court whose jurisdiction was under consideration in that case was the police court of the city and county of San Francisco and the superior court whose jurisdiction was questioned was the superior court of the state of California in and for that city and county. The area which the police court was "of" and which the superior court was "in and for" was the same—the territory included within the exterior boundaries of the city and county. We should have the same situation here if the county of Los Angeles were coterminous with either the city of Long Beach or the city of Los Angeles, in which two cities municipal courts have been established. There is within the boundaries of the two cities, however, but a fraction of the territory of the county. It is that fact which renders Green v. Superior Court inapplicable and which makes the question here presented a difficult one.

A point arises from the language of the Constitution which must be considered as a stepping-stone to the discussion of the questions springing from the two enactments of the Legislature attempting to confer jurisdiction upon the municipal courts. The organic law itself vests a certain jurisdiction in those tribunals. We have already seen that section 11 of article 6 contains the provision:

> "Municipal courts shall have original jurisdiction * * * in all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to one thousand dollars or less, and of actions of forcible or unlawful entry or detainer where the rental value is one hundred dollars or less per month, and where the whole amount of damages claimed is one thousand dollars or less, and in cases to enforce and foreclose liens on personal property where the amount of such liens or the value of the property is one thousand dollars or less, and in all criminal cases [including high grade misdemeanors]."

[4-7] Does this language confer upon a municipal court jurisdiction over high grade misdemeanors committed in any part of the county within which the court is located or only over such offenses when they are committed within the limits of the city in which the court sits? As indicating that only a strictly local jurisdiction was intended to be conferred, it is to be observed that the grant of jurisdiction over misdemeanors made in the Constitution is coupled, in the same sentence, with a grant of jurisdiction over civil cases, including actions as to real property, and particularly over actions of forcible or unlawful entry or detainer. These latter actions—those affecting real property generally—are local in character (Code Civ. Proc. § 392), and although the section cited, strictly speaking, makes them local as to county only, the Legislature has heretofore regarded actions of entry or detainer, especially, as local in a more restricted sense. In the legislation (Code Civ. Proc. §§ 113, 1163) vesting a concurrent jurisdiction in such cases in the justices' courts and in superior courts, the jurisdiction of the former is limited to the township over which each justice presides. And it is to be noted in this connection that actions of entry and detainer were the only real actions over which justices' courts were given jurisdiction. These enactments of the Legislature, venerable in their age, and therefore well known to the public, furnish an aid to the construction of the Constitution. It must be assumed, we think, that the people had them in mind in reframing the organic law. We think, therefore, that the criminal jurisdiction conferred upon the municipal courts by the Constitution is strictly local as to each court; that is, that under the grant only those offenses are cognizable by it which are committed within the limits of the municipality in which the court was created and in which it sits. In a grant of jurisdiction to a court named as the municipal courts are, with the direct and positive provisions which the Constitution contains as to their location—as to the territoriality within which they may exist—it can hardly be supposed that the people could have intended an exercise of

an extraterritorial jurisdiction without saying so expressly. This statement must be true, especially, as it seems to us, under the form in which the grant of criminal jurisdiction is made. It accompanies a grant of civil jurisdiction which, in part, at least, is strictly local to each city in which a municipal court exists. Where a grant of jurisdiction over various matters is made by a single sentence, and the jurisdiction over some of them is necessarily local, it would appear that the entire grant confers only a local jurisdiction, unless it be specifically provided in the grant that as to some of the matters mentioned an exercise of extraterritorial jurisdiction is intended. This conclusion is apparently not in accord with the views of a late text-writer. He refers to section 11 of article 6 of the Constitution as containing a "general grant of jurisdiction in terms unlimited territorially" (Tuttle on Cal. Mun. Courts, § 37, p. 72), and the reference is made in such a connection as to induce the view that the author's purpose is to concede a county-wide jurisdiction to municipal courts solely for the reason that the Constitution does not expressly provide that the jurisdiction granted is intracity, although he hints at a different possibility elsewhere (section 42, p. 87). We have shown that at least a part of the jurisdiction granted is local to cities in which municipal courts may be created, and that fact, with the consequences which flow from it in a construction placed upon the entire grant, would seem to meet the suggestion made by the author in question. Irrespective of this consideration, however, we think the author's view is incorrect upon general principles. That part of the jurisdiction conferred upon the municipal courts by section 11 of article 6, not taken from the justices' courts, formerly was vested in the superior courts, which are left by the Constitution to exercise a higher jurisdiction than the municipal courts. This is evident from the fact that the amount limiting the jurisdiction of the latter courts in civil cases, and the grade of offenses by which their jurisdiction is limited in criminal cases, are both below the limits prescribed for the superior courts, and by the further fact that the superior courts are to entertain appeals from the municipal courts. The latter courts are then inferior to the superior courts. Under such circumstances it seems that a grant of jurisdiction to the municipal court, which jurisdiction formerly resided in the superior court, must be strictly construed, and that, therefore, the failure of the Constitution to specify the territorial limits of jurisdiction operates as a restriction of the grant contained in it. Under Green v. Superior Court, supra, whatever jurisdiction is granted by the Constitution to the municipal courts is exclusive of the jurisdiction formerly vested in the superior court. The grant in section 11 of article 6, doubtless, comes within the meaning of the clause "otherwise provided for," contained in section 5. Upon the authority of the case cited the jurisdiction granted by section 11 is, doubtless, exclusive within the city limits of each municipality within which a municipal court is established; but we think the decision goes no further, for the reasons already stated, and because no question as to territorial jurisdiction was involved in it. To extend the effect of the case beyond the point indicated would be to violate a well-established proposition of law:

> "A court is not ousted of the jurisdiction which it possesses over a subject by a subsequent legislative enactment conferring jurisdiction on another court over the same subject, unless such an intention is plainly manifested either by the words of the statute or by a necessary implication therefrom." 15 C. J. 1131.

And it is a familiar rule that—

> "The general principles governing the construction of statutes apply also to the construction of Constitutions." 12 C. J. 699.

The grant of jurisdiction contained in section 11 is "subsequent" to the grant to the superior court contained in section 5, for in that respect the latter section has been in the same form for many years. The grant contained in section 11 was made at the general election of 1924.

[8] The question of which we have just made disposition is not free from difficulty, by any means, but we now come to one which is yet more troublesome. Did the people, by the clause to the effect that "the Legislature shall provide by general law * * * for the jurisdiction" of municipal courts "except in the particulars otherwise specified in this section," contained in section 11 of article 6 of the Constitution, intend to empower the lawmaking body to provide for the exercise of jurisdiction over misdemeanors committed in the territory of a county which lies outside the limits of cities in which municipal courts are created? As we have already discovered, the people themselves, by the Constitution, have granted to the municipal courts a jurisdiction which is strictly local to the city in which each of those courts is established. Here is the stepping-stone to which we have alluded on an earlier page. As the people so limited their grant, did they intend that the Legislature should confer upon the new courts an extraterritorial jurisdiction? The very form of the question indicates to some extent that they did not, but various other considerations are to be weighed before the question is finally answered. If the grant of jurisdiction contained in the Constitution were not clogged with the limitation which we see in it, the question before us might take on a different aspect. The courts have placed a construction upon section 1 of article 6 of the organic law which appears to sup-

port the view that the Legislature has power to confer upon municipal courts a county-wide jurisdiction. That section provides that "the judicial power of the state shall be vested in" certain courts, including "such inferior courts as the Legislature may establish in any incorporated city or town, * * * or city and county." To the list of courts contained in the section there was added, by amendment adopted in 1924, "such municipal courts as may be established in any city or city and county." Prior to this amendment the section had stood unchanged, in all respects material to our present inquiry, since the adoption of the Constitution. The Supreme Court has seen in the section, not a mere designation of the courts which may be established in the different parts of the state, each perhaps with a jurisdiction limited territorially to the city, town, or city and county within which it is created, but a list of courts for each of which the Legislature may prescribe a jurisdiction extraterritorial to the municipality "in" which it is established. This construction seems to have arisen from the fact that the Constitution reads that the judicial power *of the state*, not of a certain municipality in particular instances, shall be vested in the city courts contemplated by the provision, along with the other tribunals named in it, and was apparently forecasted in People v. Cobb, 133 Cal. 74, 65 P. 325, and perhaps in other cases, although it is not there directly declared. The construction is, however, directly announced in a later case. In the opinion there rendered the court referred to section 103 of the Code of Civil Procedure, which, in part, then provided (Stats. 1905, p. 49; Stats. 1907, p. 190), as it does now, that city justices of the peace "shall have the same jurisdiction, civil and criminal, as justices of the peace of townships and township justices' courts." In order that the effect of the decision may be appreciated, it becomes necessary to refer to the language of section 1425 of the Penal Code to the effect that "justices' courts have jurisdiction of the following public offenses committed with the respective counties in which such courts are established"; the particular offenses being then named. It is to be noted that, in addition to the language of section 103 of the Code of Civil Procedure above quoted, section 1425 of the Penal Code is found in a "title" which is headed "Proceedings in Justices' and Police Courts and Appeals to Superior Courts" and in a "chapter" headed "Proceedings in Justices' and Police Courts." In the opinion now under examination the Supreme Court, after referring to section 103 of the Code of Civil Procedure, said:

> "Justices of the peace are part of the constitutional judicial system of the state, having concurrent jurisdiction with superior courts in certain matters expressly given by the Constitution (article 6, § 11), and also having such jurisdiction in civil and criminal cases as is given by the general laws of the state to all justices of the peace. In this regard there is no distinction whatever between township and city justices. * * * A city justice is simply a part of this general state system, elected for a certain subdivision thereof. It is immaterial in this connection that the Legislature has attempted to confer upon city justices an additional jurisdiction in matters peculiar to the city, such as cases arising from violations of municipal ordinances, etc. The Constitution in terms provides that the Legislature shall determine the number of such justices of the peace to be elected in townships, incorporated cities and towns, or cities and counties, and shall fix by law the powers, duties, and responsibilities of such office. Article 6, § 11." Graham v. City of Fresno, 151 Cal. 465, 91 P. 147.

The case cited should be read in connection with In re Kaster, 52 Cal. App. 454, and In re Kaster, 185 Cal. 647, 198 P. 1031, which plainly decide that the Legislature may confide to township justices' courts a jurisdiction over offenses committed in any part of the respective counties in which such courts sit. The effect of all three of these cases, under section 1 of article 6 of the Constitution, if that section alone be considered in its application to the new municipal courts, is obvious. By the amendment of 1924 the last-named courts were included in the list of tribunals specified in the section. In them a part of the judicial power "of the state" is now lodged. If we consider section 1 alone, under the cases cited, we must conclude that the Legislature has power to confer upon municipal courts a jurisdiction over offenses committed anywhere in the counties in which they respectively sit. But section 1 cannot be considered alone. We must reckon with section 11 of the same article. Section 1 itself makes no grant of jurisdiction. Section 11 does, but the grant contemplates only a jurisdiction, as to each municipal court, over offenses committed within the city in which the court sits and in which it exists. May the Legislature now grant to municipal courts a county-wide jurisdiction, under section 1 of article 6, or is the power to be exercised by that body controlled by the provisions of section 11 only, with such limitation as is imposed by the nature of the grant of jurisdiction contained in the section itself? And in answering the question it must be remembered that section 11 reads that the Legislature may provide for the jurisdiction of such courts "except in the particulars otherwise specified in this section." Here arises another question. Does this language import that the grant as to other particulars may include all the jurisdiction, territorially, grantable to justices' courts under section 1?

At this point in the discussion we are called upon to consider a late decision of the Supreme Court in a prohibition proceeding, announced under a condition of affairs now to be stated. Section 11 of article 6 of the Constitution contains this provision:

> "In any city * * * where such municipal court has been established, and in townships situated in whole or in part in such city * * * there shall be no other court inferior to the superior court except as herein provided,"

—the evident purport of the language being that in the territory described there should be no court inferior to the superior court except a municipal court. A municipal court was established in the city of Long Beach, and at the time of its creation a certain township lay partly within and partly outside the corporate limits of the city. The question was presented to the Supreme Court whether, under the language of the Constitution last above quoted, the existence of the justice's court which had theretofore exercised jurisdiction within the township in question was terminated. The Supreme Court determined that the township court continued to exist, but that its powers within the city were at an end. The decision limited the territorial jurisdiction of the justice to that portion of the township lying outside the limits of the municipality. The conclusion was reached and is expressed in the following language:

> "Reading said constitutional amendment as a whole, it is manifest that its purpose was to provide for the organization and functioning of so-called municipal courts within the territorial limits of such cities and cities and counties as possessed the requisite population therefor and as should by the ways provided therein conclude to embrace its benefits, the municipal courts to be thus established to be confined in some respects as to their jurisdiction and functions to the territorial limits of the municipalities thus resolving to establish the same. It was a matter of public political record and history of which the framers of this amendment apparently took notice that in the course of establishing such municipal courts in such municipalities cases would arise where townships with their already established justices' courts would be found to lie partly within and partly without the prescribed limits of such municipalities, and which would as to that portion of the area of such townships as lay within the boundaries of such municipalities be affected by the action of the latter in resolving to bind themselves within the terms of said amendment and that as to such portions of such townships thus to be affected the provisions of said amendment should be operative. But it nowhere appears from said amendment when considered as a whole that it was the intent of those who framed it to disturb to the extent of destroying the judicial organization within those portions of such affected townships as lay outside of the limits of those municipalities which had decided to set up municipal courts within their said limits. To so interpret the particular language of the portion of said amendment upon which the petitioner relies, and which is above excerpted, would be to give to the amendment as a whole the effect of either taking away from the inhabitants of the portion of such townships as lay without the bounds of such municipalities their already established justices' courts, leaving them without tribunals for the institution and trial of causes within the jurisdiction of such court, or of *extending the jurisdiction* of the municipal courts of contiguous cities over such outlying territory, neither of which results is thinkable as within the intent of the framers of this amendment to the Constitution, since to give it such an interpretation would be to take away from the inhabitants of such outlying territory their already established system of justices' courts and township officers by the vote of the electorate of an incorporated municipality of which they form no part, and to substitute in place thereof a system of municipal courts in the establishment of which and in the selection of the judges and other officers of which they would have no vote or voice."

The italics are those of the Supreme Court. After quoting from various cases dealing with questions of statutory and constitutional construction the court proceeds:

> "Having in mind these principles and applying them to the amendment as a whole and to the particular language in the portion thereof above quoted and upon which the petitioner places his main reliance, we are of the opinion that the phrase therein reading, 'In townships situated in * * * part in said city or city and county, there shall be no other court,' etc., should be interpreted to mean that it was the intent of the framers of said amendment to provide that in such part of such townships as would be found to be situated within such city or cities establishing such municipal court there should be no other inferior courts than such municipal courts as were to be provided therefor under the terms of said amendment. Such an interpretation would leave said amendment entirely free from the absurdity and confusion which would result from placing the meaning upon said clause for which the petitioner contends."

The opinion then refers to a statute passed by the Legislature and touching the subject of municipal courts, and says further:

> "It thus appears that the Legislature by the foregoing provisions in said act has placed upon the constitutional amendment in question precisely the interpretation which in our opinion should be given to its terms. It would seem to follow from the foregoing considerations that within that portion of Los Angeles township lying outside of incorporated territory and wherein the original case against said petitioner arose, the justice's court of said township still continued to exist and function. It is true that it did so within restricted territory in view of the action of the city of Long Beach in electing to organize a system of municipal courts within its own territorial limits, but the original jurisdiction of said justice's court remained otherwise unimpaired. And, if this conclusion be correct, it would seem to further follow that the fact, if it be a fact, that the city of Long Beach had or had not succeeded by amendment of its charter in bringing itself within the terms of the constitutional amendment and in thus establishing a system of municipal courts within its territorial limits, would be immaterial to the determination of this cause, since the offense with which the petition-

er stands charged was committed in a portion of Los Angeles township which was never within the territorial limits of said city of Long Beach." Bakkenson v. Superior Court, 197 Cal. 504, 241 P. 874.

We have studied this case with the utmost care, in an endeavor to see in it no departure from the reasoning upon which is based the decisions in Green v. Superior Court, supra, and in the two cases In re Kaster, supra, in so far as it may be contended that those decisions affect the jurisdiction of municipal courts, but without avail. In its late decision the Supreme Court declares that it is intended by the Constitution that the municipal courts are "to be confined in some respects as to their jurisdiction and functions to the territorial limits of the municipalities * * * resolving to establish the same." Owing to the use by the court of the qualifying phrase "in some respects" this passage itself presents no great difficulty. It is only when later expressions of the court are examined that a conflict with the earlier cases, if it be sought to apply them to the municipal courts, seems to appear. One of these later expressions is that in which the court says that the contention of the petitioner leads to one or the other of two unthinkable results. One of these results is that of *extending the jurisdiction*—and the court is careful to italicize the words —"of the municipal courts of contiguous cities over such outlying territory." The court says that neither of the results mentioned is thinkable, because to allow them would be "to take away from the inhabitants of such outlying territory their already established system of justices' courts and township officers by the vote of the electorate of an incorporated municipality of which they form no part, and to substitute in place thereof a system of municipal courts in the establishment of which and in the selection of the judges and other officers of which they would have no vote or voice." The latter part of this reasoning—that relating to "the selection of the judges and other officers"—is necessarily, as it seems to us, in conflict with the conclusion reached in Green v. Superior Court and in the cases In re Kaster, if it be sought to apply those cases to municipal courts. We need not pause to cite the statutes under which city and township justices are to be elected by the people of the cities or townships within which, respectively, they are to sit. Under the rule of the cases last cited any citizen of a county—and that, of course, means, in the last analysis, every citizen of a county—may be subjected to the jurisdiction of any and every city and township justice in the county, in the election of none of which he has had a vote or choice, except that one or those who occupy the bench in his own city or township. We have above referred to the statutes under which justices are limited to the territory of their respective townships or cities in the exercise of jurisdiction in actions of entry and detainer, and to the understanding of that rule which permeates the community—the state. Doubtless, under the cases last cited, the Legislature has the *power* to confer upon justices' courts a county-wide jurisdiction in such actions. The entire effect of those cases, as bearing upon the various instances just stated, seems to be obliterated by the reasoning of Bakkenson v. Superior Court, when it is sought to apply them to municipal courts.

The remark in the opinion in Bakkenson v. Superior Court to the effect that, under the contention of the petitioner, the people of the portion of the township lying outside the limits of Long Beach might be deprived of their system of courts "by the vote of the electorate of an incorporated municipality of which they form no part," requires a particular consideration. The courts contemplated by the decisions in Green v. Superior Court and in the cases In re Kaster, are created by the Legislature, a body which represents the entire electorate of the state. As to the municipal courts the situation is quite different. In the establishment of such courts the people of the state at large have no voice, and in that fact lies a very cogent reason for the conclusion reached by the Supreme Court in its late decision. A *system* for the creation of municipal courts has been established by the people of the state by means of the Constitution, just as they have established a system for the adoption of freeholders' charters by cities, but a municipal court may not be erected, nor may a charter be adopted in any city except at its own behest. The Constitution provides, as to municipal courts, that such a tribunal may be established in a city when its charter, or an amendment thereto, so provides, or when its people shall so vote at an election. Article 6, § 11. The actual establishment of a municipal court therefore takes on the character of a "municipal affair" as that term is employed in the section of the Constitution relating to the adoption of freeholders' charters. These observations, somewhat amplifying the language of Bakkenson v. Superior Court, show a vast difference between justices' courts and municipal courts in a respect which is most material to the question now before us, and are persuasive of a conclusion that the municipal courts were intended to exercise but an intracity jurisdiction.

Another consideration is closely allied with the point touched upon in the last preceding paragraph. Townships are political subdivisions of a county (Pol. Code, § 4015), just as counties are political subdivisons of the state. Added together, townships cover the entire state. In this circumstance there would seem to exist a warrant for a grant of a county-wide jurisdiction to justices' courts. If an offense is committed in a certain township, and there is any sound reason why a charge based upon it should not be tried there, another township is near at hand, the jurisdiction of which may be invoked for a trial of the charge. The situation is different as to cities, and especially as to cities of over 40,000 inhabitants governed under freeholders' charters; these being the only cities within which municipal courts may be established under the Constitution. Cities are not together continuous and connected political subdivisions of the state. They are distinct individual entities. Cities, and especially charter cities, are in a sense independent political organizations, each practically imperium in imperio. Const. art. 11, § 8. Charter cities of more than 40,000 inhabitants are few and far between and in many, perhaps in a majority, of the counties there is none. Under all these circumstances a peculiar situation would arise if the contention of appellant was upheld. In many of the counties—those in which there can be no municipal courts—the superior courts would still possess jurisdiction over high grade misdemeanors. In those counties in which municipal courts are established the same jurisdiction would rest in the single municipal court, or in the few municipal courts in each, to the utter exclusion of the superior courts in those counties. It cannot be supposed that the people, by the Constitution, would authorize such an anomalous condition of affairs to be created by the Legislature except by express language intended to vest such an authority. It is therefore quite logical upon these considerations to see in the provisions of the Constitution as to municipal courts an intention upon the part of the people to authorize the establishment of strictly city courts.

We conclude that the Legislature was without power to give to municipal courts a county-wide jurisdiction over high grade misdemeanors, and that such jurisdiction, when invoked as to offenses committed outside of the territory of cities in which municipal courts have been established, rests now, as it did formerly, in the superior courts.

In criminal No. 1382 the judgment is affirmed. In criminal No. 1460 the writ is discharged, and the prisoner is remanded to custody.

We concur: CRAIG, J.; THOMPSON, J.

81 Cal. App. 76

OLES v. KAHN BROS. et al. (Civ. 5484.)★

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1927. Hearing Denied by Supreme Court March 28, 1927.)

1. Trial ⇨139(1), 165—Motion for nonsuit should be denied, if there is any evidence sustaining plaintiff's case, and facts which evidence tends to prove are assumed as true.

Motion for nonsuit should be denied, if there is any evidence to sustain plaintiff's case, without passing on question of sufficiency; material facts which evidence tends to prove being assumed to be true.

2. Trial ⇨165—On motion for nonsuit, evidence contradictory to plaintiff's evidence must be disregarded.

Where, on motion for nonsuit, evidence is susceptible of two constructions, court must take view most favorable to plaintiff, disregarding contradictory evidence.

3. Negligence ⇨136(27)—Whether lunch counter customer slipping on uneven platform knew of danger, held for jury.

In action against owner of department store as lessor of lunch counter enterprise, for injuries sustained by customer, who, after arising from stool at lunch counter, stumbled on uneven platform to which stool was fastened, issue at to whether plaintiff observed unevenness of platform and had knowledge of existence of danger at time of stepping thereon *held* for jury.

4. Negligence ⇨136(27)—Customer's knowledge of dangerous condition of platform at lunch counter held for jury.

In action against lessor of lunch counter for injuries sustained on leaving counter by stumbling on uneven platform to which stools were attached, mere fact that plaintiff saw platform when she stepped on it, did not warrant court, as matter of law, in finding that plaintiff knew, or should have known, of existence of unevenness in surface of platform.

5. Negligence ⇨136(27)—Contributory negligence of customer in failing to remember dangerous condition of lunch counter platform held for jury.

In action by customer against lessor of lunch counter for injuries sustained by stumbling over uneven platform in leaving counter, though plaintiff observed unevenness on ascending platform, whether her failure to keep such element of danger in mind while arising from stool and leaving platform was want of ordinary care, *held* for jury, in view of rule that forgetfulness of known danger will not operate to prevent recovery, unless it constitutes want of ordinary care.

6. Negligence ⇨136(22)—Whether lunch counter platform was dangerous held for jury.

In action for injuries sustained by stumbling over uneven platform on leaving lunch counter, whether unevenness rendered platform unsafe and dangerous *held* for jury.

7. Negligence ⇨136(27)—Whether dangerous condition of lunch counter platform was patent to customer held for jury.

Whether unsafe condition of platform at lunch counter was patent to customer because of its unevenness *held* for jury, in action for injuries sustained by stumbling over platform on leaving lunch counter.

8. Trial ⇨159—Insufficiency of pleadings in action for injuries caused by uneven platform at lunch counter did not warrant nonsuit, where issue of defective condition was raised in answer and at trial.

In action for injuries from stumbling over uneven platform at lunch counter, though complaint did not set out fact of negligence or facts

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★Hearing denied by Supreme Court.

constituting negligence, court was not justified in granting nonsuit, where defects in complaint were rendered harmless because of defendant's answer, which made issue of alleged defective and unsafe condition of platform and trial which proceeded on that issue.

9. Negligence 🔑108(2)—Pleading must allege injurious acts were done negligently or facts excluding any other hypothesis than negligence.

In action for injuries alleged to have been caused by defendant's negligence, it must appear from complaint that acts causing injury were done negligently, or else facts alleged must of themselves necessarily exclude any hypothesis other than that of negligence.

10. Pleading 🔑403(2)—Complaint lacking necessary averment may be aided by allegations of answer.

Complaint which lacks averment of fact essential to cause of action may be aided by averments of fact in answer to uphold judgment.

11. Pleading 🔑403(4)—Where issue of defendant's negligence as proximate cause of injury is raised by answer, and case is fairly tried, defect in complaint becomes immaterial.

Though complaint fails to allege that negligence of defendant was proximate cause of injury, such defect is rendered immaterial where issue of negligence is raised by answer, and case fairly tried under circumstances indicating defendant was not injured by pleadings.

12. Landlord and tenant 🔑169(11)—Whether department store leasing lunch counter was liable for injuries caused by defective condition of platform held for jury.

Whether department store leasing lunch counter had sufficient control over business of lunch counter to legally connect it with liability for injuries caused by defective condition of platform to which stools were attached *held* for jury, in action for injuries sustained by slipping on platform.

13. Landlord and tenant 🔑169(5)—Where department store, sued for injuries sustained from uneven platform at lunch counter, claimed to be mere lessor, rejecting menu which contained name of store held error.

In action against department store leasing lunch counter for injuries sustained from stumbling over platform at counter, sustaining objection to menu used at lunch counter on which name of department store was printed *held* error, as such menu tended to show department store had interest in business beyond that of mere lessor.

14. Negligence 🔑32(1)—Owner or occupant of premises owes invitee duty of ordinary care to keep premises in safe condition.

Owner or occupant of premises who induces others to come upon it by invitation expressed or implied owes them duty of using reasonable care to keep premises in safe and suitable condition, so that invitees will not be unnecessarily or unreasonably exposed to danger.

15. Landlord and tenant 🔑167(2)—Department store, leasing lunch counter, over which it retained partial control, owed duty to invitees to keep counter in safe condition.

Department store, leasing lunch counter in its store, which retained control over its business with regard to employees and quality of goods and prices, owed duty of reasonable and ordinary care to persons using lunch counter to keep premises in safe and suitable condition so that such persons would not be unreasonably exposed to danger.

16. Negligence 🔑32(2)—Persons entering store during business hours to purchase goods are invitees.

Person who enters store during business hours to purchase goods enters on implied invitation of owner of store.

17. Negligence 🔑44—Storekeeper is required to use ordinary care to keep passageways used by customers in safe condition.

Storekeeper owes to customers duty of exercising ordinary care to keep aisles and passageways through which customer goes in reasonably safe condition so as not to expose customer to danger or accident.

Appeal from Superior Court, Alameda County; Mortimer Smith, Judge.

Action by Katherine C. Oles against Kahn Bros., a corporation, and W. J. O'Brien. Judgment of nonsuit for defendants, and plaintiff appeals. Reversed.

Ostrander & Carey, of Oakland, for appellant.

Snook & Brown and Thos. J. Ledwich, all of Oakland, for respondent Kahn Bros.

George A. Connolly, of San Francisco, for respondent O'Brien.

KNIGHT, J. An appeal by plaintiff from a judgment of nonsuit in an action to recover damages for personal injuries. About noon on the day of the accident appellant entered a department store owned and operated by Kahn Bros., a corporation, for the purpose of making a purchase of merchandise, and, while there, seated herself on a stool in front of a lunch counter maintained in said store and operated by respondent W. J. O'Brien, intending to lunch thereat. Upon arising from the stool, she slipped or stumbled from a low platform on which the stool was fastened and was thereby injured.

The complaint alleged:

"That the said fall by plaintiff to the floor, and the said injuries, was and were occasioned by the unsafe and defective condition of said stool and platform, in this, that a portion of the said temporary platform, and to which portion the stool upon which plaintiff had been seated was affixed, consisted of a wooden plank of an inch or more in thickness, one end of which was immediately to the right of said stool, so that, when plaintiff was arising from said stool, and turned to the right to step to the floor, her right foot slipped from the end of said plank causing her to lose her balance and fall as aforesaid;" that plaintiff "did not know that the platform was uneven, or in the condition hereinabove described, or in any dangerous or defective condition."

The evidence shows with more particularity, the construction of said platform and stool to have been as follows: The stool upon which appellant seated herself, together with three other stools, was fastened to an inch plank laid upon, and securely fastened to, a temporary wooden platform, composed of two-inch planks resting on joists laid upon and along the surface of the tile floor. The platform was about two and a half feet wide, and the elevation was approximately six inches above the tile floor; the space between the tile floor and the under surface of said two-inch planks being left open. The edge of the one-inch plank on which the stools were fastened extended to within a few inches of the outer edge of the platform, and the end thereof projected five or six inches beyond the base of the fourth or extreme right-hand stool on which appellant was seated, causing an uneven surface on the platform the thickness of said one-inch plank. The circular-shaped seat of the stool was thirty inches above the surface of the platform, and rested on a standard running down into a cone-shaped base, fastened to said one-inch plank, the base of the cone resting in the center of, and covering about two-thirds of the width of said plank. The evidence further shows that the construction of said platform and stool was rigid and strong.

The direct cause of appellant's fall, as testified to by the only witness who observed the movement of appellant's feet as she was about to leave the platform, was that "* * * one board was shorter than the other, and her foot turned on it." Continuing, the witness stated: "I saw her foot as it turned, and it just threw her—there was nothing there for her foot to rest on, she lost her balance, and just plunged off the platform." Regarding this same matter, and aside from any confusion which respondents claim exists in the testimony, appellant testified in effect that, after arising from the stool, she stood erect, took one short step, and, as she started to take another step, fell; that when taking the second step, she felt her foot "strike the board," but that she "did not see the board," nor did she "actually see" what caused her "to stumble."

Respondents contend that, even though it be conceded that the platform was in an unsafe condition on account of the unevenness thereof, the granting of the nonsuit must be sustained upon the ground of appellant's contributory negligence, in that it affirmatively appears from her testimony, as they claim, that she observed the condition of the platform when she stepped up to take her seat on said stool, and that, having knowledge of its condition, failed to exercise ordinary care in arising from the stool and leaving the platform.

[1, 2] The general rule is that a motion for a nonsuit should be denied when there is any evidence to sustain the plaintiff's case, without passing upon the question of its sufficiency, or as to whether the court believed it or not. Upon such motion the material facts which the evidence tends to prove must be assumed to be true; if the evidence is fairly susceptible of two constructions, the court must take the view most favorable to the plaintiff, and, if contradictory evidence has been given, it must be disregarded. Mitchell v. Brown, 18 Cal. App. 117, 122 P. 426.

Disregarding, therefore, any asserted contradiction in the proof, it appears from appellant's testimony that she looked down and saw "the *platform*" when she "stepped up" to be seated on the stool; that it appeared to her "like it was just temporary construction"; also that she "just glanced down at the *platform*" as she arose from the stool in leaving. (Italics ours.) But in connection therewith she further testified, on redirect examination, that prior to the accident she had not observed any unevenness in the platform at the point where she fell; that after she had fallen, and was seated in a chair which had been brought to her, she noticed "that the end of the board extended out a short distance from the stool."

[3, 4] We are of the opinion that the latter testimony is, as appellant contends, susceptible to the fair inference that, athough appellant realized, necessarily, that there was a platform upon which she stepped in taking her seat on the stool, she did not in fact observe the details of construction of said platform so as to note the unevenness of its surface; and, therefore, since the evidence tends to show, as already pointed out, that the unevenness of said platform was the element of danger which caused appellant to fall, the question of whether appellant did observe the unevenness of the platform, and, consequently, have knowledge of the existence of the said danger, should have been left to the determination of the jury. In other words, we believe that the mere fact that appellant saw the platform when she stepped upon it would not warrant the court in declaring, as a matter of law, that she knew, or should have known of the existence of any unevenness in its surface, particularly in view of her positive statement to the contrary. Brinkworth v. Sam Seelig Co., 51 Cal. App. 668, 197 P. 427.

In furtherance of their contention that appellant did observe the unevenness of said platform, respondents call attention to the fact that appellant testified as to particular matters concerning the construction thereof, in so far as it related to projections and measurements, and the location of the stool thereon. But in this connection the record fairly supports the conclusion that the facts thus testified to by appellant were gained by her as a result of the observations she was making from the photograph of the platform, regarding which she was then being cross-examined, and also from those made by her while seated in the chair, near the point of the accident, after the happening thereof, and that said testimony was not based upon observations made by her before she started to leave the platform.

[5] Even though appellant's testimony was susceptible of the one construction that prior to the accident she did observe the unevenness of said platform, which it is claimed constituted the element of danger, there would still be the question for the determination of the jury as to whether or not it was a want of ordinary care on the part of appellant not to have kept in mind such element of danger while arising from the stool and leaving the platform. Hayward v. Downer, 65 Cal. App. 450, 224 P. 265; Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078. In the former case it was said:

> "There is much respectable authority in support of appellant's first point, and such, in fact, was the rule in this state until the Supreme Court, in Meindersee v. Meyers, 188 Cal. 498, 503, 205 P. 1078, held that, notwithstanding this knowledge and means of knowledge, it was for the jury to determine whether it was a want of ordinary care for the injured not to have the source of danger in mind."

And in the latter case it was declared:

> "Even forgetfulness of a known danger will not always operate to prevent such recovery, for to forget is not negligence, unless it shows a want of ordinary care. Generally the question is one for the jury (Roseberry v. Edward F. Neihaus & Co., 166 Cal. 481, 483, 137 P. 232) and the present case comes well within the rule."

[6, 7] We find no merit in the further point made by respondents that under neither the allegations of the complaint nor the circumstances proved at the trial was it shown that the platform was defective; or, if it was, that such defect was patent, and, consequently, no recovery can be based thereon. The complaint alleged, and substantial evidence was offered to prove, that the platform was uneven, and that by reason of that condition alone appellant sustained injuries. It was therefore a question for the jury to decide as to whether such unevenness rendered the platform unsafe and dangerous, and, if so, whether, under the circumstances adduced, its dangerous and unsafe condition was patent to appellant. The action herein is not based upon the ground that appellant's fall was occasioned by the mere presence of said platform, but on account of the uneven surface thereof; the action in this respect differing from those cited by respondents upon this point, wherein the injuries were caused by falling on steps or elevated structures which the owner has a right to assume would be obvious to an invitee upon the ordinary use of the latter's own senses.

[8-11] Respondents further contend that the judgment of nonsuit must be sustained in any event upon the ground that the complaint fails to state a cause of action, in that it contains no general allegation of negligence, nor any general allegation as to the stool and platform being "unsafe and defective"; and that, although appellant attempts to set out with particularity the specific defective condition of the stool and platform, the facts alleged do not of themselves show such condition to have been unsafe or defective. It is doubtless necessary, as respondents assert, that it appear in the pleading by direct averment that the acts causing the injury were done negligently, or else the facts alleged must in and of themselves necessarily exclude any hypothesis other than that of negligence (South v. County of San Benito, 40 Cal. App. 13, 180 P. 354); but we think that the allegations hereinabove referred to bring the complaint within the rule stated. But, even though the complaint be subject to the defects claimed, they were rendered harmless, because the answers of respondents fully tendered the issue of the alleged defective and unsafe condition of said platform and stool, and the trial of the action proceeded upon that issue. "The rule is well settled that a complaint which lacks the averment of a fact essential to a cause of action may be so aided by the averment of that fact in the answer as to uphold a judgment thereon, * * * even though a demurrer to the complaint for the want of this fact had been erroneously overruled" (Daggett v. Gray, 110 Cal. 169, 42 P. 568, cited approvingly with other authorities in Martin v. Southern Pacific Co., 44 Cal. App. 3, 185 P. 1030); and, where a complaint is defective in that it does not expressly allege that the negligence of defendant was the proximate cause of the injury, but such issue is raised by the answer, and the case is fairly tried upon the merits, and under circumstances indicating that nothing in the pleadings misled defendant to his injury, the matter of pleadings becomes immaterial. Fay v. Cox, 45 Cal. App. 696, 188 P. 623.

[12] Equally without merit is the contention urged on behalf of respondent Kahn Bros., Inc., that, irrespective of all questions of negligence, the nonsuit as to it must be sustained upon the ground that its legal relation to the lunch counter enterprise was merely that of lessor. True, there was a provision in said lease that Kahn Bros. "should have no interest in said business"; but, when all the evidence adduced on this point is considered, the inference may be reasonably drawn therefrom that the interest mentioned was a financial one only, and that it still retained a cer-

tain amount of control over the conduct of said business and of that portion of the premises occupied by it which would tend to legally connect it with liability for any injuries proximately caused by the alleged defective condition of said platform.

The evidence in this respect was in substance as follows: Said counter was located within the department store, and on the main floor thereof; and, according to the testimony of the vice president of said corporation, was maintained for the purpose of serving meals to patrons of said store, the aisle adjacent to the stools in front of said counter being used in common by patrons of the store and the lunch counter. The lease provided that said enterprise should be conducted in the name of Kahn Bros. and not in the name of the lessee. The right was given to the lessor to cause the discharge of the lessee's employees on reasonable grounds; to require the lessee to improve the quality of his goods or reduce his prices; and make such discounts on sales made to dressmakers, employees, and such other classes as the lessor should deem wise. It further provided that the lessee should do no advertising of said business in his own name or otherwise than in the name of the lessor, nor without first obtaining the consent of the lessor, and many other restrictions were placed upon the conduct and operation of said lunch counter business, which need not be mentioned herein. Said lease contained the further provision that the location, style, arrangement, color, and construction of all fixtures should be subject to the approval of the lessor, and it was shown that, pursuant to the provision last mentioned, the original installation and construction of said lunch counter, together with the necessary equipment, including said platform and stool, and the subsequent changes and repairs thereto, were done and made with the approval of Kahn Bros.

[13] In addition appellant, offered in evidence a printed menu generally used at said lunch counter, on the front cover of which is printed: "Kahn's Soda Fountain Menu," but, on objection by respondent Kahn Bros., the evidence was excluded. We believe that appellant was entitled to the proof as a circumstance tending to show that Kahn Bros. had an interest in said business beyond that of mere lessor.

[14-17] In view of the foregoing facts, it would seem that the status of the respondent Kahn Bros. was sufficiently brought within the general rule that the owner or occupant of premises who induces others to come upon it by invitation, express or implied, owes them the duty of using reasonable and ordinary care to keep the premises in a safe and suitable condition so that they will not be unnecessarily or unreasonably exposed to danger (29 Cyc. 453; Herzog v. Hemphill, 7 Cal. App. 116, 93 P. 899; Means v. Southern Cal. Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206), and also within the rule of Brinkworth v. Sam Seelig Co., supra, and the cases therein cited, which hold that one who, during business hours, lawfully enters a store to purchase goods, does so at the implied invitation of the owner, upon whom the law imposes the duty of exercising ordinary care and prudence to keep the aisles and passageways, in and through which by their location and arrangement a customer in making his purchases is induced to go, in a reasonably safe condition so as to not unnecessarily expose him to danger or accident; it appearing here that said platform in question was located in a part of said store where customers were wont and were required to go while making purchases therein. Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646.

From the state of the record before us, we conclude that the motions for nonsuit were erroneously granted, and therefore the judgment entered thereon is reversed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

81 Cal. App. 30

PEOPLE v. RICHARDS. (Cr. 1351.)

(District Court of Appeal, Second District, Division 2, California. Jan. 25, 1927.)

Criminal law ⟹1186(4)—In prosecution for rape, court's statement of evidence to jury, while so unfair as to constitute error, held not ground for reversal (Const. art. 6, §§ 4½, 19; Pen. Code, § 1138).

In prosecution for rape, court's statement of evidence, on return by jury for further instructions, *held* so one-sided and unfair to defendant as to constitute error, under Const. art. 6, § 19, and Pen. Code, § 1138, though not ground for reversal, in view of clear case against defendant and Const. art. 6, § 4½.

Craig, J., dissenting.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Tom D. Richards was convicted of rape, and he appeals. Affirmed.

Karl A. Machetanz, of Exeter, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. The appellant in this case was charged by information with the crime of rape, alleged to have been committed by force and violence, and against the resistance of a female not his wife, in the county of Tulare, on or about the 5th day of July,

1925. The jury returned a verdict of guilty, a motion for new trial was presented which was denied, and this is an appeal from the judgment and from the order denying such motion.

The only question here in controversy is as to whether or not the trial court committed reversible error in a statement made by it following protracted deliberation and return by the jury into court for further instructions. We deem it expedient to first relate the predominant facts as they were presented to the jury by the respective parties.

It is conceded that on the evening of July 4, 1925, the prosecutrix, the appellant, and a companion of the latter drove from the city of Visalia to Porterville, and thence to Terminus Beach at the invitation of appellant and in the latter's automobile; that the appellant and the prosecuting witness danced at the beach, and at about 11:30 p. m. started back toward Visalia; that the third party did not return with them; that the two principals followed the Mineral King highway for a distance of six or seven miles, whereupon the defendant turned onto a byroad, stopped his car, turned out the lights, and stepped from the car; that he walked to her side of the machine, and she moved to the other side and stepped out; they both testified that shortly afterward the defendant had intercourse with her. The crux of the case consists of the construction placed by the jury upon conflicting evidence as to whether there was resistance or voluntary submission upon the part of the prosecutrix, and, as to whether or not the remarks of the trial court improperly influenced the jury in its conclusion in this respect, as indicated by the verdict. The girl testified that the defendant threw her to the ground; that she fought, kicked him, and pulled his hair, and that she struggled until too exhausted to further resist; that she screamed nearly all of the time, and that the defendant told her that if she did not keep quiet he would knock her senseless; and ten other witnesses, including a physician, corroborated her testimony as to her physical condition. It appeared that her clothing was soiled, her hair was matted with dirt, her body was bruised, and she was in such a deplorable state that she was confined to her bed for several days thereafter. In the face of these facts, the defendant testified that the prosecuting witness had submitted with almost no reluctance.

The jury retired at about 4 o'clock p. m., and on the following morning returned into court, whereupon the foreman stated that some of them could not understand the question of fact as to "whether it was force or whether it was not." The trial judge replied as follows:

> "That is for the jury to determine. The court cannot instruct you as to whether it was force or not. The court cannot give any instruction that involves a construction by the court of what the facts are, that is, as to how the jury should find the facts. The jury should determine these facts for themselves.
>
> "Now, this case has been tried twice and the jury have all the evidence before it, and it appears to the court as though they ought to arrive at a verdict; and the only thing the court can do is to give you further time to consider it. It might state the testimony to the jury in relation to the fact that you have inquired about. The defendant admits the sexual intercourse. He testified it was obtained by consent of the prosecuting witness. On the other hand, the prosecuting witness testifies that she did not consent; that the act was committed by force and by threats of great bodily harm; and that she was exhausted and gave up. She came into town with the defendant. She was covered with filth—that is, with dirt; her clothing, her arms and face and her hair full of dirt and dust. Three or four witnesses besides her testified to those facts. They testified to bruises on her body. She was with the defendant up to the time she arrived in town and at her home. She immediately went up the stairs and told her friend of what had occurred. And the testimony of her friends and of the doctor are that she was in the condition as stated by the court; that is as the testimony has been given by those witnesses. Now it is for the jury to determine from all the facts whether the defendant committed the act by force or not, or by threats of great bodily harm."

The authorities upon which appellant relies for a reversal recite and condemn expressions of trial courts stating their conclusions to juries upon the testimony before them. In People v. Casey, 65 Cal. 260, 3 P. 874, it was said:

> "To *state* the testimony is one thing. To declare what it *shows* is another and very different thing. It is for the jury, exclusively, to determine what the testimony *shows*." (Italics in original.)

In that case the jury were told that the evidence *showed* that the defendant had endeavored to dispose of the property, the subject-matter of the action. In People v. Pitisci, 29 Cal. App. 727, 157 P. 502, the jury were present when the court stated to counsel that a given theory was "an absurdity." Other inhibited statements to juries, such as "Do not be contrary," "It seems very plain to me," "As to those facts there is no contention and you must find accordingly," that they were not at liberty to disregard the testimony of a witness, that "of course" the defendant "has a powerful motive to swear himself out of this thing," and that, as men of common sense, they must recognize the interest of the defendant's daughters, who testified in the case.

Section 19, article 6, of the Constitution, provides that:

> "Judges shall not charge juries with respect to matters of fact but may state the testimony and declare the law."

In the instant case the trial judge stated the testimony of eyewitnesses, without resort to details, and correctly declared that:

> "It is for the jury to determine from all of the facts whether the defendant committed the act by force or not, or by threats of great bodily harm."

It nowhere appears that the court indicated a belief as to the truth or falsity of any witness' testimony, or that the jury should believe the facts to be true as had been testified, or find for or against the defendant if they believed them.

As long as we preserve the system of giving the jury the exclusive right to pass upon matters of fact and exclude judges from that right, no suggestion must be made by the trial court as to its opinion upon the weight of evidence or the credibility of witnesses. It is, indeed, a difficult matter to avoid error in that regard and to state a considerable portion of the testimony, especially in trials of long duration. Hence, in a number of instances our Supreme Court has advised that trial judges refrain entirely from the exercise of their authority to state the evidence, and has further suggested that, if it be found necessary to state the evidence, all of the testimony be read. The wisdom of such a course cannot be doubted. However, trial courts are often confronted with situations which no measure of foresight or degree of wisdom can prophesy or provide against. And so, in many cases, a wide discretion is permitted, and the rule is universally accepted that all intendments must be resolved favorably to the rulings made at the time of the trial. In connection with this question in spite of the pointed advice against the statement of the testimony, in a number of cases in this state, and in numerous other jurisdictions where similar provisions as to the distinction between the province of the court and the jury exist, the action of a trial judge who has stated the testimony had been held not only to be not prejudicially erroneous, but free from error. Therefore trial courts may state the testimony, using their own language to do so. They may do this without giving all of the testimony or having it read by the stenographic reporter. This was done and was upheld in the following cases: People v. Perry, 65 Cal. 569, 4 P. 572; People v. Wilson, 23 Cal. App. 513, 138 P. 971; People v. Vasquez, 49 Cal. 561; People v. Christensen, 85 Cal. 568, 24 P. 888.

Of all of the instances where the Supreme Court has advised against this procedure perhaps the danger has been most pointedly set forth and the admonition most strongly pronounced in People v. Matthai, 135 Cal. 442, 67 P. 694. It will be sufficient for the purposes of this case to take that decision as a measure. If we may safely say that the instruction here under consideration does not violate the fundamentals there indicated as reasons for the warning given, no error has in fact been committed, although by pursuing the course which followed great risk of falling into such error was perhaps unnecessarily run. In that case it was said:

> "It is as dangerous as it is unnecessary for the court to attempt to state the evidence. To state the evidence means to state it with fairness and exactness, and this is impracticable, unless all of the evidence in the case should be repeated. The attempt usually results, as it has in this case, in an instruction upon the facts, or upon the supposed facts, which is both argumentative and unjust—argumentative, because the apparent opinion of the court as to the defendant's guilt can be seen thinly veiled; unjust, because of its assumption of matters either not proved, or at least in dispute—an assumption which eliminates any consideration of the evidence favorable to the defendant, and which, coming from the court, bears most heavily against him."

The instruction which the trial court had given was very lengthy, and, as the opinion points out, assumed a number of important facts which were in dispute, and contained statements which were clearly argumentative. Such an instruction called forth a strong caution against the practice of attempting to state the testimony to the jury; and yet, it was certainly not intended to deny to trial courts the right provided by our state Constitution to "state the testimony." The objection to the court attempting to do this is based upon the proposition that such an effort usually results in an instruction which is both argumentative and unjust. From a careful analysis of the instruction of which complaint is here made, we cannot say that it is in any sense argumentative. It cannot be said that the court's opinion is exhibited by its statement of the testimony of the witnesses. In the opinion in the Matthai Case it is said that such an instruction is usually unjust, "because of its assumption of matters either not proved, or at least in dispute." In the instruction in the case at bar, nothing was assumed. The court did no more than to state the effect of the testimony of the defendant himself and that of other witnesses, all of whose statements, except those of the complaining witness, were entirely undisputed. In view of other decisions of our Supreme Court, it cannot be concluded that the trial court, in its exercise of the authority conferred by the provision of the Constitution to which we have adverted, must give a verbatim statement of the testimony of witnesses, or none at all.

In People v. Perry, supra, the trial court instructed the jury that:

> "The testimony there certainly could be no misunderstanding with regard to. I state as the testimony in the case, the only testimony in the case touching the time when the watch was taken, is that tending to show it was taken near the door, and that of the defendant that he picked it up in front of the counter."

While the Supreme Court, in commenting upon this instruction, stated that it is always safer to read the testimony from the judge's notes or the shorthand reporter's notes, still, the instruction quoted is held not to have been erroneous, since it did not invade the province of the jury by expressing an opinion of the court as to the weight of the evidence nor as to the facts proved. The same may be said of the instruction to which objection is here urged. The most serious criticism that can fairly be made is that, in stating the testimony upon the point as to which the jury had requested further information (that is, whether the defendant used force or not in committing the act which he admitted), the defendant's evidence is stated more briefly than that of the prosecution. However, from a careful reading of the transcript it appears, as the jury must have also known, that this was necessary, since the people produced many witnesses whose testimony bore upon that issue, whereas no other witness than the defendant gave testimony for him, and his own evidence on the question of force was substantially confined to the statement that the prosecuting witness consented to the act of intercourse. When the court stated that the defendant testified that the intercourse was obtained "by consent of the prosecuting witness," it put the matter more strongly favorable to the defendant than did his own testimony, for nowhere in his recitation of the transaction did the defendant say that the prosecutrix gave her express consent to the intercourse, although it is true that from his version of the occurrence consent might well have been inferred.

The constitutional provision is not that the trial court may "quote" or "have read" the testimony, but that it may "state" the testimony. In doing this, some discretion must be left to the judge as to the form of the statement. As long as such statement is complete upon this subject of inquiry, does not assume an argumentative trend, or is not unjust, it is within the authorization of the Constitution.

But the trial court in People v. Matthai, supra, it will be observed, also took it upon itself, in general instructions to the jury, in the first instance to state the testimony and to construe it, upon an isolated issue in the case, whereas, in the instant case, the jury returned into court after receiving the instructions and having deliberated upon a verdict, requesting information upon the point already mentioned. Section 1138 of the Penal Code provides that:

> "After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the cause, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the district attorney, and the defendant or his counsel, or after they have been called."

It has been held that, under such circumstances, the judge may restate the testimony of a witness (People v. Ybarra, 17 Cal. 166), that the judge may state it from recollection, read his minutes, or a memorandum taken by another (People v. Boggs, 20 Cal. 432), but that the court is required to give only such instructions as may be asked (People v. Anthony, 20 Cal. App. 586, 129 P. 968). In the case at bar the jury returned and asked as to whether or not force was used by the defendant in the accomplishment of the admitted intercourse. This question the court declined to answer, and twice stated that it was not authorized to do so, but it did state that the defendant denied such fact, whereas witnesses for the prosecution had testified to conditions which we have heretofore related. We think that under the provisions of the section last cited, in view of the fact that much of the evidence upon the point in question was circumstantial, the trial court did not err in restating from recollection the evidence of such circumstances as tended to indicate the use of force, and the testimony of the defendant directly denying it and tending to indicate that there was none. Furthermore, it may appropriately be remarked that the appellant does not contend that the trial court misstated the testimony in any respect. The most that can be said of his argument is that the court was without authority to give the instruction complained of. But the supplemental instruction added nothing to those already given, and merely gave to the jury a restatement, as required by section 1138 of the Penal Code. They were then emphatically, and properly, told that they alone could decide the question asked by their foreman.

Appellant insists that the verdict itself indicates that the jury were influenced to convict him by the remarks of the trial court. It reads as follows:

> "We, the jury, find the defendant guilty as charged in the information.
> "J. W. Munsey, Foreman.
> "We, the jury, recommend the greatest leniency in this case."

It is but a truism to say that the defendant was guilty or that he was not guilty, and that it appears from the verdict that, although the jury may have felt constrained to intercede for him, yet, bearing in mind the admonition of the trial court that they should determine the facts for themselves, they were finally convinced beyond a reasonable doubt that he was guilty. As said in People v. Collins, 195 Cal. 325, 233 P. 97, the language of the first paragraph that appellant is guilty of the crime charged is complete and unequivocal, and the additional words recommending mercy or leniency are merely surplusage.

From what has been said herein, other points presented do not require further discussion, and, prejudicial error not appearing, the judgment and order appealed from are affirmed.

WORKS, P. J. (concurring). I concur in the judgment, but on grounds different from those stated in the foregoing opinion. I cannot escape the conclusion that the trial court erred in the statement made to the members of the jury when they returned to the courtroom, after some time spent in deliberating on the case. I think, however, that the error does not require a reversal.

If we consider the judge's statement as a recital of the evidence in the cause, it was unfair to appellant. He remarked:

> "He [the appellant] testifies it [the sexual intercourse] was obtained by the consent of the prosecuting witness."

This is the only part of the judge's statement which relates to testimony given on behalf of appellant. On the other hand, he recited in considerable detail, during the remainder of his comment, the testimony produced by the prosecution. It will appear below that the testimony of defendant himself contained matter of detail which could have been given by the judge in connection with his comparatively lengthy statement of the testimony produced by the prosecution. The entire statement was so one-sided as to be unjust to appellant, and it was therefore erroneous, even upon the assumption that it was a statement of testimony.

But the judge's recital was not altogether a statement of testimony. He did not state testimony when he said that appellant had testified that the sexual act was committed "by consent of the prosecuting witness." Appellant testified to conduct of his alleged victim from which the jury might have concluded that she had voluntarily yielded herself to his embraces. The evidence is undisputed that the two were together for some hours preceding the time when the act of sexual intercourse took place. They had been to a dance together and traveled together in appellant's automobile for miles. Appellant testified that the prosecuting witness submitted, without protest, to suggestive handling and pressure on his part while they danced together. He said that she was kissed by him several times in his car, without objecting. As to the few minutes immediately preceding his alleged violation of her person, he detailed conduct on her part, which, if his testimony was to be believed, indicated that she was a willing participant in the act to which it is claimed he forced her. The jury, judging from the verdict, refused to believe appellant, but his testimony might have had greater weight with that body if the judge had stated it as fully as he stated the testimony offered by the prosecution, instead of giving his mere conclusion that appellant had testified that the prosecuting witness had consented to his act.

The judge did not state the evidence when he said:

> "She was covered with filth—that is, with dirt; her clothing, her arms and face and her hair full of dirt and dust."

The remark was in form a statement of his own, and the jury must so have considered it. It is true that he followed it with, "Three or four witnesses besides her testified to those facts," but, considering what he had just said, the jury must have viewed this addition, not so much as a statement for them, as one indicating the basis upon which the judge had reached his own conclusion.

On the whole, and taking the judge's entire statement, I think the jury must have concluded that he was convinced that appellant had violated the person of the prosecuting witness. To my mind, two decisions of the Supreme Court uphold the view that the remarks of the judge constitute error. See People v. Gordon, 88 Cal. 422, 26 P. 502; People v. Matthai, 135 Cal. 442, 67 P. 694.

I think, however, that the error of the trial court cannot result in a reversal. I have examined the entire cause, including the evidence, as required by section 4½ of article 6 of the Constitution, and am not of the opinion that the error has resulted in a miscarriage of justice. The evidence against appellant was overwhelming.

THOMPSON, J. I concur in the foregoing concurring opinion.

80 Cal. App. 768

NUETZEL v. MACKIE. (Civ. 3125.)★

(District Court of Appeal, Third District, California. Jan. 22, 1927. Hearing Denied by Supreme Court March 21, 1927.)

1. Bills and notes ⚷275—Payee, indorsing nonnegotiable note to "order," held liable in favor of remote indorsee.

Payee, indorsing note to "order," *held* liable as indorser in favor of remote indorsee, though instrument was originally nonnegotiable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Order (in Commercial Law).]

2. Bills and notes ⚷170—Nonnegotiable instrument may be made negotiable between indorser and subsequent holders by indorsement to order, though intermediate indorsement is without recourse.

Rule that nonnegotiable instrument becomes negotiable between indorser and subsequent holders, if indorsed to "order" or "bearer," applies even though intermediate indorsee may

★Hearing denied by Supreme Court.

have limited his liability by using words "without recourse."

3. **Bills and notes 🔑170—Holder of nonnegotiable note may not convert blank indorsement into special indorsement by adding words "order or bearer" (Civ. Code, § 3116).**

Civ. Code, § 3116, providing holder may convert blank indorsement into special indorsement by writing over indorser's signature in blank any contract consistent with character of indorsement, does not authorize holder to insert words "order or bearer" in blank indorsement of nonnegotiable note, as such change would not be consistent with character of contract.

4. **Mortgages 🔑218—Holder of note secured by mortgage is not precluded from enforcing indorser's liability by statute allowing but one action for recovery of debt secured by mortgage (Code Civ. Proc. § 726).**

Code Civ. Proc. § 726, providing there can be but one action for recovery of debt or enforcement of a right secured by mortgage, does not bar holder of note secured by mortgage from enforcing indorser's liability, as such section is for benefit of mortgagor, and does not apply to independent contracts of indorsers on mortgagor's note.

Appeal from Superior Court, Los Angeles County; William H. Ellis, Judge.

Action by C. R. Nuetzel against Julia Mackie. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Jarrott & Jarrott, of Los Angeles, for appellant.

Walter E. Burke, of Los Angeles, for respondent.

PLUMMER, J. On the 3d day of April, 1920, B. R. Smith and wife executed and delivered to the defendant, Julia Mackie, a promissory note for $3,000. This note was secured by mortgage upon certain real property in San Bernardino county, state of California. On the 30th day of June, 1920, Julia Mackie transferred said note to the Globe Land Company, a corporation, by a written indorsement on the back thereof in the following words: "Pay to the order of Globe Land Co. Julia Mackie." Thereafter, and on or about July 13, 1920, said Globe Land Company transferred the note to the plaintiff by written indorsement on the back thereof in these words: "Without recourse, pay to the order of C. R. Nuetzel Globe Land Company by Harry B. Goodman, President & Manager." The indorsements above mentioned were for a valuable consideration, interest being unpaid, the plaintiff declared the note due and payable according to the terms thereof, demanded payment of the makers, and, upon dishonor, caused the note to be protested, and notice of protest and nonpayment given to the defendant. Thereafter this action was brought against the defendant to recover upon her indorsement. Upon the foregoing facts, the court rendered judgment for the defendant and plaintiff appeals.

[1] Two questions are presented for consideration: (1) By indorsing the note in the form above set forth, did the defendant assume any liability to the indorsee of the Globe Land Company? and (2) Does section 726 of the Code of Civil Procedure prohibit the prosecution of this action?

The note in question was secured by a mortgage under the terms of which said note was rendered nonnegotiable. The liability of the defendant depends upon the question of her intent, as evidenced by the form of indorsement used by her in the signing of the note to the Globe Land Company. In many of the states the defendant would be liable, though the indorsement were in blank; in others, when the indorsement is in blank, the payee is not liable to a remote indorsee. In 8 C. J., under the title of Bills and Notes, §§ 73, 74, and 75, the decisions of the various courts to be considered here is thus epitomized:

> "The liability of a regular indorser of a nonnegotiable note, to his indorsee, is the subject of much conflict in the decisions. While it would seem that a party indorsing a nonnegotiable note cannot but intend to make himself liable in some capacity, it is often held that he is not liable, or, at least, not to the same extent, as is the indorser of a negotiable note."

States are then named in which it is held that the indorser is a mere assignor, and not liable to the indorsee on the contract of indorsement; following which states are named in which it is held that an indorser is liable to the indorsee either as indorser or as guarantor. The text-writer then states:

> "However, all the courts agree that a payee of a nonnegotiable note may become liable as an indorser by expressing such intent in his indorsement or otherwise, or by inducing the assignee to take it by an agreement to that effect."

The text-writer further states that in many of the states apparently no distinction is made in the decisions concerning irregular indorsers between instruments which are negotiable in their character and those which are not, the presumptive liability of the indorser being the same in either case.

In many of the cases cited, the decision turns upon the ascertained intent of the indorser, as evidenced by the form of the indorsement. In 19 Cal. Jur. 885, the liability of an indorser on negotiable paper is thus stated:

> "Although it has been said that as between the immediate indorsee of the payee of a nonnegotiable instrument, and the payee, the rights and liabilities of the parties are the same as in the case of a negotiable instrument, it seems clear, in general, that the payee who in-

dorses a nonnegotiable instrument is to be regarded as the mere assignor of the paper, and he is not liable to the indorsee of his indorsee where the indorsements are in blank or 'without recourse.' However, as in the case of other contracts, it is competent for the parties to make any contract they choose; and in case they clearly express intention to be bound in the same manner as the indorsers of negotiable instruments, the court will give effect to their intention."

In 3 R. C. L. 876, the rule is thus stated:

"Although an instrument as originally made is not negotiable for lack of words of negotiability, yet if it is indorsed to 'order' or 'bearer,' it becomes as between the indorser and subsequent holders a negotiable instrument and subject to the principles and usages of instruments of that character."

And on page 1161 of the same volume, the text reads:

"Nonnegotiable instruments do not fall within the pale of the law merchant; and the law therefore, writes no contract over a blank indorsement on a nonnegotiable instrument as it does over a blank indorsement on a negotiable instrument. The reasonable presumption as to what was intended as an indorsement, in the absence of evidence showing a different intention, is that the indorser intended to do only that which was necessary to transfer the title to the assignee; and the indorsement standing alone, creates no liability against him. Of course, if the indorser expressly agrees, or the form of the indorsement is such as to show an intention on the part of the indorser, that he shall be held liable for payment in case the maker defaults, such effect will be given to the indorsement. If the indorser of a nonnegotiable note writes over his indorsement the words 'pay to B or order,' the note will become negotiable as between the indorser and B or any subsequent holder."

To the same effect is the decision of the Supreme Court of Wisconsin in Carruth v. Walker, 8 Wis. 252, 76 Am. Dec. 235, where it was held that an indorsement, "Pay to the order of Charles Albert," on the back of a nonnegotiable instrument, rendered the indorser liable to remote indorsees, citing the cases of Brenzer v. Wightman, 7 Watts & S. (Pa.) 264; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554; Leidy v. Tammany, 9 Watts (Pa.) 353; Seymour v. Van Slyck, 8 Wend. (N. Y.) 404; Dean v. Hall, 17 Wend. (N. Y.) 214; Story on Promissory Notes, pars. 128, 129; Chitty on Bills, 219. In Ann. Cas. 1912B, 707, the annotator states the rule as follows:

"If the indorser expressly agrees or the form of the indorsement is such as to show an intention on the part of the indorser that he shall be held liable for payment in case the maker defaults, such effect will be given to the indorsement," citing San Diego First National Bank v. Falkenhan, 94 Cal. 141, 29 P. 866; Jossey v. Rushin, 109 Ga. 319, 34 S. E. 558, 77 Am. St. Rep. 377; Jenness v. Barron, 95 Me. 531, 50 A. 712; Kline v. Keiser, 87 Pa. 485; Shaffstall v. McDaniel, 152 Pa. 598, 25 A. 576; Benton v. Gibson, 1 Hill (S. C.) 56; Wilson v. Mullen, 3 McCord (S. C.) 236 (also a number of cases enunciating the same rule).

In the case of First National Bank, etc., v. Falkenhan, 94 Cal. 141, 29 P. 866, the court was considering the effect of an indorsement of a nonnegotiable note which contained a waiver of protest. It was there held that the words "waiving protest" indicated an intention on the part of the indorser to charge himself with liability. In Haber v. Brown, 101 Cal. 445, 35 P. 1035, while not necessary to a decision in that case, it is said:

"In respect to the immediate indorsee of the payee of a nonnegotiable promissory note, the indorsement will ordinarily create the same liabilities and obligations as the indorsement of a negotiable note,"

—and then, in considering indorsements made in blank, it is held that the indorsee ought not to be allowed to alter the terms of a writing by inserting anything above such blank indorsement which would give the indorsement the character of negotiability.

In Kendall v. Parker, 103 Cal. 319, 37 P. 401, 42 Am. St. Rep. 117, the blank indorsement on a nonnegotiable instrument was not sufficient to hold the payee liable to an indorsee of his indorsee. No question of intention of the indorser was present in that case. The indorsement was simply in blank, and, as stated in the annotations found in Ann. Cas. 1912D, p. 5, it is uniformly held that, in order to make a note negotiable, the words "to order" or "to bearer," or equivalent words, must be used. The court in the Kendall Case had before it no language in the indorsement indicating other or further intention on the part of the indorser than simply to assign his rights in the instrument to his immediate indorsee. Thus the Kendall Case neither extends nor limits the rule which is set forth by a number of the authorities holding the mere indorsement of a nonnegotiable instrument by the payee will not render it negotiable, nor give the indorsee a cause of action against prior parties; although it will render such indorsee liable to his indorsee, and will, if he use fit words in the indorsement, render him liable to all subsequent indorsees. Randolph on Commercial Paper, § 17; Story on Promissory Notes, § 128; Carruth v. Walker, 8 Wis. 252, 76 Am. Dec. 235; and the cases there cited; First Nat. Bank v. Falkenhan, 94 Cal. 141, 29 P. 866; De Hass v. Dibert, 70 F. 227 (C. C. A.) 30 L. R. A. 189.

[2] In the recent case of Quinn v. Rike, 50 Cal. App. 243, 194 P. 761, it is held: "Where the payee of a nonnegotiable promissory note assigns all his interests therein and by the assignment, which is evidenced by a writing on the back of the note, excuses presentment, demand, and notice of protest, there is an implied intent to become liable as

an indorser; and where such intent appears the liability of indorser follows." This case cites several of the cases which we have been considering and shows clearly that where any apt words are used such as give negotiability to an instrument, the payee will be held liable to an indorsee of his indorsee. The rule which we have stated applies even though an intermediate indorsee may have limited his liability by using the words "without recourse." To meet this line of authorities, following which we must hold that the use of the words "pay to the order of" by the defendant evidenced the legal intention of the parties to fix liability on the defendant in favor of the plaintiff as an indorsee of her indorsee, the respondent calls our attention to section 3116 of the Civil Code, which reads:

> "The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement,"

—and proceeds to argue that indorsees of the note in question would have the same right to write above a blank indorsement like words which we find used by the payee in this instance, and proceeds to deduce the conclusion therefrom that the words used in the indorsement evidence no intention on the part of the indorser.

[3] This argument, however, is not consistent with the cases which we have cited, which hold that upon a nonnegotiable instrument the indorsee possesses no such right. The section referred to is confined specifically to the character of the contract upon which the indorsement is to be made, and, if that contract is a negotiable instrument, then and in that case the holder thereof may insert the necessary words above a blank indorsement to make it a special indorsement, but, if it is not consistent with the character of the contract, no such right is given by the section. The case of Quinn v. Rike, supra, was decided December 2, 1920, three years after the adoption of the Code as amended, which, we think, is a sufficient answer to the respondent's contention.

[4] As to the right of the plaintiff to maintain this action, the answer turns upon whether section 726 of the Code of Civil Procedure has any application. The respondent cites the case of Western Fuel Co. v. S. G. Leward Co., 190 Cal. 25, 210 P. 419, as authority for the statement that this action cannot be maintained. It is there said that under the Code an independent action at law cannot be maintained for a debt, whatever the form, if secured by a mortgage, citing a number of California cases upholding this rule. While the principle of law set forth in the case just cited is firmly established in this state, its inapplicability, however, is apparent. In the Western Fuel Co. Case, the action was against the mortgagor, and not against the indorser upon an independent contract. It has been several times held in this state that section 726, Code of Civil Procedure, is for the benefit of a mortgagor, and has no relevancy to independent contracts of other parties, though the action is based upon the same instrument, to wit, against a guarantor or indorser, etc. Jones v. Evans, 6 Cal. App. 88, 91 P. 532; Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171.

This precise question was before the court in the case of Murphy v. Hellman Commercial Trust & Savings Bank, 43 Cal. App. 579, 185 P. 485, and we need not go further into this question than simply to call attention to the opinion of the court in that case, found on pages 582 and 583 of the volume cited, and the decisions on this question there referred to and considered. A consideration of this case shows clearly that section 726 of the Code of Civil Procedure has no application whatever where the action seeks to enforce the liability of an indorser.

It follows from what has been stated that the judgment of the trial court must be reversed, but, as the findings of the trial court show all the facts necessary to be found for the entry of judgment in favor of the plaintiff, save and except the amount of interest to be added to the principal of the note, it is hereby ordered that the judgment of the trial court is hereby reversed, and the cause remanded to the trial court, with directions to ascertain, by calculating, the amount of interest due, add the same to the principal, and to then enter judgment for the plaintiff.

We concur: FINCH, P. J.; BUCK, Justice pro tem.

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81 Cal. App. 199

PEOPLE v. LOPEZ. (Cr. 1406.)

(District Court of Appeal, Second District, Division 2, California. Feb. 4, 1927.)

1. Criminal law 🔑1159(3)—Appellate courts cannot determine facts when evidence is substantially conflicting.

Where there is a substantial conflict in the evidence, appellate courts have not the right to determine questions of fact.

2. Criminal law 🔑829(3)—Homicide 🔑286(2)—Refusing instruction defining malice held not error, conviction being for assault with deadly weapon not necessitating proof of malice, and other instructions covering one requested.

The refusal to instruct as to the nature of malice in prosecution for assault with deadly weapon with intent to murder *held* not error, where the conviction was only for assault with deadly weapon, and other instructions fully covered the substance of that requested.

3. Criminal law 🔑829(9)—Refusing instruction that burden of proving criminal assault never shifts held not error; instruction explaining reasonable doubt rule being sufficient.

Refusing instruction that the burden of proof in prosecution for assault with deadly weapon with intent to kill never shifted to defendant *held* not error; it being sufficient to instruct that the jury must be convinced beyond reasonable doubt to convict.

4. Homicide 🔑151(1)—Statute held not to shift burden of showing mitigation or justification in assault with intent to murder (Pen. Code, § 1105).

Pen. Code, § 1105, dealing only with murder trials, does not operate to shift to defendant burden of proof to show mitigation or justification in prosecutions for assault with deadly weapon with intent to kill, notwithstanding evidence of justification.

5. Homicide 🔑241—Jury balances evidence in mitigation or justification with other evidence in reaching verdict.

In prosecutions for homicide or criminal assault, facts in mitigation or justification are to be considered with all other facts, and if the jury are convinced of guilt beyond reasonable doubt, it is immaterial whether their conviction resulted from weakness of defense or strength of prosecution.

6. Aliens 🔑39—California court cannot order deportation of alien.

There is no authority by which California state courts may order an alien deported.

7. Criminal law 🔑1184—Portion of judgment ordering alien's deportation after serving sentence for assault with deadly weapon, being void, may be stricken and remainder affirmed (Pen. Code, § 245).

Where alien convicted of assault with a deadly weapon was ordered deported after serving sentence, such portion of the judgment, being void, may be stricken without violence to the remainder; proper penalty being that provided by Pen. Code, § 245.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Marguerito Lopez was convicted of assault with a deadly weapon, and he appeals. Judgment modified, and, as modified, affirmed.

Theodore Gottsdanker, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, J. The defendant was charged by information with the offense of assault with a deadly weapon with intent to commit murder. The jury returned a verdict of guilty of assault with a deadly weapon, upon which verdict defendant was sentenced for the term prescribed by law, with this additional order in the judgment: "After sentence has been served, defendant is to be deported to Mexico." Defendant's motion for a new trial of the cause was denied, and it is from the judgment thus pronounced and the order denying his motion for a new trial that he prosecutes this appeal.

It appears from the testimony that the defendant and one Hernandez had purchased four pints of whisky during the evening of February 27, 1926, of which they had consumed three pints before 12:15 a. m. of the 28th. At this time Police Officer William J. Hackett observed them near the Santa Fé depot in Los Angeles city. By reason of the fact, as he testified, that they were boisterous and noisy, he approached them and found them under the influence of liquor. Hernandez was able to walk and to talk coherently. A search of him revealing no liquor, the officer sent him home. The fourth pint of liquor was found on defendant's person, and the officer says he put him under arrest for violation of the Wright Act;[1] that he put his right arm under defendant's left armpit and started to lead him to the patrol box. They had not proceeded far when the defendant fell or swung himself in front of the officer and on his way down grabbed the officer's gun from the holster on his left hip. Simultaneously with the grabbing of the gun Officer Hackett let go of defendant's arm and struck upward with his arms so that the first shot fired passed between them close to the defendant's head. The defendant fell to the ground and shot the second time, this shot striking the officer about three inches below the left nipple and emerging from the tip of the left shoulder blade.

The defendant took the stand in his own behalf and testified that he and Hernandez were merely talking together when seen by the officer; that Hackett approached them and searched them; that he hit Hernandez on the back and sent him home; that the officer then commenced to pull him (the witness) along the street, bumping him with his knee and asking him questions in English which he did not understand; that finally the officer asked him for money, and because his purse had nothing but a dollar and some keys in it the officer pulled his gun; that the defendant made a grab for it, whereat the officer tripped and fell; that the defendant fell upon the officer and while grappling for the gun it was discharged. The defendant freely admitted possession of the liquor and that he was intoxicated.

[1] Under this state of facts the appellant says that the verdict is not supported by the evidence. It has been stated so many times that appellate courts have not the right to determine questions of fact where there is a substantial conflict in the evidence that it is unnecessary to refer to authorities to support the statement. There is a substantial conflict in this action, and for that reason we pass to the next question on this appeal.

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[1] St. 1921, p. 79.

[2] And the next point presented is that the court erred in refusing to give the instruction requested by defendant as follows:

> "You are instructed that legal malice or the malice aforethought of statute denotes a wrongful act done intentionally and without legal cause or excuse."

It will be noted first that the defendant was convicted of an assault with a deadly weapon, an offense less than that with which he was charged, but necessarily included in it. The offense of which he was convicted did not necessitate the proof of a specific intent to commit it. People v. Marseiler, 70 Cal. 98; People v. Gordan, 103 Cal. 568–575, 37 P. 534. Hence the refusal to give the instruction cannot be considered to constitute error. Aside from this fact, however, the jury were given appropriate instructions covering the subject of intent and malice as necessary constituents of the offense with which defendant was charged, and the substance of the requested instruction was fully covered.

[3] The defendant next assigns as error the refusal of the court to instruct the jury as follows:

> "The court instructs the jury that in a criminal case, the burden of proof never shifts to the defendant, and in this case the burden of proof remains upon the state throughout the case to prove an unlawful shooting, and the burden does not under any circumstances shift to the defendant to prove his innocence."

This assignment by the defendant is dismissed by him in his brief by the statement "that the court erred in refusing to give the following instruction requested by the defendant." The first impulse when no greater light is shed upon the question is to say the court did not err. Substantial justice to the client and the cause of precedent law, however, cause us to give it careful consideration. The testimony related by the defendant in this case tended to justify the assault, and the respondent argues that section 1105 of the Penal Code does shift the burden of proof to the defendant to show circumstances of mitigation or justification. That section, however, deals only with "a trial for murder," and has no application to the case at bar. People v. Gordon, 88 Cal. 422, 26 P. 502, and cases cited. The testimony in the case at bar was to be tested by the rule of reasonable doubt, and upon that doctrine of the law the court gave the usual instructions.

[4] In the case of People v. Byler, 35 Cal. App. 208, 169 P. 431, which involved a charge of murder, the defendant asked an instruction somewhat similar to that refused here under that portion of section 1105 which reads, "unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter." The requested instruction in that case which the court refused to give was, in effect, that if the proof showed that the offense only amounted to manslaughter the burden of proving mitigation or justification or excuse did not devolve upon the defendant, but that it rested upon the people to prove affirmatively and beyond a reasonable doubt that the mitigating circumstances or justification did not exist. In that case the court was of the opinion, as we are here, that the giving of the usual instruction upon the question of reasonable doubt was sufficient. The whole defense of mitigation or justification in a case of this character is to be considered by the jury in connection with all of the facts, and if after considering all the facts they are convinced beyond a reasonable doubt it matters not whether they are so convinced by the inherent weakness of the defense or by rebuttal testimony of the prosecution.

[5-7] We now come to that part of the judgment which orders the deportation of the defendant. The Attorney General concedes that there is no authority of law by which the state courts can make a valid order of this character. Without passing upon the question as to whether the state may properly enact such legislation, it is sufficient that it has not. The penalty provided for the crime of which defendant was convicted is that found in section 245 of the Penal Code, to wit, "imprisonment in the state prison, or in a county jail, not exceeding ten years, or by fine not exceeding five thousand dollars, or by both." It follows, therefore, that the judgment for deportation is void. It does not necessarily follow that the remaining portion of the judgment is affected. The void portion of the judgment may be separated without violence to the remainder, as was done in a somewhat similar situation in People v. Fick, 89 Cal. 144, 26 P. 759.

It is ordered that the judgment appealed from be and it is hereby modified by striking out the words, "after sentence has been served, defendant is to be deported to Mexico," and, after such modification, the judgment and order are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

81 Cal. App. 192

BAXTER v. KING. (Civ. 5597.)

(District Court of Appeal, First District, Division 2, California. Feb. 3, 1927.)

1. Limitation of actions ⊂⊃21(1)—Action for money not identified as specific thing is not one for conversion, and is barred by two-year period of limitations (Code Civ. Proc. § 338, subd. 3, § 339, subd. 1).

Action for money not identified as specific thing is considered as one on contract or debt and not for conversion, and is within two-year statute of limitation provided in Code Civ. Proc. § 339, subd. 1, and not section 338, subd. 3, providing for three-year statute of limitations.

2. Limitation of actions ⊂⊃21(1)—Action for damages for refusal to deliver corporate dividends received by defendant is barred by two-year period of limitation (Code Civ. Proc. § 338, subd. 3, § 339, subd. 1).

Action for damages for refusing to deliver corporate dividends received by defendant does not come within Code Civ. Proc. § 338, subd. 3, setting three-year period of limitation, which includes actions for specific recovery of personalty or actions for damages for taking or injuring personalty, but is barred by section 339, subd. 1, setting two-year limitation on actions on contract or debt.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by Jennie M. Baxter, as administratrix of the estate of Sadie E. Pritchard, deceased, substituted as appellant in place of Sadie E. Pritchard, against Hazel H. King. Judgment for defendant, and plaintiff appeals. Affirmed.

C. Franklin Baxter, of Los Angeles, and Hamilton A. Bauer, of San Francisco, for appellant.

George Clark Sargent, of San Francisco, for respondent.

KOFORD, P. J. Plaintiff appeals from the judgment for defendant after order sustaining demurrer to plaintiff's amended complaint. The demurrer, besides demurring generally, raised the statute of limitations by appropriate specifications. The complaint in many respects is like the one passed upon in Pritchard v. Mercantile Trust Co. & King, 65 Cal. App. 327, 224 P. 103. The defendant there was sued as administratrix, but here individually. The complaint alleges that plaintiff was a partner of Fred G. King; that he conducted the partnership business in his own name from 1892 until the time of his death in 1920; that a large sum of the profits of said business was invested by said King for said partnership in the purchase of a large number of shares of stock in the Boston-Pacific Oil Company, a corporation; and that the certificates representing said stock, "which had been issued to him in his lifetime in his name being in his possession at the time of his death as a part of the assets and property of said partnership, belonged to plaintiff as the sole surviving partner of said partnership." Allegation No. VI is as follows:

"That said defendant made representations to said corporation that she was the administratrix of the estate of Fred G. King, and that the stock and dividends mentioned belonged to the estate of Fred G. King, and demanded said dividends of said corporation, and was paid by said corporation the sum of $25,146.68, on and after the 19th day of July, 1921, and converted the said amount to her own use, and refuses to deliver said sum or any part thereof to plaintiff as the sole and surviving partner of the firm of Fred G. King, and still detains the said sum of money from plaintiff to her damage of her interest in said sum in the sum of $12,578.34, and the interest thereon at the rate of 7 per cent. from the said time of the conversion thereof."

The complaint was filed July 15, 1924, which was more than two years, but less than three years, after the alleged cause of action accrued. The cause is not barred by the statute, therefore, if it is one included in subdivision 3, § 338, Code of Civil Procedure, which requires to be commenced within three years "an action for the taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property." But if the cause alleged is one included in subsdivision 1 of section 339, Code of Civil Procedure, to wit, "An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision 2 of section 337," then it is barred by the statute of limitations.

It will be noted from reading tne allegations of the complaint above quoted that a cause which would ordinarily be stated as an action for money, simply, is worded as if it were an action for damages for detaining or converting said money.

[1] It is true that sometimes money can be treated as specific property, and where identified can form the basis of an action for conversion, and might also be the subject of an action for the specific recovery of personal property. But where the money or fund is not identified as a specific thing the action is to be considered as one upon contract or for debt and not for conversion. Randolph & Co. v. Walker, 78 S. C. 157, 59 S. E. 856; Larson v. Dawson, 24 R. I. 317, 53 A. 93, 96 Am. St. Rep. 716; Hazelton v. Locke, 104 Me. 164, 71 A. 661, 20 L. R. A. (N. S.) 35, 15 Ann. Cas. 1009.

[2] Subdivision 3 of section 338 divides itself into two divisions. Plaintiff's cause of action does not fall within the division which includes actions for the specific recovery of personal property, because plaintiff is not asking for a specific fund, but for damages for refusing to deliver corporation dividends re-

ceived by the defendant, which damages are said to be one-half of the entire amount received by the defendant. This action would therefore have to fall within the remaining part of said subdivision 3 if it is governed by the three-year provision of the statute of limitations. In order to agree with this we should have to hold that this is an action for damages for the taking, detaining, or injuring of certain goods and chattels, to wit, one-half the amount of certain dividends received, together with interest thereon; or, in other words, an action for detaining money. It is obvious that such a ruling would have the effect of moving practically all actions for debt out of the two-year class into the three-year class. Nearly every creditor would have the same right as plaintiff here to claim that his debtor is in truth detaining money from him. We are unable to follow appellant to such lengths.

In view of the conclusion we have arrived at upon this point, it will not be necessary to consider the other alleged infirmities of the complaint.

The judgment appealed from is therefore affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

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80 Cal. App. 754

RAUSCHAN v. GILBERT et al. (Civ. 3187.)★

(District Court of Appeal, Third District, California. Jan. 22, 1927. Hearing Denied by Supreme Court March 21, 1927.)

1. States 🔑191(1)—State cannot be sued without its consent.

The state cannot be sued without its consent, and is not liable for torts of its officers, agents, or servants, except when it has clearly and definitely consented thereto.

2. States 🔑191(1)—Action against State Compensation Insurance Fund or Industrial Accident Commission for torts of its officers held not authorized by statute (Workmen's Compensation Act, § 38 [b]).

Workmen's Compensation Act, § 38 (b), *held* not to authorize action against State Compensation Insurance Fund or Industrial Accident Commission for torts of its officers or agents committed in discharge of their duties as such.

3. States 🔑191(1)—Action against State Compensation Fund for tort of officers is not authorized on theory of being business enterprise conducted by state for profit (Workmen's Compensation Act, § 37 [c], as amended by St. 1915, p. 1098, § 19).

Under Workmen's Compensation Act, § 37 (c), as amended by St. 1915, p. 1098, § 19, action is not authorized against the State Compensation Insurance Fund for torts of its officers on theory that it is a business enterprise conducted by the state for profit, since it clearly appears from such section that Legislature did not intend that Compensation Fund should be managed for profit.

4. States 🔑112—State does not waive immunity from liability for torts of its officers, employed in administration of private business enterprise conducted by state.

State engaging in prosecution of private business enterprise does not waive its immunity from liability for torts of its officers or agents employed in administration of affairs of such enterprise.

5. States 🔑112—State held not liable for torts of agents engaged in duties in administering state compensation fund unless consenting thereto.

State *held* not liable for torts of its agents, servants, or employees, committed while engaged in performance of their duties in administering the state compensation insurance fund, unless it has clearly given its consent to be so bound or liable.

6. States 🔑191(2)—Action held not maintainable against State Compensation Insurance Fund for slander based on employee's statement that plaintiff was afflicted with loathsome disease.

Since state has not authorized actions against it or any of its mandatories for torts of its agents, action cannot be maintained against State Compensation Insurance Fund for slander, involving a statement by one of its employees that plaintiff was afflicted with a loathsome disease.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by Martin Rauschan against Dr. Ramon A. Gilbert and the State Compensation Insurance Fund. Judgment dismissing the action as to defendant last named, and plaintiff appeals. Affirmed.

Emil G. Buehrer, of San Francisco, for appellant.

Frank J. Creede, of San Francisco, for respondent.

HART, J. This is an action in tort, and was brought by the plaintiff to recover damages upon two separate and distinct causes of action—the one, for the utterance by the defendant Gilbert, "as the servant and agent of the (defendant) State Compensation Insurance Fund," of certain alleged slanderous language and words of and concerning plaintiff, and involving the statement that plaintiff was afflicted with a loathsome disease, and the second founded upon the charge that, by reason of said alleged slanderous language and words, as so uttered by said Gilbert, they having been uttered in the presence of the wife of the plaintiff, the latter lost the affection, consortium, society, etc., of his said wife, or, in other words, that the utterance

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★Hearing denied by Supreme Court.

of said language and words, as explained, caused the alienation from plaintiff of the affection, consortium, etc., of his wife.

The defendant State Compensation Insurance Fund, to which hereinafter we will refer as the Compensation Fund, interposed a demurrer to the complaint upon both general and special grounds. The court sustained the demurrer so interposed, "without leave to amend." Judgment was thereupon entered dismissing the action as to the demurring defendant. The plaintiff appeals from said judgment.

The plaintiff, by this action, seeks to fasten upon the defendant Compensation Fund liability for the damage he claims to have sustained by reason of the alleged slanderous words used by the defendant Gilbert of and concerning plaintiff, and for the loss by him of the affection, consortium, etc., of his wife, because of the utterance of said language and words in her presence and hearing, upon the theory that Gilbert, at the time he used the alleged slanderous language, was the agent of the other defendant and then acting within the scope of his authority as such agent.

The complaint alleges that the defendant Compensation Fund was and is a corporation, organized under the laws of the state of California, and "was and is duly and regularly in the business of acting as an insurance carrier for employees and others in said state, under the provisions of the Workmen's State Compensation, Insurance and Safety Act of the state of California, for profit"; that Dr. Ramon A. Gilbert, "at all times hereinafter mentioned, was in the employ and under the direction of said State Compensation Insurance Fund, as a physician and surgeon." The remainder of the story may the better be told in the language of the complaint itself as follows:

> "That on or about the 16th day of July, 1923, plaintiff was in the employ of the S. Bauer Cooperage Company at San Francisco, state aforesaid, and on said day in the due and regular course of his said employment, plaintiff sustained an injury to his person, to wit, a hernia. That at said time defendant State Compensation Insurance Fund was the insurance carrier of the said S. Bauer Cooperage Company, and under the provisions of the said Compensation Act was liable to pay any compensation which might or could be awarded to plaintiff because of the injury by him sustained as aforesaid. That on or about the 17th day of July, 1923, plaintiff was examined by one Dr. Peters, at the Franklin Hospital, San Francisco, and was by him informed that he was suffering with 'hernia,' and was advised to submit to a radical operation to cure him thereof. That on or about the 6th day of August, 1923, plaintiff was admitted to said Franklin Hospital, and thereafter on the 9th day of August, 1923, an operation was performed on the body of plaintiff by Dr. Conrad Weil, at said hospital, to cure plaintiff from said injury sustained in said employment, as aforesaid. That on or about the 24th day of September, 1923, at the request of the attorney of said State Compensation Insurance Fund, plaintiff was sent by said defendant to defendant Gilbert for an examination to determine the extent of his disability on account of said injury. That on said day plaintiff, in company with his wife and his representative, proceeded to the office of said Gilbert, where plaintiff was examined in private by said Gilbert. That thereupon said defendant Gilbert returned with plaintiff to where his wife and his representative, Moses Amaral, were standing, and in the hearing and presence of said Moses Amaral and his wife, Mrs. Rauschan, the said Gilbert, as the servant and agent of the said State Compensation Insurance Fund as aforesaid, spoke of and concerning the plaintiff the following words, to wit: 'This man was not operated on for hernia; he never had a hernia. What he had is the ——' (naming a loathsome disease). That immediately thereupon the said Gilbert was cautioned by plaintiff's said representative that such statements were untrue and would cause plaintiff great and irreparable injury, in that they would be the source and cause of discord between plaintiff and his wife and would probably result in causing a divorce to be had by plaintiff's wife, but that said Gilbert entirely ignored said warning and smilingly retorted, 'I don't care,' and walked away."

It is then alleged that the "words so spoken and published were and are deliberately false and defamatory," were so known to be by said Gilbert, and were made maliciously and "with the object to frighten plaintiff and cause him to abandon his claim for compensation for said injury, which said claim had been filed with and was then pending before the Industrial Accident Commission of the state of California, and were intended to save the said defendant State Compensation Insurance Fund from paying compensation to plaintiff to which he was lawfully entitled."

The complaint proceeds to allege that the plaintiff has been greatly damaged in his good name and reputation as a result "of the speaking and publication of the said words" by defendant Gilbert, as alleged; that, ever since the utterance of said words by said Gilbert, the marital relations of plaintiff have been disrupted; that his wife, ever since the utterance of said words as indicated, has vilified plaintiff, has wrongfully accused him of promiscuous sexual relations with other women than herself, and has and does wrongfully characterize him in language befitting one who habitually engages and has engaged in indiscriminate immoral relations with disreputable females; "that, since the said speaking of the said words, plaintiff's wife has refused and still refuses to have any marital relations with plaintiff, and because of the premises plaintiff has been deprived of his domestic happiness." For the damage so set up and claimed, plaintiff asks for an award of $25,000.

The second cause of action, as we have seen, is for the alleged loss by plaintiff of "comfort, consortium, and affection" of his wife, the direct result, as the complaint alleges, of the utterance by defendant Gilbert, under the circumstances described in the statement of the first cause of action, of the words therein set forth and which constitute the grounds of complaint herein. For the damage so claimed, plaintiff also asks for the sum of $25,000.

The demurrer to the complaint as to both counts was properly sustained.

An act known as the Workmen's Compensation Act was passed by the Legislature of 1911 (Stats. 1911, p. 796). In October, 1911, the people adopted and added to article 20 of the Constitution, section 21, expressly authorizing the Legislature to create and enforce a liability on the part of all employers to compensate their employees for any injuries incurred by said employees in the course of their employment, irrespective of the fault of either party. Stats. 1911, p. 2179. In pursuance of said amendment to the Constitution, the Legislature in 1913 passed a law entitled in part:

> "An act to promote the general welfare of the people of this state as affected by accident causing the injury or death of employees in the course of their employment, by creating a liability on the part of employers to compensate such employees and their dependents for such accidental injury or death irrespective of the fault of either party, and providing the means and methods of enforcing such liability; and creating a 'State Compensation Insurance Fund' to insure employers against such liability and providing for its administration and regulating such insurance by other insurance carriers," etc. St. 1913, p. 279.

Section 1 of this law provided that the same "may be cited as the 'Workmen's Compensation, Insurance and Safety Act.'" In 1918, section 21 of article 20 of the Constitution was amended by a vote of the people. Among the changes therein made was a provision expressly authorizing "the establishment and management of a State Compensation Insurance Fund," a provision which was not contained in the amendment of 1911 of article 20 of the Constitution. However, the legislation involved in said acts represents the exercise of the state's power of police, nowithstanding the express grant in the Constitution authorizing such legislation. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 694, 151 P. 398, 401 (Ann. Cas. 1916E, 703). In other words, as was said in the case just mentioned, in which the Workmen's Compensation, Insurance and Safety Act was under attack:

> "If such a law may be given force, the sanction for it must be found in that legislative authority usually termed the police power."

These propositions, however, are not contested here. And, as we understand counsel for the appellant, he does not deny that the system or scheme involved in the Compensation, Insurance and Safety Act constitutes and was intended to constitute a governmental mandatory or agency to which the Legislature committed the administration of certain of the state's sovereign powers; that, in other words, the State Compensation Insurance Fund is an agency of the state and was established for the purpose of administering certain portions of the sovereignty of the state.

[1] It is a proposition placed beyond the realm of doubt—indeed, it is elementary—that the state cannot be sued without its consent, "and all the authorities are united upon the proposition that it is a general principle of law that a state is not liable for the torts of its officers, agents, or servants, and that it can be made so liable only upon its clear and definitely given consent." Western Assur. Co. v. Drainage Dist., 72 Cal. App. 68, 75, 237 P. 59, 62, in which a hearing was denied by the Supreme Court; see, also, notes to vol. 13 A. L. R. 1264, 1268, 1276. Upon this proposition we may well present excerpts from a few of the authorities. In Gibbons v. United States, 8 Wall. 275, 19 L. Ed. 453 (see, also, Rose's U. S. Notes), Mr. Justice Miller said:

> "The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties."

In his work on Agency, § 319, Judge Story declares that:

> "The government does not undertake to guarantee to any person the fidelity of any of its officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments and difficulties and losses, which would be subversive of the public interests."

See, also, Hensley v. Reclamation Dist. No. 556, 121 Cal. 96, 97, 53 P. 401; Sels v. Green, (C. C.) 81 F. 555, affirmed in (C. C.) 88 F. 127.

[2] But we do not understand that the appellant disputes the foregoing proposition. He does claim, however, that under the Employers' Liability Act a party may sue the State Compensation Insurance Fund to recover damages for a tort committed by any of the officers or agents or servants thereof in the course of their employment as such for two reasons, to wit: (1) Because the act provides (section 38 [b]) that the Industrial Accident Commission may "sue and be sued in all the courts of the state in all actions arising out of any act, deed, matter or thing made, omitted, entered into, done, or suffered in connection with the State Compensation Insurance Fund, the administration, management or conduct of the business or affairs relating thereto"; (2) that the State Compensation Insurance Fund was established and

is maintained by the state for the purpose of profit, and that the state thus is exercising its proprietary and not its governmental powers, and that therefore the state, as is true of municipal corporations when exercising their proprietary capacity, may be sued for the torts of its officers or agents or servants committed in the performance of their duties in the administration of the proprietary powers of the government. Answering the proposition first suggested, it is to be remarked that the provision of the statute authorizing the State Industrial Accident Commission to sue or to be sued is remedial only—"that is, its effect is not to create a liability against such governmental agency, but merely to afford a remedy where none was formerly available for the enforcement of 'such liability as would have existed if the statute had not been enacted.'" Denning v. State of California, 123 Cal. 316, 55 P. 1000; Chapman v. State, etc., 104 Cal. 690, 38 P. 457, 43 Am. St. Rep. 158; Melvin v. State, 121 Cal. 16, 53 P. 416. See, also, Western Assur. Co. v. Drainage Dist., supra. Counsel has not pointed out, nor have we been able to find, any provision of any law in this state which authorizes the maintenance of a suit against the State Compensation Insurance Fund or the State Industrial Accident Commission for the torts of its officers or agents or servants committed while in the discharge of their duties as such.

The case of Chapman v. State of California, 104 Cal. 690, 38 P. 457, 458, 43 Am. St. Rep. 158, is cited by appellant as authority for his position that the state, in instances in which it engages in the prosecution of what in an ordinary sense would properly be regarded as a business enterprise, may be sued and held liable for the torts of its officers or agents employed in performing the duties of its proprietary powers. In that case the action was for damages for the loss of a quantity of coal through the negligent act of certain officers or employees of the state. The complaint therein alleged that, on a date named, the defendant, "in consideration of wharfage and dockage charges, paid to its officers, the state board of harbor commissioners, received upon one of its public wharves, situated in the city of San Francisco, and under the jurisdiction and control of the state board of harbor commissioners, about one hundred and thirty tons of coal belonging to the assignors of plaintiff, and to be removed by them from such wharf"; that a large portion of the wharf on which the coal was placed broke and gave way "by reason of the negligence, omission, and carelessness of defendant, its officers, and agents, * * * in failing, and neglecting to keep said wharf in good and sound condition and repair," all said coal was sunk in the bay of San Francisco and became a total loss, etc. The contention of the Attorney General in that case was that the state was not responsible for the negligence of its officers, undoubtedly assuming that the action was one sounding in tort. The Supreme Court, in its opinion, held to the contrary, declaring, among other things:

> "A wharfinger is impliedly bound by his contract as such to exercise ordinary care for the preservation and safety of property intrusted to him (Edwards on Bailments [3d Ed.] § 359), and this imposes upon him the duty to exercise ordinary care to ascertain the condition of his wharf, that he may know whether it is reasonably safe for the purposes for which he hires it; and, if merchandise is received by him upon a wharf which is unsafe, and is thereby lost, so that he cannot deliver it according to his contract, the wharfinger is liable therefor if ordinary care would have enabled him to know the condition of his wharf; and such negligence on his part will be treated as a failure to exercise ordinary care for the safety of the property intrusted to him. *This negligence, however, and the consequent loss of the goods intrusted to him, would be a breach of the terms of his contract, and his liability therefor could have been enforced at common law by an action of assumpsit* (1 Chitty on Pleading, *114; Baker v. Liscoe, 7 Term Rep. 171); and under our practice the owner or consignee may sue upon the contract for the damages sustained by reason of such negligence." (Italics ours.)

But appellant seems to place much reliance upon the following language from the case of People v. Stephens, 71 N. Y. 527, and which was approvingly quoted in the opinion in the Chapman Case:

> "'But when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts the rights and obligations of the contracting parties must be adjusted upon the same principle as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor, and suitor.' See, also, Carr v. State, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370, 22 Am. St. Rep. 624."

The foregoing language should be read in the light of the declarations of the court in the same case first hereinabove quoted. As so read and considered, it is clear that the court, in using the language which appellant construes as a support for his position, was referring entirely to cases in which the state had breached its contracts, negligently or otherwise. In other words, the court, in the language referred to, was speaking of actions against the state sounding in contract and not actions to recover damages for the torts of the state's officers, agents, or servants committed while discharging their duties as such. While not saying so in so many words, it is clear that the court, in the Chapman opinion, had in mind and purposely recognized the proposition that, as to the state or any of its agencies or mandatories established for the purpose of administering portions of its sovereign powers, the rule of liability for wrongs committed by the state or such agencies appertains exclusively to breaches of contractual obligations, and not to the tortious acts of the agents or employees of the state committed in the course of their employment as such from which injury to the person or property of others directly follows. Indeed, if the Chapman decision could reasonably be construed as sanctioning the right of action in tort against the state or any of its mandatories for the torts of its officers, etc., the case would represent an exception to the general run of cases upon that subject in practically all the state as well as federal jurisdictions. Many of these cases are cited in respondent's brief. They are too numerous to mention herein.

[3] The contention that the case here is taken out of the category of cases in which the state or its agencies charged with the administration of certain portions of its sovereignty by reason of the asserted fact that the State Compensation Insurance Fund is a business enterprise conducted by the state for profits, is answered adversely thereto by the Compensation Act itself. Section 37 (c), as amended by St. 1915, p. 1098, § 19, provides:

> "Said fund shall, after a reasonable time during which it may establish a business, be fairly competitive with other insurance carriers, and it is the intent of the Legislature that said fund shall ultimately become neither more nor less than self-supporting. In order that the State Compensation Insurance Fund shall ultimately become neither more nor less than self-supporting, the actual loss experienced and expense of the fund shall be ascertained on or about the first of January in each year for the year preceding, and should it then be shown that there exists an excess of assets over liabilities, such liabilities to include the necessary reserves, and a reasonable surplus for the catastrophe hazard, then, in the discretion of the commission, a cash dividend shall be declared to, or a credit allowed on the renewal premium of each employer who has been insured with the fund, such cash dividend or credit to be such an amount to which, as in the discretion of the commission, such employer may be entitled as the employer's proportion of divisible surplus."

Thus it is clearly made to appear that the Legislature did not intend that the Compensation Fund should be managed for profit, but, to the contrary, plainly evinced the intention that it should not be conducted as a profit-bearing enterprise to the state. A similar proposition was advanced in the case of Melvin v. State, 121 Cal. 16, 53 P. 416. The plaintiff sought damages against the state for personal injuries received by the falling of a portion of the "grand stand" on which he was sitting as a spectator at the state fair held at Sacramento, claiming and alleging that said "stand" was, by the state's officers in charge of the fair, negligently maintained in a condition unsafe for the use or purpose for which it was erected and intended to be maintained. He paid the required admission fee to the grounds and buildings of the fair, and it was contended, among other things, as here, that the state fair was a business enterprise conducted by the state for gain or profit. The court held that, although all persons desiring to visit the fair were required to pay an admission fee and the same was collected by the state through its officers or agents in charge of the fair, it was not the design or intention of the act creating the institution (a governmental agency) that it should be profit-producing to the state, and that the language of the statute itself showed clearly that it was not to be so conducted. In this connection, it may well be stated that there is much in the opinion in the Melvin Case that cogently bears upon some of the other points presented here and which supports the position of respondent thereon.

[4] The proposition that the state, when it engages in the prosecution of a private business enterprise, waives its immunity from liability for the torts of its officers or agents employed in the administration of the affairs of such enterprise, is not supported either by principle or authority. As we have seen, appellant seeks to support the proposition upon the theory upon which municipalities are held subject to the rule of liability in cases in which the damage complained of has been caused by the negligent act or conduct of an officer, agent, or servant engaged in the discharge of duties appertaining to or connected with the administration of some function of the municipality in the employment or exercise of its proprietary capacity or powers. In the case of Riddoch v. State, 68 Wash. 329, 123 P. 450, 452, 42 L. R. A. (N. S.) 251, Ann. Cas. 1913E, 1033, the court had before it precisely the same proposition. In a well-considered opinion, the Supreme Court of Washington held that the proposition was entirely untenable. What is said in the opinion on the subject involves such a clear exposition of the rule and of the reasons that mark a clear line of distinction between the state and municipalities in such a case, that we feel that we are justified in reproducing it in full:

> "The appellant seeks to confine this rule of nonliability for torts to cases where the negligence of the officer or agent occurred in the discharge of some purely governmental function of the state. He contends that, in leasing the armory, the state was engaged in a private enterprise, and that the rule of nonliability, therefore, does not apply. The question is admittedly a new one. No authority distinctly so holding, nor indeed recognizing such an exception, has been cited, and we have found none. It is argued that the distinction is sustained by analogy to a similar exception to the rule of nonliability as applied to municipal corporations. The analogy, however, does not hold. Munici-

pal corporations enjoy their immunity from liability for torts only in so far as they partake of the state's immunity, and only in the exercise of those governmental powers and duties imposed upon them as representing the state. In the exercise of those administrative powers conferred upon, or permitted to, them solely for their own benefit in their corporate capacity, whether performed for gain or not, and whether of the nature of a business enterprise or not, they are neither sovereign nor immune. They are only sovereign and only immune in so far as they represent the state. They have no sovereignty of their own, they are in no sense sovereign per se. Their immunity, like their sovereignty, is in a sense borrowed, and the one is commensurate with the other. Such is, in effect, the conclusion reached in Hill v. Boston, 122 Mass. 344, 23 Am. Rep. 332, after a most exhaustive review of the authorities, both American and English. The same principle underlies our own decisions. Sutton v. Snohomish, 11 Wash. 24, 39 P. 273, 48 Am. St. Rep. 847; Russell v Tacoma, 8 Wash. 156, 35 P. 605, 40 Am. St. Rep. 895; Cunningham v. Seattle, 42 Wash. 134, 84 P. 641, 4 L. R. A. (N. S.) 629, 7 Ann. Cas. 805; Linne v. Bredes, 43 Wash. 540, 546, 86 P. 858, 6 L. R. A. (N. S.) 707, 117 Am. St. Rep. 1068, 11 Ann. Cas. 238.

"On the other hand, the state is inherently sovereign at all times and in every capacity. It is the organized embodiment of the sovereign power of the whole people. By reason of this sovereignty, it possesses all powers, but only such powers, as are within the limitations of the state Constitution and without the prohibitions of the federal Constitution. It can do no act, except in the exercise of this sovereign power and within these constitutional limitations. If it may constitutionally take over any enterprise, though usually of the nature of a private business, the very taking over is an exercise of this sovereign power. It seems much more logical and much more consonant with the idea and genius of sovereignty that the enterprise thus taken over should be impressed with the sovereign character of the state, than that the state should become hampered by the private character of the enterprise. The latter result is incompatible with the concept of sovereignty.

"This seems to us to be the only logical basis for the following decisions, holding the state not liable for torts in connection with the administration of such enterprises taken over by the state: State v. Hill, 54 Ala. 67, in which the state was held not liable, at the suit of an owner, for the tortious killing of stock by the agents of the state in operating a railroad; Melvin v. State, 121 Cal. 16, 53 P. 416, in which the state was held not liable to a spectator, who had paid for admission to a state fair conducted by an agency of the state, for a tortious injury by the falling of negligently constructed seats; Denning v. State, 123 Cal. 316, 55 P. 1000, in which the state was held not liable to an employee, injured by the fall of a negligently fastened ladder on a tug boat owned by the state, and operated by the state harbor commissioners as an agency of the state."

To the same effect are all the cases to which our attention has been directed. Of these, the following may be named: Davis v. State, 30 Idaho, 137, 163 P. 373, 375, Ann. Cas. 1918D, 911; Herkimer Lumber Co. v. State, 189 N. Y. S. 119, 122, 196 App. Div. 708; State v. Sharp, 21 Ariz. 424, 189 P. 631; Dietrich v. Palisades Interstate Park Com., 187 N. Y. S. 454, 456, 114 Misc. Rep. 425; Stephens v. Commissioners of Palisades Interstate Park Com., 93 N. J. Law, 500, 108 A. 645; State v. Mutual Life Ins. Co., etc., 175 Ind. 59, 93 N. E. 213, 42 L. R. A. (N. S.) 256, 261; Clodfelter v. State, 86 N. C. 51, 41 Am. Rep. 440.

[5, 6] The necessary conclusion from the foregoing considerations is, obviously: That the State Compensation Insurance Fund is an agency of the state, created and maintained for the purpose of administering certain of the state's sovereign powers; that the state cannot be bound by or held liable for the torts of its agents, servants or employees committed while engaged in the performance of their duties as such, unless it has clearly given its consent to be so bound or liable; that the state of California has not authorized the maintenance of actions against it or any of its mandatories for the torts of its agents, etc., committed while prosecuting their duties as such; and that therefore the plaintiff cannot maintain this action against respondent herein. The conclusion thus arrived at and announced is manifestly decisive of the case here as to both counts of the complaint. It is hence unnecessary to consider herein the attack upon the complaint on the other grounds raised by the demurrer and discussed in the briefs of the respective counsel.

The judgment is affirmed.

We concur: FINCH, P. J., and PLUMMER, J.

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81 Cal. App. 86

KRUSE et ux. v. WHITE BROS. et al.★

(Civ. 5464.)

(District Court of Appeal, First District, Division 1, California. Jan. 27, 1927. Rehearing Denied Feb. 26, 1927. Hearing Denied by Supreme Court March 28, 1927.)

1. Municipal corporations 🔑706(7)—Contributory negligence of pedestrian injured by automobile held for jury.

Evidence, in action by pedestrian to recover for injuries by automobile while crossing a public highway, *held* sufficient for jury on question of contributory negligence.

2. Municipal corporations 🔑705(2) — Pedestrian has equal rights on highway with automobile driver.

Pedestrian, although having duty of using ordinary care for his safety, has equal rights on public highway with those of automobile driver.

★Hearing denied by Supreme Court.

3. Master and servant 🔑302(1)—Employee's deviation exonerating employer from liability for negligence must be for purpose entirely personal.

In order that employee's deviation from strict course of duty will exonerate employer from liability for injuries resulting from employee's negligence, it is essential that the deviation be for purpose entirely personal to employee and must be so substantial as to amount to an entire departure.

4. Master and servant 🔑332(2)—Employee's deviation as constituting complete departure from duty is question of fact.

Whether employee's deviation from strict course of duty has been so material or substantial as to constitute a complete departure is usually a question of fact.

5. Master and servant 🔑332(2)—Employee's abandonment of employment at time of injuring pedestrian by automobile held for jury.

In pedestrian's action for personal injuries by automobile owned by corporation and operated by employee, evidence on question of whether injury occurred after employee had abandoned employment *held* for jury.

6. Trial 🔑253(4)—Instruction directing verdict for pedestrian injured by automobile held not erroneous as ignoring defense that employee was not acting within employment.

Instruction, in pedestrian's action for injuries from automobile, directing verdict in event of finding certain facts, *held* not erroneous as ignoring defense that employee was not acting within scope of employment, since such question was fully covered by other instructions and use of word "defendants" necessarily implied that jury must find, in connection with facts specified, that employee was acting within scope of employment.

7. Appeal and error 🔑1170(9)—Instruction authorizing inference that automobile driver, when injuring pedestrian, was acting within employment, held not reversible error under evidence supporting finding (Const. art. 6, § 4½).

Instruction directing jury to infer that automobile driver at time of injuring pedestrian was acting within scope of employment *held* not to require reversal under Const. art. 6, § 4½, in view of evidence sufficient to support jury's finding without aid of inference referred to in instruction.

8. Trial 🔑296(7)—Instruction requiring overcoming presumption that employee, when injuring pedestrian, was within employment by satisfactory evidence, if erroneous, held not prejudicial in view of other instructions (Code Civ. Proc. § 1835).

Instruction, in pedestrian's action for injuries by automobile, requiring inference that at time of accident defendant employee was engaged in business of defendant employer to be overcome by satisfactory evidence, if erroneous, *held* not prejudicial, in view of other instructions, since in absence of instruction as to significance given term "satisfactory evidence" by Code Civ. Proc. § 1835, jury must be presumed to understand words according to ordinary meaning.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by E. A. Kruse and wife against White Bros. and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. E. Reardon, of San Francisco, for appellant William T. Meyer.

Wm. M. Abbott, K. W. Cannon, and Walter H. Linforth, all of San Francisco, for appellant White Bros.

Preston & Duncan, of San Francisco (Robert E. Hatch, of San Francisco, of counsel), for respondents.

CASHIN, J. Appeals by defendants from a judgment entered on a verdict for the plaintiffs in an action to recover for personal injuries.

E. A. Kruse is the husband of Madeline C. Kruse, and the latter—who will be hereinafter referred to as the plaintiff—while crossing a public highway known as the Alameda, near its intersection with Yosemite avenue in Berkeley, Alameda county, was injured by an automobile owned by the corporation defendant and operated by Meyer, one of its employees. As grounds for reversal of the judgment, it is urged by appellant corporation that the evidence is insufficient to sustain a finding that Meyer was acting within the scope of his employment, and that certain instructions to the jury were prejudicially erroneous; and, by appellant Meyer, that the only inferences reasonably to be drawn from the evidence support his special defense of contributory negligence.

Meyer, who resided in Oakland, was there employed as a salesman for the corporation, a dealer in hardwood lumber, with its place of business in San Francisco. According to the testimony his working hours commenced at 8 a. m. and ended at 5 p. m., it being his duty during those hours to solicit orders for his employer, for which purpose the automobile was furnished by the latter. The automobile when not in use was kept in a garage in the possession of Meyer, the employer making a money allowance for this service. Some days before the date of the accident—which occurred on November 23, 1921, at about 6 p. m.—Bruce Bartholomew, who wished to purchase a quantity of hardwood lumber, communicated his wants to Meyer, and the testimony tends to show that it was the intention of the latter on the evening of the accident to call at the Bartholomew residence, which was situated at Colusa avenue between San Pedro and Tacoma avenues, one block southwest of the Alameda. At about 5 p. m. on that day Meyer drove the automobile from the yard of a lumber company, to which his duties had taken him and which was situated several blocks south and west of the Bartholomew residence, to a point several blocks east and south of the yard mentioned. He there by previous arrangement met Miss Keaha Ingram, who also resided on Colusa avenue, but four blocks northwest of the Bartholomew residence. Meyer testified that, accompanied by her, he drove back over the same route to Milvia street, which runs north from the route previously traversed, followed this street to Hopkins street, and thence through the latter to the Alameda. From this point for a considerable distance the Alameda runs in a northerly direction, thence turns to the northwest, from the turn running nearly parallel with the section of Colusa avenue in which are situated the residences mentioned. These streets are connected by cross-streets, two of which, namely, San Pedro and Tacoma avenues, lead from the Alameda to points between which is situated the Bartholomew residence, and two, called Capistrano and San Lorenzo avenues, join Colusa avenue further to the northwest at points nearer the Ingram residence. Meyer testified that he, with his companion, proceeded along the Alameda, passing San Pedro and Tacoma avenues, and then turned to the northeast near its intersection with Capistrano avenue into a street known as Lovers' Lane, which follows a winding course in that direction, ending at Yosemite avenue. The latter street, which Meyer followed, runs thence to the west and ends at the Alameda at the place of the accident, which was northeast of the residences and cross streets mentioned. The distance from the junction of Tacoma avenue with the Alameda along the latter to Lovers' Lane and thence through the lane and Yosemite avenue to the point of the accident was approximately 2,150 feet; and from the junction mentioned directly along the Alameda to the same point it is approximately 1,600 feet. Meyer further testified that it was his intention to turn at the place of the accident and proceed southeast along the Alameda to San Lorenzo avenue, distant about 400 feet, and thence to the junction of the latter with Colusa avenue, which junction is approximately 600 feet from the Bartholomew residence and 1,000 feet from the Ingram residence; thence to drive northwest to a point near the latter residence, allow his companion to alight, and then, if time permitted, to proceed to the dwelling of Bartholomew.

To prove that there was no diversion from the direct route to the latter residence, plaintiff sought to show by certain physical conditions that, contrary to the testimony of Meyer and his companion, he reached Yosemite avenue by a route to the east of the Alameda and Lovers' Lane. On the evening of the accident, which was dark, vision being made more difficult by a thick fog, the plaintiff, who was proceeding to her home, in attempting to cross from the southwest to the northeast side of the Alameda to a point a few feet to the north of a triangular parked space at its junction with Yosemite avenue, was struck by the automobile driven by Meyer, which approached from the east along the latter street and turned in a northwesterly direction into the Alameda. Yosemite avenue before reaching the Alameda divides in order to permit vehicles to pass to the north and south of the parked space mentioned, the north curb line of the avenue turning to the northwest for that purpose. The plaintiff testified that she stopped, looked, and listened before starting to cross; that she neither saw nor heard the approach of an automobile; that she then proceeded to the north of the parked space, where she stopped and looked east along Yosemite avenue; that she saw the lights of an automobile in that direction which appeared to be stationary; that hearing no warning signal she continued her course to the gutter on the further side of the Alameda and had placed her foot on the curb when, having seen no approaching light until immediately before the impact, she was without other warning struck and injured. Appellant Meyer admitted that the automobile rounded the curb to the north at a speed between 10 and 15 miles an hour; that he had not seen respondent until the car reached the point about 2 feet from the place where she was struck, and that the horn was not sounded.

[1, 2] While, as contended by Meyer, it was the duty of the plaintiff to use ordinary care for her own safety, her rights in the street, although not superior, were equal to his, and her testimony, if believed by the jury, was sufficient, in view of the circumstances, to sustain the finding that in pursuing the course shown she was not wanting in ordinary care. As stated, Meyer was a salesman, and while it appears from the testimony of officers of the corporation that he had been instructed that the auto should be used only for business purposes it further appears from that of the sales manager that the latter knew that the order was not being strictly followed. The automobile was at all times in Meyer's possession, and he was not forbidden to use it for business purposes after his regular hours, nor to permit others to accompany him while so using it. He was given a wide discretion as to his movements, not being restricted—as might happen with an ordinary servant—to particular routes while performing his duties.

[3] In Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295—where it appeared that it was the duty of a servant to drive his employer's automobile from a garage to the home of the latter four blocks to the west, but who drove the car on a mission solely his own to a point 2½ miles to the east, a collision occurring

while returning to the garage—it was held that the act of the servant was not within the scope of his employment, following the general rule there stated that if a servant abandons or departs from the business of the master and engages in some matter suggested solely for his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and while so engaged commits a tort, the master is not answerable. Kish v. Cal. State Auto Assn., 190 Cal. 246, 212 P. 27. To exonerate the master, however, it is essential that the deviation be for purposes entirely personal to the servant (39 Corp. Jur., p. 1297, Master and Servant, §§ 1493, 1494); and a deviation will be regarded as immaterial if the latter combines his own business with that of the master or attends to both at substantially the same time (Brimberry v. Dudfield Lumber Co., 183 Cal. 454, 191 P. 894). A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. 39 Corp. Jur. p. 1297, Master and Servant, § 1493. As the rule has been stated:

> "One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances the mingling with the pursuit of the master's business some purpose of the servant's own." Shearman & Redfield Negligence (6th Ed.) § 147a.

[4] Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury. Healey v. Corkrill, 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115; Ritchie v. Waller, 63 Conn. 155, 28 A. 29, 27 L. R. A. 161, 38 Am. St. Rep. 361; Gousse v. Lowe, supra; Dennis v. Miller Automobile Co. (Cal. App.) 238 P. 739.

In the instant case the evidence was sufficient to show that Meyer was not required to follow certain or fixed routes while engaged in the performance of his duty, and to support the conclusion that acts not amounting to a complete turning aside from the employer's business so as to be inconsistent with its pursuit were anticipated by the employer; and that deviations from the strict line of his employment, so long as the pursuit of the employer's business remained the controlling purpose, were tacitly assented to by the latter.

In Dennis v. Miller, supra, it appeared that it was the duty of an employee of the defendant corporation to transport packages from its garage to the office of an express company situated 14 blocks to the west and 10 to the north of the garage; that instead of proceeding to his destination by the usual and more direct route to the west and thence to the north, as an accommodation to other employees, who wished to be transported to their home situated 6 blocks to the south and 11 to the west of the garage, he proceeded south to the street on which the residence was situated, and thence towards the west, and that when at a point near the residence an accident occurred. It was there held that the question whether the employee was then acting within the scope of his authority was one for the jury.

[5] Whether the detour made by Meyer on the evening of the accident amounted to an abandonment of the employment was in view of the evidence a question on which reasonable men might differ. We cannot say as a matter of law that such was its effect; and are of the opinion that, as in the case last cited the question was one for the jury; and that their implied finding that it was not such abandonment is supported by the evidence.

It is admitted that the corporation owned the car and that it had been furnished to the employee for use in its business. It might fairly be inferred from the testimony of Meyer and Bartholomew that the pursuit of the master's business was the controlling purpose of the employee throughout his course, and that the deviation from the direct route was within the rule stated—one which the employer might reasonably be deemed to have anticipated and assented to, and was not such as to amount to an abandonment of the employment.

[6] The court by three of its instructions directed a verdict for the plaintiff in the event the jury found certain facts to be true. Appellant corporation contends that in so doing the court ignored the defense that Meyer at the time of the accident was not acting within the scope of his employment. Two of the instructions referred to provisions of the law requiring the signal device directed to be attached to a motor vehicle to be sounded as a warning of danger, and forbidding the operation of the car without adequate braking equipment; and the third to the care required of the driver. By the first the jury were told that if at the time of the accident the "defendants" violated the first provision mentioned, and by the second and third that if the "defendants" at the time of the accident were operating the car without adequate brakes or without due care as to speed, they should render a verdict in favor of the plaintiff if they further found that the omissions mentioned were the proximate cause of the injury and that plaintiff was not guilty of contributory negligence.

The question presented by the defense mentioned was fully covered by other instructions; and the use of the word "defendants" necessarily implied that the jury must find, in connection with the facts specified, that the servant at the time of the accident was acting within the scope of his employment.

[7] The jury were further instructed as follows:

> "In this case it is admittedly the fact that at the time of the accident the defendant Meyer was in the employ of the defendant White Bros., Inc., and that the automobile which he was driving was the property of the defendant White Bros., Inc., and was intrusted by that company to Meyer for use as a solicitor for said White Bros. From these facts the law infers that at the time of the accident in question the defendant Meyer was acting within the scope of his employment by the defendant White Bros., Inc. This inference, however, may be overcome by other evidence in this case."

It is contended that this instruction in effect directed the jury to infer from the admitted facts that the servant at the time of the accident was acting within the scope of his employment. As held, the jury might draw the inference in the absence of proof to the contrary (McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417), but are not bound to do so (Davis v. Hearst, 160 Cal. 143, 116 P. 530; Fahey v. Madden, 56 Cal. App. 593, 206 P. 128); and an instruction that a presumption arises or that the law infers therefrom that the servant was so acting is a misdirection of the jury (Fahey v. Madden, supra; Albert v. McKay & Co., 53 Cal. App. 325, 200 P. 83), which, as held in the cases last cited, is a ground for reversal if, as section 4½ of article 6 of the Constitution in effect provides (People v. Chapman, 55 Cal. App. 192, 203 P. 126; Vallejo & Northern R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238), it affirmatively appears that the error resulted in a miscarriage of justice. The testimony of Bartholomew tends to prove the fact that an engagement had been made for the evening in question, and this, with Meyer's testimony that he then intended, time permitting, to call on the former was sufficient to support the finding of the jury without the aid of inferences drawn from the admitted facts referred to in the instruction; and we cannot say that this finding was based on the erroneous statement that a presumption arose therefrom.

[8] Appellant corporation in its closing brief calls attention to a further instruction given at plaintiff's request which was as follows:

> "The inference that at the time of the accident the defendant Meyer was engaged in the business of the defendant White Bros. may be overcome by satisfactory evidence that Meyer had departed from the business of White Bros. and was engaged exclusively on business of his own."

It is urged that this instruction placed an undue burden on appellant, requiring more than a preponderance of the evidence to overcome the inference which might be drawn by the jury.

In Hutson v. Southern Cal. Ry. Co., 150 Cal. 701, 89 P. 1093, an instruction was given which stated in substance that the defense of contributory negligence must be proved to the satisfaction of the jury by a preponderance of the evidence. The court in reversing the judgment and ordering a new trial on other grounds said with respect to the instruction that—

> "In a civil case it is the weight of evidence * * * which is sufficient to establish a fact. * * * As given, the instruction might tend to confuse a jury into believing that something more than this was required."

In a dissenting opinion Justice Shaw, referring to the criticized instruction, said:

> "The court seems to have feared that the words 'to your satisfaction' might be understood by the jury to mean 'beyond a reasonable doubt.' But the jury must be presumed to understand words according to their ordinary meaning."

The court, in Boa v. S. F.-Oakland Terminal Railways, 182 Cal. 93, 187 P. 2, with respect to a similar instruction given by the trial court, said:

> "This court has repeatedly decided that an instruction that in substance informs the jury that a party having the burden of proof as to a certain fact or issue must establish it to the satisfaction of the jury by a fair preponderance of the evidence is not reversible error, where the other instructions in the case clearly define what is meant by a preponderance of the evidence and distinctly advise them that a preponderance of the evidence will be sufficient to justify a finding in favor of the party having the burden. In such cases it is held that the words 'to the satisfaction of the jury' are equivalent to 'find' or 'believe.'"

In the absence of an instruction as to the signification given the term "satisfactory evidence" by the Code section (Code Civ. Proc., § 1835), as said in the Hutson Case, supra, "The jury must be presumed to understand the words according to their ordinary meaning." According to Webster, New International Dictionary, the word "satisfactory" means "sufficient"; and by the Century Dictionary and Cyclopedia the definition "fulfilling all demands and requirements" is given, the term "satisfactory evidence" being therein defined as "such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced."

In the instant case the jury was instructed that in civil cases a preponderance of the evidence is all that is required. The meaning of the term was defined; and it was further instructed that if it found from the evidence that at the time of the accident the driver was not performing any work for his employer, but was on a mission of his own, its verdict should be for the appellant corporation notwithstanding that the latter owned the automobile and the driver was its employee. These instructions were sufficient to correct the impression which the criticized instruction might tend to create, and the latter, if erroneous, was not prejudicial.

The evidence was sufficient to sustain the verdict, and we find no error in the proceedings which can reasonably be said to have resulted in a miscarriage of justice.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

81 Cal. App. 159

PEOPLE v. STAFFORD. (Cr. 1438; 3010.)★

(District Court of Appeal, Second District, Division 1, California. Jan. 31, 1927. Rehearing Denied March 1, 1927. Hearing Denied by Supreme Court March 31, 1927.)

1. Embezzlement 🔑10—Evidence showing sale of securities, under power of attorney fraudulently obtained, and appropriation of proceeds held not to warrant acquittal on charge of embezzling securities (Pen. Code, § 507).

In prosecution, under Pen. Code, § 507, for embezzling certain corporate stocks and bonds belonging to complaining witness, evidence that defendant had sold the stocks and bonds involved, under a power of attorney fraudulently obtained, authorizing him to act for complaining witness and for her use and benefit, *held* not to entitle defendant to acquittal on theory that he had not appropriated the stocks and bonds, but rather their proceeds.

2. Embezzlement 🔑8—Though complaining witness was estopped to claim title to securities, sold under power of attorney fraudulently obtained, state could investigate execution of power.

In prosecution for embezzlement of stocks and bonds, sold under power of attorney fraudulently obtained, complaining witness was estopped to contend, as against innocent purchaser, that title did not pass, though state was not estopped to inquire into circumstances of transaction prior or subsequent to the execution of the power of attorney.

3. Embezzlement 🔑10—Defense that power of attorney, under which stocks were sold, fixed defendant's rights, though fraudulently obtained, held not available.

In prosecution for embezzling stocks and bonds, sold under power of attorney fraudulently obtained, defense that defendant's rights were controlled by the written power, however obtained, *held* not available, being based on his own wrongdoing.

4. Criminal law 🔑696(7)—Refusal to strike out answer only in part responsive to question held not error, motion being addressed to whole.

In prosecution for embezzlement of stocks and bonds, sold under power of attorney fraudulently obtained by promise of marriage, refusal to strike out answer of complaining witness concerning defendant's authorized use of her charge accounts *held* not error, though part of answer was not responsive to question; the motion being addressed to the whole.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

James L. Stafford was convicted of embezzlement, and he appeals. Affirmed.

Wm. T. Aggeler, Public Defender, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

YORK, J. The defendant was convicted on the first count of an indictment, which first count charged him with the embezzlement of certain corporation stocks and Liberty bonds, "all of the aggregate value of $686." A motion for a new trial was made and denied, and the defendant has appealed from the order denying motion for a new trial, and from a judgment of conviction on the verdict.

[1] Appellant contends that he was given authority to sell the stocks and bonds by the complaining witness by a letter or power of attorney executed by her, and he claims that, having been so authorized, he was acting within the scope of his authority when he sold the bonds, and hence, that there could have been no unlawful conversion of the property by him. But unfortunately for his contention, the letter or power of attorney executed by the complaining witness authorized him to act for her and for her use and benefit, and the jury could have found, and undoubtedly did find, that he obtained the possession of the property dishonestly, and obtained the power of attorney dishonestly, and did not intend to dispose of the property for her or for her use and benefit, but for himself and for his own use and benefit.

Reduced to plain terms, appellant's contention, in effect, is that, because by this power of attorney he was authorized to sell the bonds and stocks, he could not be convicted of embezzling that property (which is the

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★Rehearing denied. Hearing denied by Supreme Court.

charge against him), even though he might have been guilty of embezzling the money obtained by selling that property. But the evidence was sufficient to warrant the jury in determining that the stocks and bonds had been intrusted to him for no further purpose than that he might use them as collateral in borrowing money for use in a certain business; that he promised to return said stocks and bonds to the owner, Mrs. Meagher, when they had served that specific purpose; that he obtained the power of attorney by pretending that it was needed to enable him to use the stocks and bonds for said stated purpose; that, instead of using the property for the purpose and in the manner authorized by the owner, defendant sold said property outright and decamped with the money. Under such facts, it cannot be maintained that there was not an embezzlement of the property intrusted to the defendant, or that the embezzlement, if any, must have been embezzlement of the money and not of the stocks and bonds. The transaction, the fraud, the crime, was single and inseparable, and included the very property which had been intrusted to the defendant. Pen. Code, § 507.

There was no error in the trial court's refusal to give the requested instruction pertaining to an alleged partnership, or the requested instruction to acquit the defendant. There was no evidence worthy of consideration that the complaining witness was ever a partner with the defendant, or that he ever intended to form a partnership with her, or that there ever was a bona fide partnership such as defendant contended existed, and the evidence is not sufficient to establish that defendant ever intended to apply any of the proceeds of a sale or loan of the property of the complaining witness to any partnership venture.

[2] Appellant's contentions with regard to the alleged partnership and the binding force of the power of attorney are inconsistent in that, while he contends that the terms of the power of attorney should control, and that they cannot be varied by any oral stipulations, he himself endeavored to modify or change the terms of the trust imposed upon him, by contending that oral stipulations gave him further authority to deal with the property to promote the alleged partnership. While it is true that if the defendant sold the property and the purchaser was innocent of the defendant's breach of trust, the complaining witness would be estopped to contend that the title did not pass, such a condition would have no significance as to appellant's obligation to the complaining witness. The state would not be estopped to inquire into the circumstances of the transaction, prior or subsequent to execution of the power of attorney. People v. Martin, 102 Cal. 558, 36 P. 952; People v. Tambara, 192 Cal. 236, 219 P. 745.

[3] If we interpret the position of appellant accurately, he seeks to show his innocence of the charge by proving his own perfidy He virtually contends that he obtained the authority to do with the property as he pleased, even though such authorization was obtained by deceiving the complaining witness, making love to her, and promising to marry her, although he was a married man, of which fact he kept her uninformed. In People v. Treadwell, 69 Cal. at page 235, 10 P. 508, our Supreme Court quotes Lord Mansfield:

> "No man shall set up his own iniquity as a defense, any more than as a cause of action."

His position shows his guilty intent. Appellant, among other things, wrote complaining witness, whom he had fraudulently induced to consent to marry him:

> "Anent the handling of your affairs, Billy dear, you will have to give me a legal power of attorney to do this, otherwise, it would not be lawful for me to transact any business on your behalf."

The time was set for the proposed wedding, and just before that time arrived appellant surreptitiously disappeared, and the complaining witness had never been informed what he had done with her stocks and bonds, and now, in his defense, he argues:

> "The written document is controlling."

In the face of all his fraudulent scheming to obtain for his own use property of the complaining witness without compensation to her, and his violation of the terms of the trust, the court did not err in refusing to instruct the jury to acquit him. In the case of People v. O'Brien, 106 Cal. 104, 39 P. 325, cited by appellant, there was no felonious intent and no deception. There is undisputed testimony in this case sufficient to establish such a continuous story of felonious intentions and deceptions on the part of appellant that it would be difficult to believe that he had any honest purpose in any of his acts, either in obtaining the property or the power of attorney.

[4] Many rulings of the trial court have been cited as erroneous. We have reviewed them all, and the court may have made some remarks of a slightly prejudicial nature. In cross-examination of the complaining witness as to her authorizing him to purchase on her account at a store, appellant's counsel asked of her:

> "And you told whatever Mr. Stafford charged was all right?"

She answered:

> "I told him that Mr. Stafford and I expected to be married on Saturday and that he was financially embarrassed temporarily; that I had given him right of my charge accounts. I went into the store the next morning, and when I saw the list I realized that it was all wrong because there were many items of women's apparel and things."

A motion was made to strike out the answer, that it was not responsive. The motion was denied. The last sentence was not responsive, but inasmuch as the motion pertained also to matter that was responsive, the court could not grant the motion in full without striking out the responsive matter. It was therefore not error, as it would have been if the motion had been to strike out the unresponsive portion only, definitely setting forth in the motion the unresponsive portion. Some rulings were made which were subject to criticism, but they were not prejudicial, because, while evidence was excluded or admitted against objections which should have been sustained, the fact of the bad faith of the defendant would otherwise have been fully sustained by evidence which is not open to objection.

To review here separately all of those rulings objected to would have no useful purpose. The remarks of the trial judge excepted to, if omitted, would still have left facts which could not be refuted as establishing appellant's guilt beyond controversy. Therefore there was no miscarriage of justice in the trial of this case.

Therefore the judgment and order appealed from are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for hearing in the Supreme Court after judgment in the District Court of Appeal is denied. In denying said petition we do not wish to be considered as approving any language to be found in the opinion to the effect that the appellant should have been found guilty of embezzlement if he had formed, at or prior to the time he acquired possession of the property, the felonious intent to convert the same to his own use, in violation of the terms upon which it had been entrusted to him. Such language was not necessary for the decision of any question involved in this appeal, and is an incorrect statement of the law applicable to the crime of embezzlement.

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81 Cal. App. 187

BAXTER v. BOSTON-PACIFIC OIL CO.

(Civ. 5558.)

(District Court of Appeal, First District, Division 2, California. Feb. 3, 1927.)

1. Pleading 🔑270—Demurrer could be amended after issue joined, by leave of court, to contain certificate of counsel (Code Civ. Proc. § 473, superior court rule 40).

Demurrer was pleading, which, under Code Civ. Proc. § 473, could be amended by leave of court, after issue joined, to include certificate of counsel, required by rule 40 of the superior court.

2. Courts 🔑85(1)—Rules of court should not be permitted to obstruct justice.

Rules of court are but a means to facilitate justice, and should not be permitted to obstruct it.

3. Corporations 🔑133—Corporation was not guilty of conversion for refusal to transfer stock for partner of deceased stockholder, who claimed stock to be partnership property, but who produced no proof of legal title (Code Civ. Proc. § 1585).

Corporation was not guilty of conversion for refusal to transfer stock on demand of partner of deceased stockholder, an apparent stranger, who produced no proof of legal title, nor the certificate itself, but who claimed that stockholder had purchased shares for partnership, in view of Code Civ. Proc. § 1585.

4. Partnership 🔑67—Legal title to stock purchased for partnership in name of partner, whose name was also partnership name, was in estate of deceased partner, who purchased stock.

Where partnership name was that of one of partners, who bought stock for partnership, legal title to stock was in estate of deceased partner, in whose name it was bought.

5. Corporations 🔑130—Corporation occupies fiduciary relation with shareholders in holding and transferring title to stock.

Corporation occupies fiduciary relation with its shareholders in holding and transferring title to shares of stock, and is required to act in good faith and with care in making such transfers.

6. Corporations 🔑131—Corporation was not bound on its peril to correctly interpret legal relations existing between partners and transfer stock to partner seeking it.

Corporation was not bound on its peril to correctly interpret legal relations existing between partners, and award title of stock to partner seeking it, where there was disputed claim, which required judicial settlement.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Sadie E. Pritchard against the Boston-Pacific Oil Company, to compel the transfer of stock. From a judgment for defendant, and from an order refusing to strike defendant's amended demurrer, plaintiff appeals, and Jennie M. Baxter, as administratrix of the estate of Sadie E. Pritchard, deceased, was substituted as appellant in place of plaintiff. Affirmed.

C. Franklin Baxter, of Los Angeles, and Hamilton A. Bauer, of San Francisco, for appellant.

Frank Hall and Harry S. Whitthorne, both of San Francisco, for respondent.

KOFORD, P. J. When the demurrer to the complaint came on for hearing in the court below, the point was raised that no certificate of counsel was attached to the demurrer, as required by rule 40 of the superior court of the city and county of San Francisco. The court thereupon granted defendant leave to file an amended demurrer. The amended demurrer was afterwards filed, containing the missing certificate. Thereafter a motion was made by plaintiff to strike the amended demurrer, upon the ground that the filing of the same was without authority of law. This motion was denied. Thereafter the court heard the amended demurrer upon its merits, and made its order sustaining the same, without leave to amend. Judgment was entered for defendant. This appeal is from the order refusing to strike and from the judgment for defendant.

[1, 2] It is urged that a demurrer to a complaint is not a pleading, and cannot be amended after issue joined. The case of Hedges v. Dam, 72 Cal. 520, 14 P. 133, is relied on. That case, however, is authority to the contrary. It holds that a demurrer is a pleading, which may be amended as of course under section 472, Code of Civil Procedure, before the trial of the issue of law thereon. If a demurrer is a pleading under section 472, which may be amended as of course, then it is also a pleading which, under section 473, Code of Civil Procedure, may be amended by leave of court, as was done in this case. We think the amendment to the demurrer was properly allowed and that the motion to strike was properly denied. Rules of court are but a means to facilitate justice, and should not be permitted to obstruct it. Pickett v. Wallace, 54 Cal. 147; Sullivan v. Wallace, 73 Cal. 307, 14 P. 789.

The next question to be considered is whether the complaint states a cause of action. In brief, it alleges as follows: That plaintiff, in 1892, entered into a verbal "partnership and association" with Fred G. King to engage generally in mining business. Plaintiff was to supply the capital and King his time and abilities to the business. Thereafter the business was carried on by them "in and under the firm name of Fred G. King" up to the time of the death of King in 1920, leaving plaintiff the sole surviving partner of said firm; that large profits were made; that no accounting or settlement of the partnership affairs has been made; that a large sum of said profits was invested by said King for said partnership association in the purchase of 50,354 shares of the defendant corporation, of the "face value" of over $300,000, "which were standing in said partnership name on the books of said corporation, and were held by him as such partner at the date of his death, the certificates * * * which had been issued to him in his lifetime in his name being in his possession at said date as a part of the assets and property of said partnership." It is further alleged that demand was made of defendant to transfer and deliver one-half of said stock and certificates to plaintiff as sole surviving partner of said King; that defendant has refused to do so, to the damage of plaintiff in the sum of $150,000. The prayer is that defendant be compelled by an order of court to transfer one-half of said stocks and certificates to plaintiff, or for judgment for $150,000, the value thereof, and damages to plaintiff by reason of said refusal.

Plaintiff calls this an action for conversion, and cites authority to the effect that conversion lies against a corporation for refusing to transfer shares of stock to one entitled thereto. She especially relies on Ralston v. Bank of California, 112 Cal. 208, 44 P. 476, to this effect. She also cites Code of Civil Procedure, § 1585, and authorities to the effect that a surviving partner may continue in possession of the partnership property and wind up its affairs. From this it is apparent that this action is brought on the theory that plaintiff had a present existing right upon demand to have the shares (one-half thereof) transferred to her by the corporation; that plaintiff is entitled to damages for conversion, the conversion being the refusal of the corporation to transfer the one-half of the stock and certificates to the plaintiff upon demand.

The Ralston Case cited above does not support plaintiff's contention. In that case the plaintiff was the transferee and the holder of the certificate of stock. The defendant corporation refused to transfer the stock on demand, claiming a lien thereon under its bylaws on account of indebtedness to the bank of the former stockholder. The court held that, inasmuch as the bank had sold the said indebtedness of the stockholder, it was no longer entitled to a lien.

[3, 4] While in a proper case a surviving partner is entitled to possession of the partnership shares of stock, it does not for that reason alone follow that the corporation is guilty of conversion for its refusal to transfer stock upon the demand of an apparent stranger who produces no proof of legal title nor the certificate itself representing its shares. Whatever might be the ultimate right of plaintiff in the stock under the facts alleged, the fact is that the legal title to the stock was in the estate of Fred G. King, deceased. Notwithstanding the allegation in the complaint that the stock was held in the name of the partnership, to wit, Fred G. King, that being also the name of the deceased, it was as if he held in his own individual name the legal title for the alleged partnership.

[5, 6] A corporation occupies a fiduciary relation with its shareholders in holding and transferring title to shares of stock and is required to act in good faith and with care in making such transfers. Cooper v. Water Co., 171 Cal. 158, 153 P. 936; Nagel v. Ham, etc., 88 Wash. 99, 152 P. 520. A corporation is not bound upon its peril to correctly interpret executory contracts of shareholders or other legal relations existing between its shareholders and to award the title of stock

to the ultimate and true owner. There may be a disputed claim made which requires judicial settlement between the claimants before it should be recognized. We think this is such a case. Damages for conversion have been refused against a corporation for its failure to transfer stock where the one demanding transfer relied for his rights upon an executory contract without the legal title and where proper evidence of his title or right of possession was not produced. Edwards v. Sonoma Valley Bank, 59 Cal. 136; Morrison v. Gold, etc., Co., 52 Cal. 306: Hawkins v. Mansfield Gold Mining Co., 52 Cal. 513. Likewise damages for conversion have been awarded against a corporation for transferring stock without sufficient proof of authority from the registered owner. Tafft v. Presidio, 84 Cal. 131, 24 P. 436, 11 L. R. A. 125, 18 Am. St. Rep. 166, citing Civ. Code, § 324.

Under these authorities we think the defendant was justified in refusing to transfer the stock (one-half thereof) to plaintiff upon her demand as alleged in the complaint.

It is ordered that the judgment be affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

81 Cal. App. 55

CLOVER v. JACKSON. (Civ. 5332.)

(District Court of Appeal, First District, Division 1, California. Jan. 26, 1927.)

1. Constitutional law 🔑240(1), 296(1)—Licenses 🔑7(1)—Broker's act requiring license for sale of shares of stock by owner whose predecessor acquired shares before enactment of act, held unconstitutional (Corporate Securities Act, § 2, subds. 9, 9 [a], and §§ 5, 14).

Corporate Securities Act, § 2, subds. 9, 9 (a), and sections 5, 14 (St. 1917, p. 673), requiring natural person to secure broker's permit before he may sell his own securities where he was not issuer or underwriter of same, is unconstitutional, and hence does not affect validity of sale of shares of capital stock by owner having no broker's license whose predecessor acquired shares before enactment of act.

2. Courts 🔑90(1)—Case, falling clearly within rule stated in prior decision of Court of Appeals, is controlled thereby.

Where facts of case fall clearly within rule stated in previous decision of Court of Appeals such decision is controlling.

Appeal from Superior Court, Los Angeles County; Bertin A. Weyl, Judge.

Action by J. B. Clover against J. C. Jackson, in which defendant filed cross-complaint. Judgment for defendant on cross-complaint, and plaintiff appeals. Reversed.

Wm. B. Ogden, of Los Angeles, for appellant.

Wm. H. Neblett, and John Dickinson, both of Los Angeles, for respondent.

KNIGHT, J. An appeal by plaintiff from a judgment given in favor of defendant on a cross-complaint in an action brought to recover installment payments claimed to be due under a written contract whereby defendant agreed to buy from plaintiff 80 shares of the capital stock of the Rush Creek Mutual Ditch Company.

Answering, defendant denied that said installments were then due, and interposed affirmative defenses alleging fraud in procuring the contract, and that said contract was void under the provisions of the Corporate Securities Act (St. 1917, p. 673), in that the sale of said stock was made by plaintiff without having first obtained a broker's license as required in said act. Defendant also filed a cross-complaint setting forth substantially the same matters alleged in the affirmative defenses, and prayed for a rescission of the contract of sale and the return of a cash payment of $800 made on the purchase price of said stock at the time of the execution of the contract. In answer to the cross-complaint plaintiff denied the material allegations thereof, and alleged that the provisions of said Corporate Securities Act under which defendant sought to invalidate the sale were unconstitutional.

The trial court found in substance that nothing was due plaintiff under the complaint for the reason that the action had been brought prematurely; that plaintiff had committed no fraud, but that the contract of sale was void under the Corporate Securities Act for the reasons set forth in the affirmative defense and in the cross-complaint. Accordingly, judgment was entered that plaintiff take nothing by his action, that the contract of sale be canceled, and that defendant have and recover from plaintiff the said sum of $800 with interest.

Plaintiff's appeal herein is directed against that portion of the judgment, given under the cross-complaint, declaring the contract to be void, and for the return of the $800 cash payment made thereunder, and does not involve the remaining portions of the judgment pertaining to the issues arising under the allegations of the complaint, or those relating to the question of fraud.

Section 5 of the Corporate Securities Act as it stood at the time the foregoing transactions occurred provided in part that:

> "No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner a certificate, then in effect, authorizing such person or company so to do. * * *"

And subdivisions 9 and 9 (a) of section 2 of said Corporate Securities Act provided as follows:

> "The word 'broker' as used in this act includes every person or company, other than an agent, who shall, in this state, engage, either wholly or in part, in the business of selling, offering for sale, negotiating for the sale of, or otherwise

dealing in any security or securities issued by others, or of underwriting any issue of securities or of purchasing such securities with the purpose of reselling them or of offering them for sale to the public for a commission or at a profit; excepting therefrom the following: (a) any owner of any security who is not the issuer and underwriter thereof, who sells or exchanges the same for his own account; provided, that such sale or exchange is not made in the course of repeated and successive transactions of like or similar character by him. * * *"

By section 14 of said act it was declared that any person who failed to comply with or willfully violated said act was guilty of a public offense punishable by imprisonment in the state penitentiary or in the county jail or by a fine. It was therefore respondent's contention in the trial court, as it is here, that since the statute denounced as a penal offense the act of selling stock without a broker's certificate, a contract founded upon or made pursuant to such criminal act is void even though the statute does not expressly so declare. Berka v. Woodward, 125 Cal. 119, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Smith v. Bach, 183 Cal. 259, 191 P. 14.

The following are the facts: The Rush Creek Mutual Ditch Company, a mutual irrigation company, organized during the year 1912, under the laws of this state, was engaged in developing water in Mono county, Cal., for the purpose of irrigating certain land in the vicinity of Mono Lake. The total capitalization of said company consisted of 30,000 shares, of which 29,995 were, in January, 1913, issued to the Mono Valley Improvement Company in consideration of the performance of a contract made by the latter company to construct a canal through lands to which the ditch company proposed to furnish water for irrigation. Each share represented and carried with it an ownership interest in said canal and the water rights and other properties of said ditch company, and a permanent right to have, use and enjoy one inch of water, measured under four-inch pressure, diverted from said canal during the irrigation season for irrigating and reclaiming lands under and contiguous to the canal.

Said improvement company failed to complete the construction of said canal, and in June, 1918, its contract to do so was taken over by appellant, who is a construction engineer, having specialized in irrigation work for over 20 years in the states of Oregon, Idaho, Colorado, and California. In consideration for the assumption by appellant of the performance of said uncompleted contract to build said canal, said improvement company transferred to him 19,120 shares of the stock held by it in said ditch company, also certain promissory notes of the face value of $55,000, and an interest in 428 acres of land in Mono county. Under his contract appellant was obliged to construct the canal for a distance of about 30 miles, and up to the time of trial he had completed 9 miles thereof and expended for this purpose approximately $50,000.

Soon after receiving the entire block of stock from said improvement company appellant advertised the same for sale through the medium of newspapers and printed literature. Being attracted by said advertisements, respondent, in April, 1919, entered into the contract in question for the purchase of said 80 shares at a price of $60 a share, making an initial payment thereon of $800 and agreeing to pay the balance of $4,000 in annual installments extending over a period of ten years; but appended to the contract was an agreement on the part of appellant that none of said installments should become due and payable until said canal had been completed to a point specified therein, from which water could be diverted for irrigation of the real property described therein, and thereafter all payments due up to that time should be paid within 30 days. The contract for the sale of the stock to respondent was the first one made by appellant after acquiring the stock, the next one being made with other parties some five months later, and thereafter 15 or 20 similar contracts were entered into, the total sum received from all sales of stock amounting to approximately $20,000.

The trial court found specifically from the foregoing facts that at the time of the sale in question appellant was the owner of a large number of shares of the capital stock in said company, of which the 80 shares sold to respondent were a part, and that the entire block of stock acquired by him had been issued to, fully paid for by, and the right to transfer, sell and assign vested in, appellant's assignor in January, 1913, prior to the enactment of said Corporate Securities Act. The main question presented for determination, therefore, is whether, in view of appellant's conceded ownership of the stock, which so far as the record shows is not tainted with fraud, and under the circumstances under which the sale was made to respondent, the provisions of said Corporate Securities Act requiring a broker's certificate to sell the same are, as appellant contends, unconstitutional, as being violative of the rights of individuals to own, hold and dispose of property, and consequently inoperative as to the transaction here involved.

Since this action was tried and decided in the trial court, and subsequent to the filing of the record on appeal herein, the constitutionality of the provisions of the Corporate Securities Act challenged herein were fully considered and determined in the recent case of People v. Pace (Cal. App.) 238 P. 1089, a petition for hearing before the Supreme Court having been subsequently denied. It was therein held that subdivisions 9 and 9 (a) of section 2 of said act, as amended in 1923 (Laws 1923, p. 87), which, so far as the questions here involved are concerned, are identical in terms with the original enactment of 1917, in force at the time of this sale, were unconstitutional in so far as they attempted to require a natural person to secure a broker's permit as provided in said act before he may lawfully sell his own securities, where he was not the issuer or underwriter of the same.

[1, 2] We are of the opinion that the facts of the instant case fall clearly within the rule there stated, and that therefore the decision in that case must be held as controlling here. There the defendant Pace, president of a domestic corporation engaged in the candy business, acquired a large amount of the stock of said corporation by purchasing from the company certain unpaid promissory notes given in payment of stock subscriptions, the company holding the stock as collateral for the payment of said notes. Upon default in payment of said notes, Pace became the bona fide owner of said stock, and thereafter, without having a broker's certificate, disposed of a number of shares thereof in 16 separate sales covering a period of about five months. In support of the constitutionality of the statute it was there contended, as here, that the effect of the provisions of said act under consideration was merely to reasonably regulate the mode of disposing of property for the protection of the public and in the interests of general welfare, and that the owner's right of disposition was not taken away thereby. Answering this contention the court said, after reviewing a number of cases upon the subject:

> "But nowhere in the authorities sustaining the regulation of the business of brokers do we find authority to sustain the contention made here, that the police power under the guise of general welfare may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law."

The instant case, on principle, cannot be fairly differentiated from the case cited, although in two particulars their facts differ; here the stock was acquired by the present owner's predecessor several years prior to the enactment of the Corporate Securities Act, which does not appear to be the fact in the Pace Case, and appellant herein did not apply for a broker's certificate prior to the sale of the stock; whereas, in the Pace Case the stock was sold by Pace after a broker's permit, previously issued to him, had been revoked. But it would seem that the presence in the case before us of the distinguishable facts above mentioned only furnishes additional grounds for the application herein of the doctrine announced in the Pace Case.

Appellant's constitutional objections herein were based mainly upon the proposition that the stock which was the subject of the sale in question was issued to and paid for by appellant's predecessor long before the enactment of the Corporate Securities Act, by virtue of which act respondent seeks to annul the sale, and no contention was made as to the effect of the provisions of said act upon a case where the owner sold stock issued subsequent to the passage of said act, such as the Pace Case proved to be. Nevertheless, the legal principles announced in that case, being decisive of the legal issues presented here, must be given application herein and this appeal governed thereby.

Therefore, upon the authority of the Pace Case and for the reasons stated therein, it is held that the sale of said stock by appellant, under the circumstances hereinabove mentioned, did not constitute a public offense, and consequently the judgment declaring the sale to be void upon that ground is reversed.

We concur: TYLER, P. J.; CAMPBELL, J. pro tem.

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81 Cal. App. 195

PEOPLE v. SEIFFERT. (Cr. 1404.)★

(District Court of Appeal, Second District, Division 2, California. Feb. 4, 1927. Rehearing Denied April 4, 1927. Hearing Denied by Supreme Court April 4, 1927.)

1. Criminal law 🔑59(1)—Knowledge that crime is to be or has been committed does not make one accomplice, unless he aids in commission of crime.

Mere knowledge or belief that crime is to be or has been committed does not render person an accomplice, unless such person aided or participated in commission of crime.

2. Criminal law 🔑59(5)—To be an "accomplice," one must knowingly and with criminal intent aid or assist in criminal act.

To render a person an "accomplice," he must in some manner, knowingly and with criminal intent, aid, abet, assist, or participate in criminal act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

3. Criminal law 🔑507½—Evidence held to justify finding that sister, who went with deceased sister to defendant's office to have abortion performed, was not accomplice.

In prosecution for murder, evidence *held* to justify finding that sister, who went with deceased sister, to defendant's office to have abortion performed, was not an accomplice, where there was evidence that she had urged deceased sister not to go to defendant's office.

4. Criminal law 🔑742(2)—Whether sister, who went with deceased to doctor's office to have abortion performed, was accomplice held for jury.

In prosecution for murder, question whether sister of deceased, who accompanied deceased to defendant's office to have abortion performed, was an accomplice *held* for jury.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

John H. Seiffert was convicted of murder in the second degree, and he appeals. Affirmed.

★Rehearing denied. Hearing denied by Supreme Court.

A. T. Johnson, of San Diego, for appellant.

U. S Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and James W. Howie, of Los Angeles, for the People.

THOMPSON, J. The appellant was jointly charged with one Charles E. Marsh with murder. Marsh was granted a separate trial. The jury returned a verdict of guilty of murder in the second degree against this appellant. After denial of his motion for a new trial judgment was pronounced, and it is from that judgment and the order denying his motion for a new trial that he appeals.

The facts necessary for the disposition of this appeal are, briefly, as follows: On February 25, 1926, the deceased, Louise Giovanazzi, being then pregnant, went to the home of her sister, Mrs. de Pietri, where she remained until she was taken to the hospital a few hours before her death on March 4, 1926. On February 25, 27, 28, and March 1 and 2, the deceased visited the offices of the defendants for the purpose, as she said, of having a curettement. She was accompanied by her sister, Mrs. de Pietri, in Mrs. de Pietri's automobile. The latter remained in the reception room while the deceased was in the private room with the doctor. During the last visit and while in the private room, the deceased appeared to suffer great agony; she called her sister in, who found her "sweating just like you would take a cloth and just get it out of a bath tub." As she went to the office of the defendant on March 2, the deceased gave no indication of suffering, but after the operation they had to carry her out and put her into the automobile. About 2 a. m. the next morning the deceased was operated upon, and, according to the attending physician, a packing was removed; the abdomen was full of blood; two punctures in the uterus and one in the posterior peritoneum were found and sutured. On March 4 an autopsy was performed, and, in addition to the three punctures just mentioned, an opening or puncture of the ascending vena cava was discovered, and also a six or eight weeks' fœtus. The testimony of the physicians was to effect that death resulted from the puncture of the vena cava, which is the vein carrying the blood back to the heart. Mrs. de Pietri testified to the visits to the appellant's office and that she asked her sister not to go there any more. She also testified that her sister had told her that the doctors said she was pregnant, and she judged she was having curettement for the purpose of bringing about a miscarriage, and that she (the witness) was willing to aid her in any way she could.

The contention of the appellant is, in substance, that the verdict is not justified by the evidence for the reason that Mrs. de Pietri was an accomplice and that subtracting her testimony there was not sufficient to connect the defendant with the commission of the offense. We might as well observe at the outset that, while there is ample evidence of an attempted abortion, the only testimony tending to connect the defendant with the offense charged is the testimony of Mrs. de Pietri and her son, Dominico de Pietri, who testified that he drove the automobile and saw his mother and aunt go into the Stimson building, the place where defendants had their office, several times, and that on the last visit she was feeling pretty good when he took her there, but extremely ill when he took her home. This statement of Dominico de Pietri is of very slight corroborative value on the questioned point, but we do not feel that we are called upon to pass upon its sufficiency for the reason that the jury were given proper instructions covering the subject of accomplices and the value to be attached to the testimony of accomplices.

While there was testimony of statements made by the deceased shortly before her death that she had gone to the defendant's office for the purpose of having an abortion performed, the jury was instructed that this testimony was admitted for the sole purpose of showing her condition of pregnancy and the purpose of her visit, and that the same could not be considered by them as tending to connect the defendant with the offense charged. So far as this testimony is concerned, therefore, we are not called upon to determine its corroborative value or whether the deceased could, under the circumstances detailed, be held to be an accomplice in her own death, it having been admitted under the rule laid down in People v. Wright, 167 Cal. 1, 138 P. 349, for the limited purpose specified in the instructions.

[1, 2] As has been suggested, the court fully instructed the jury upon the subject of accomplices. It defined accessories as "all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission," and called special attention to the testimony of Mrs. de Pietri in telling them that they could not render a verdict of guilty on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and also instructed them as follows:

> "I also further instruct you that mere knowledge or belief that a crime is to be committed or has been committed does not render a person an accomplice, unless such person aided or participated in the commission of the crime.
>
> "I further instruct you that, in order to render a person an accomplice, he or she must in some manner knowingly and with criminal intent aid, abet, assist, or participate in the criminal act.
>
> "I further instruct you that an accomplice is one who, knowing that a crime is being committed, willfully and with criminal intent intentionally aids, abets, or assists another in the commission of such crime or criminal act; and

whether or not one is an accomplice, as defined in these instructions, is for the jury to determine from all the testimony and circumstances in proof in the case."

The instructions given correctly stated the law with respect to who are to be regarded as accomplices, and the effect to be given to the testimony of such a witness.

[3, 4] It should be remembered that there is no suggestion that Mrs. de Pietri was actually present when the operation was performed, nor any suggestion that she assisted the doctor in the performance of the operation, or spoke to the defendant concerning the operation. Also, there was testimony that Mrs. de Pietri urged her sister, the deceased, not to go to the doctor's office. Under these circumstances, the jury evidently believed that Mrs. de Pietri was not an accomplice, and the testimony was such that a finding to that effect must be upheld. People v. Brewer, 19 Cal. App. 742, 127 P. 808; Greenwood v. State, 3 Okl. Cr. 247, 105 P. 371; People v. McGonegal, 136 N. Y. 62, 32 N. E. 616. We are not justified in saying, as a matter of law, that the witness was an accomplice. People v. Brewer, supra. In fact, whether, as a matter of law, the witness could be considered an accomplice is discussed in the cases heretofore cited, and People v. Balkwell, 143 Cal. 259, 76 P. 1017.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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81 Cal. App. 176

SKELLENGER v. ENGLAND et al.
(Civ. 3188.)

(District Court of Appeal, Third District, California. Feb. 1, 1927.)

1. Life estates 🔑3—Evidence held to warrant finding son gave mother life estate and retained vested remainder in unused portion of principal.

Plaintiff's testimony that, by agreement, he gave mother property for her lifetime and all moneys and properties left after her life were to revert to him *held* to warrant finding that mother was given life estate, with right to consume such part of principal as was necessary for her support, and that plaintiff retained vested remainder in unused portion.

2. Life estates 🔑5—Life tenant, with right to consume principal for support, is not "trustee," in ordinary sense.

One given life estate in property, with right to consume such part of principal as might be necessary for her support, where donor retained vested remainder in unused portion thereof, was not a "trustee," in ordinary sense in which word is used.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee.]

3. Life estates 🔑3—Gift held to create relation of life tenant and remainderman.

Where son gave property to mother for her lifetime, under agreement that all properties left after her life should revert to son or his heirs, relation created was that of life tenant and remainderman.

4. Appeal and error 🔑1012(1)—If evidence is sufficient to support finding, question whether it is clear and satisfactory is for trial court.

If evidence in any case is sufficient to support a finding, question whether it is clear and satisfactory is for trial court.

5. Estoppel 🔑68(5)—Plaintiff, having convinced court in former action that statements were true, cannot complain of finding in instant case that they were true.

Plaintiff, having convinced court in divorce case that he had given property to mother absolutely, could not justly complain of court's finding, in instant action to establish trust in property given, that his previous statements were true, where contrary finding would deprive his children of support which his mother provided for them out of same property, which, he testified in divorce action, he had given her.

6. Trial 🔑91—Refusal to strike out declaration of deceased donee regarding gift, where no objection was made to question, held not error.

In action to establish trust in property, in which plaintiff claimed he had given mother life estate only, refusal to strike out testimony of witness as to statement of deceased mother, "I can do anything I please with this money," where no objection was made to question, *held* not error.

7. Gifts 🔑49(1)—Evidence held to show verbal gift to mother of property, of which she was in possession, after son had given her life tenancy (Civ. Code, § 1147).

In action to establish trust in real and personal property of plaintiff's deceased mother, evidence *held* to show that after plaintiff had given mother life estate in property of which she was in possession, he verbally gave her property absolutely, in view of Civ. Code, § 1147.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Harry D. Skellenger against Mary D. England, as executrix of the last will and testament of Sophia R. Winslow, deceased, and others, to establish trust in real and personal property. From a judgment for defendants, plaintiff appeals. Affirmed.

Karl C. Partridge, of San Francisco, for appellant.

Gerald C. Halsey, Frederick T. Leo, and Philip C. Boardman, all of San Francisco, for respondents.

FINCH, P. J. The plaintiff has appealed from the judgment herein in favor of defendants.

Sophia R. Winslow, plaintiff's mother, died May 1, 1919, leaving a last will and testament, executed September 28, 1914, by the terms of which she made disposition of her real and personal property. The will was duly admitted to probate, and defendant Mary D. England, decedent's daughter, was appointed executrix. Defendants Don and Robert Skellenger are sons of the plaintiff, both of whom were minors at the time of the trial. The plaintiff and all of the defendants are beneficiaries under the will. December 14, 1903, in the settlement of the estate of plaintiff's aunt, Caroline E. Cogswell, there was distributed to him property of the value of about $85,000, consisting of stocks, bonds, and $10,598.89 in cash. Out of the property so distributed to him, the plaintiff delivered to his mother property of the value of $20,000, consisting of money and bonds, which, he alleges, was "to be held and invested for said plaintiff in trust" for him, under an agreement "wherein and whereby it was agreed that said Sophia R. Winslow would have a life estate in said moneys and said bonds and the income thereof, and that upon the death of the said Sophia R. Winslow said moneys and bonds or the property in which said moneys had been invested should go to and vest in the plaintiff." Some of the money delivered by the plaintiff to his mother was by her invested in a city lot and the construction of flats thereon and certain bonds so delivered were held by her at the time of her death. The prayer of the complaint is that:

> "It be adjudged and decreed that Sophia R. Winslow held the herein described real and personal property in trust for the plaintiff herein, and that the said Sophia R. Winslow was the owner of a life estate only in said property, and that plaintiff herein is the owner in fee simple absolute of the property herein described, and that the defendant Mary D. England be required to deliver to plaintiff herein all the personal property and money herein described."

On issues raised by the answers of the several defendants, the court found:

> That "in or about December, 1903," the plaintiff and his mother entered into a written agreement, "under and by the terms of which agreement he gave to his mother money and other personal property * * * of the total estimated amount and value of $20,000, with the full right and power to invest, use, or dispose of the same or any part thereof as she might see fit, during her life, * * * that any of said moneys or property remaining at the death of said Sophia R. Winslow should revert to said Harry D. Skellenger, or to his heirs"; that in the year 1907 she invested a part of the money so given her in the aforesaid lot and flats; that at the time plaintiff received the $85,000 referred to herein, "he and Sophia Batchelor, the guardian herein of the minor defendants, Don and Robert Skellenger, were husband and wife, and said minor children, Don and Robert Skellenger, are the children of said marriage; that in the month of November, 1906, said Sophia Batchelor, as the wife of said Harry D. Skellenger, did commence an action to obtain a decree of divorce from Harry D. Skellinger, and for the support of herself and said two minor children; that about the time of the commencement of said action for divorce, but prior thereto, and after the execution of the said agreement, * * * but before said Sophia R. Winslow had invested any portion of any money or property received under such agreement in the real property or flats hereinabove described, said plaintiff, Harry D. Skellenger, freely and intentionally gave and voluntarily transferred, released, and intentionally gave and voluntarily transferred, released, and relinquished all of said money and other personal property to his mother, said Sophia R. Winslow, absolutely, and said money and personal property and the property described hereinabove was never given back to said plaintiff by his mother, but thereafter and up to the time of the death of said Sophia R. Winslow, the said money and personal property and the said real property hereinabove described was the sole and separate property of said Sophia R. Winslow in fee simple absolute; and by reason of said gift of all of the said property to his mother, plaintiff's said first wife, Sophia Batchelor, and said minor children, Don and Robert Skellenger, said children then being infants, and still being minors, by way of property settlement in said divorce action, received from plaintiff the sum of only $4,600, which last amount plaintiff borrowed from his said mother; that thereafter, and in the early part of the year 1919, * * * and prior to the 13th day of March, 1919, said plaintiff did direct and instruct his said mother, Sophia R. Winslow, to destroy the said agreement in writing hereinabove referred to, with the intent, purpose, and object of vesting the ownership of said money and personal property in her absolutely, and at said time said plaintiff freely and intentionally gave, released, and relinquished to his said mother any right, title, or interest in or to said property which he had or might have had by reason of the existence of said agreement, or its proceeds in whatever form it might then have been, and did further then and there confirm the ownership in fee simple absolute of said property and its said proceeds in his said mother, Sophia R. Winslow; * * * that a few days after such authority and direction was given by plaintiff to his said mother, the said Sophia R. Winslow did, pursuant thereto, destroy the said written agreement; and at all times subsequent to the making of said gift in the year 1906, by plaintiff to his said mother, and up to the time of her death, the said Sophia R. Winslow had full and complete dominion and control over all property, both real and personal, hereinabove mentioned; that at all such times the said Sophia R. Winslow had and was entitled to the possession of all of said property and held the legal title thereto as her own sole and separate property."

The attorney who drew the agreement between the plaintiff and his mother testified:

> That it was executed about the time the estate of the plaintiff's aunt was distributed; that the terms of the agreement, according to the recollection of the witness, "were that Mr. Skellenger was to convey to his mother money and

stocks or bonds, I don't remember which, to the amount, as I remember it, of $20,000. * * * She * * * agreed that she would keep that sum and invest it, and that she was to receive the income from it as long as she lived and at her death the principal was to revert to Mr. Skellenger. The document contained more than that, but that is my best recollection of the gist of its terms."

The plaintiff testified:

That he placed his copy of the agreement in his mother's safe deposit box; that he last saw it "a short time before the earthquake"; that his mother had a copy which she placed in the same safe deposit box; that "the agreement read like this: $20,000 to be given to my mother for her lifetime, and all moneys and all properties left after her life was to revert to me or my heirs"; that he told his mother to burn the agreement "about four years ago, I believe, when I was in the insane asylum" as an inebriate; that his present wife (he having contracted a second marriage after his first wife was granted a divorce) applied for letters of guardianship of his person and estate; that "it made me pretty sore when she served those papers on me, and * * * I told my mother to burn up these papers * * * so that my wife couldn't get hold of them. * * *"

"Q. * * * You do not mean that it was your intention to divest yourself of your claim to this property? A. Not on your life. I had to have something to protect my other two boys (Don and Robert). * * *

"Q. You had prior to that, had you not, made a conveyance of your property in Napa county to your present wife? A. I did."

The plaintiff further testified:

That at about the time the agreement between him and his mother was executed, "I signed over everything I had to her, * * * all properties, all moneys and all properties. * * * I gave it to her so that she would be independent, * * * she wouldn't have to come to either one of us; I gave her a lifetime interest in this money, and all money and all property was to revert back to me after her death. * * *

"Q. Did you testify as a witness in your divorce proceedings in 1906? A. I think so.

"Q. Isn't it a fact that you testified on that occasion * * * that you had absolutely nothing, no property or money or interest of any kind whatsoever? A. I testified at that time because, as I told you before, I turned over all my property to my mother at that time. * * *

"Q. Previous to 1906 you had turned over all your property to your mother absolutely? A. Yes; she had charge of all my property.

"Q. And at that time in 1906 you did not claim or assert any interest whatsoever in any property held by your mother? A. I disremember.

"Q. You are quite positive that you testified that you had absolutely no property or interest whatsoever, in the divorce proceedings? A. I think that is correct; I wouldn't be positive of it; I think it is correct.

"Q. The reason why you testified so under oath was because you had previously to that time turned over to your mother all of your properties and interests absolutely? A. I think so. * * *

"Q. Did you ever make any conveyance in writing of any of this property to your mother? A. I did not."

Mrs. Sophie Batchelor, the former wife of plaintiff, testified:

"Q. Were you present in court * * * in 1906 and 1907 when the plaintiff in this case, Harry D. Skellenger, was in court testifying as to his property and his holdings or interest in property? A. Yes, sir. * * *

* * *

"Q. What did he say at that time in regard to this property? A. He said that he did not have any money of his own; that what he had received in this will was given to his mother in fulfillment of a promise made to her. * * * That he hadn't anything.

"Q. What did he say regarding the $4,600 that you received under this interlocutory decree pursuant to that agreement? A. He said that was his mother's property, * * * it was not his. * * *

"Q. In 1919 * * * were you present at any conversation or conversations in which his mother and he took part? A. Yes. * * * That was in the latter part of February or the early part of March. * * * There had been some conversation in an adjoining room which I did not overhear. * * * As he was about to leave his mother * * * said, 'Well, Harry, now I will destroy those papers.' He said 'Mother, you can do as you please; I don't give a darn what you do. I have given it to you.' * * * I did not know to what it alluded, not having known anything about any agreement."

Mary D. England testified:

That she saw the agreement, "about a year or so before the earthquake," and also two or three years prior to her mother's death; that it provided "that Harry was to receive the money, after mamma's death, that was left. * * *

"Q. 'Money that was left,' did it state what that meant? A. No, I don't know that it did."

Fred C. Skellenger, plaintiff's brother, testified:

That, shortly after Mrs. Winslow's death, "I says to him (plaintiff), 'Now, you give mamma that property to do as she pleased with it,' * * * the property of the flats and the stocks, whatever it was. * * * He as much as acknowledged that he did, but * * * he wouldn't let it go through, because he said he didn't want the Englands to have another dollar of his money."

Lulu B. Skellenger, the wife of Fred C. Skellenger, testified:

That, at the time referred to in her husband's testimony, "We said the change that mother had made in the will was done with his consent, after he had given her the property to do as she pleased with and had told her to destroy the agreement. * * * He said that he had changed his mind; that he at that time told her to do as she had done, but that he had changed his mind because he did not want the Englands to get any more money through him."

The plaintiff denied having made the foregoing statements. There is other testimony tending to support the respective theories of the parties, but since such testimony only affects the weight of the evidence, which is substantially conflicting, it need not be set out, except in so far as it relates to the will of Mrs. Winslow.

The will was executed September 28, 1914. March 13, 1919, Mrs. Winslow cut out and burned the third paragraph of the will, and on the margin of the page upon which that paragraph appeared she wrote, in her own hand, the following:

> "March 13, 1919. Having changed my mind abut about paragraph No. III I cut it out myself I wold like to have Dan & Rabart Skellenger sones of my son Hary D. Skellenger have the rents of flats 6 flats on Caselli Ave until they are 21 and then to be sold and my 3 children Fred Harry and Mary England to shair and share alike. Sophia R. Winslow."

L. M. Hoefler was a subscribing witness to the original will. It was stipulated at the trial that Hoefler, if called as a witness, would testify that the third paragraph of the will was as follows:

> "My son, Harry D. Skellenger, having given me certain moneys which he received from the late Mrs. Dr. H. D. Cogswell, with the understanding that I should use said moneys as long as I should live, and upon my death whatever remained of the said moneys or of property purchased therewith should revert to my said son, Harry, and the moneys so given me having been invested and used by me in the building of the six flats known as Nos. 179, 179A, 179B, 181, 181A, and 181B Caselli avenue, San Francisco, Cal., I therefore give, devise, and bequeath the said six flats, together with the lot upon which the same are situated, to my said son Harry D. Skellenger."

Mary D. England testified that she was present when her mother cut out the third paragraph of the will; that the third paragraph "just said that the flats and the money that was in the bank was to revert to my brother Harry at her death"; that it did not state "where she had gotten the money to invest in these flats"; that she was certain the third paragraph did not read as stated by Hoefler; that she read that paragraph carefully, and had seen the will "a great many times." By the terms of the will three bonds of the Oakland Transit Company, of the par value of $1,000 each, which plaintiff had given to his mother at the time of the execution of the agreement, were given to Don and Robert Skellenger. The total value of the estate of Mrs. Winslow, as shown by the inventory and appraisement, is $18,195.56.

[1-3] If it be conceded that the finding to the effect that the original agreement between the plaintiff and his mother gave her the right to use or dispose of the property "as she might see fit during her life" is without support in the evidence, the plaintiff's testimony that, by the terms of the agreement, he gave his mother the property "for her lifetime, and all moneys and all properties left after her life was to revert to me or my heirs," is sufficient to warrant the inference that she was thereby given a life estate in the property, with the right to consume such part of the principal as reasonably might become necessary for her support, and that the plaintiff retained a vested remainder in the unused portion thereof. Hardy v. Mayhew, 158 Cal. 95, 104, 110 P. 113, 139 Am. St. Rep. 73; Luscomb v. Fintzelberg, 162 Cal. 433, 441, 123 P. 247; Adams v. Prather, 176 Cal. 33, 40, 167 P. 534; Colburn v. Burlingame, 190 Cal. 697, 700, 214 P. 226, 27 A. L. R. 1374.

Mrs. Winslow was not a trustee in the ordinary sense in which that word is used. In a similar case it is said:

> "Judge Mayhew was a trustee only in the sense that the duty rested on him, as a life tenant merely, to have due regard for the rights of those in remainder, a duty in the nature of a trust constituting him an implied or quasi trustee for the remaindermen." Hardy v. Mayhew, supra, page 104 (110 P. 117).

The relation created by the agreement was that of life tenant and remainderman.

The court found, in effect, that in the year 1906, shortly after the execution of the agreement and before any of the money had been invested in real estate, the plaintiff made an absolute gift to his mother of the property referred to therein, and that in the year 1919 he confirmed the gift. The only evidence tending to support the finding that such gift was made in the year 1906 consists of the declarations of the plaintiff and the conduct of the parties to the agreement. Appellant contends that such evidence is insufficient to establish the gift, quoting from 28 Corpus Juris, page 681, as follows:

> "Declarations and admissions of an alleged donor in respect to a gift are not in themselves sufficient evidence to establish the gift. * * * But since they are admissible as evidence of his intention, they are to be weighed by the jury, and, when considered together with other corroborative evidence showing a delivery of possession and an absolute parting of all dominion or interest in the subject of the gift, may be sufficient to establish the gift. It has been held that the fact of delivery must be shown by other evidence than the mere declarations of the donor."

In the next sentence following the language quoted, it is said:

> "By the weight of authority, however, the delivery may be proved by the declarations of the donor, just as the gift itself may be."

On page 638 of the same volume it is said:

> "Where property is at the time of the gift in the possession of the donee, as agent for the donor or otherwise, it is not necessary that the donee should surrender to the donor his actual possession in order that the latter may redeliver it to him in execution of the gift, but a

relinquishment by the donor of all dominion over the property and recognition of the possession of the donee as being in his own right is sufficient to perfect the gift."

In Wilson v. Hotchkiss, 171 Cal. 617, 619, 154 P. 1, L. R. A. 1916F, 389, Ann. Cas. 1917B, 570, the same rule is applied to a sale made to a vendee in possession. Section 1147 of the Civil Code reads as follows:

> "A verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

In Adams v. Merced Stone Co., 176 Cal. 415, 418, 178 P. 498, 499, it is said:

> "That the fact that the thing was already in possession of the donee at the time, of declaring the gift is not enough, is well settled by the authorities."

That statement, however, is mere dictum. The alleged gift in that case was of intangible property, being an indebtedness due the donor from the defendant corporation, evidenced only by the books of the corporation, and the gift was made in view of death. The donor died before the trial, and the only evidence offered to prove the gift was the uncorroborated testimony of the donee that the donor had made a verbal gift of the property to him, he being the president and general manager of the corporation. The court said:

> "In the case of a chose in action not evidenced by a written instrument, the only means of obtaining control that is recognized by the authorities is an assignment in writing, or some equivalent thereof."

Of the decisions cited by the court in support of the dictum quoted, Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 P. 389, involved the question of a gift by a wife to her husband of money which was the separate property of the wife deposited in a savings bank, she having taken a passbook showing an account with the bank in the alternative names of the husband or wife, and it not being "shown that the husband had any possession of the bank book until after the death of his wife." The court said that:

> "The idea of a gift is inconsistent with the retention by the wife of the right in herself to withdraw the whole of the money from the bank."

The other cases cited involved the validity of gifts made in view of death. In one of them, Drew v. Hagerty, 81 Me. 231, 17 A. 63, 3 L. R. A. 230, 10 Am. St. Rep. 255, it is said:

> "A gift, inter vivos, may be sustained without a distinct act of delivery at the time of the gift, if the property is then in the possession of the donee, and the gift is supported by long acquiescence of the donor, or other entirely satisfactory evidence. This court so held."

In Gray v. Gray, 111 Me. 21, 87 A. 661, it is said:

> "The law requires gifts inter vivos to be completed by actual delivery to the donee, or to some person for him, unless the property which is the subject of the gift is at the time in the possession of the donee, in which case the evidence must be clear and satisfactory that the donor had relinquished all control of and claim to the subject of the gift."

[4] This statement of the law applicable to verbal gifts is supported by the great weight of authority. As has been stated frequently, however, if the evidence in any case is sufficient to support a finding, the question whether it is clear and satisfactory is for the trial court. The requirement of clear and satisfactory evidence to establish a verbal gift is specially applicable in a case where the alleged donor has died prior to the trial and the only evidence offered to prove the gift is the testimony of the donee. This was the situation in Adams v. Merced Stone Co., supra. Here the position of the parties to the gift is reversed, the donee having died and the donor appearing in court to testify.

> "Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict." Code Civ. Proc. § 2061.

[5] Mrs. Batchelor testified that, in the divorce action, the plaintiff stated that he had given the property received from his aunt's estate to his mother, "in fulfillment of a promise made to her." The plaintiff testified that he had "signed over everything" that he had to his mother, "so that she would be independent"; that, in his wife's action against him for a divorce in 1906, he testified that he "had absolutely nothing, no property or money or interest of any kind whatsoever"; that he did not remember whether he then claimed or asserted any interest in the property held by his mother; that the reason he so testified in the divorce action was because he had previously turned over to his mother all of his "properties and interests absolutely"; that he had placed his copy of the agreement in his mother's safe deposit box, and had not seen it since a short time before the earthquake; and that subsequently, in the year 1919, he had directed his mother to destroy the agreement. His surrender in 1906 of possession of the agreement, which was the only written evidence of his rights in the property, and his subsequent direction to destroy it are consistent with the findings of the court and inconsistent with his present claims. His testimony at the hearing in the divorce action did not consist of unguarded statements, but they were made deliberately, under oath, for the purpose of defeating the claim of his wife and children for support. Having convinced

the court in that case that such statements were true, the plaintiff cannot justly complain of the court's finding in this case to the effect that they were true, where a contrary finding would deprive the children of the support which his mother provided for them out of the same property, which, he testified in the divorce action, he had given to her.

[6, 7] Appellant contends that the court erred in refusing to strike out testimony of Mrs. England that, at the time the agreement was burned, her mother said:

> "I can do anything I please with this money."

No objection was made to the question to which the answer was responsive. In 28 Corpus Juris, page 676, it is said:

> "The declaration of a donee in possession, to the effect that he claims the property by gift, is inadmissible as substantive evidence of the gift, but is admissible as tending to show claim of ownership, or to rebut any inference of an admission against his ownership."

The fact that by her will, executed in 1914, Mrs. Winslow gave to her grandsons a part of the specific property which the plaintiff had delivered to her tends to show that she then claimed absolute ownership of the property.

The judgment is affirmed.

We concur: PLUMMER, J.; PRESTON, Justice pro tem.

200 Cal. 382

HUNT, MIRK & CO., Inc., v. PATTERSON et al. (S. F. 11164.)

(Supreme Court of California. Feb. 7, 1927.)

Judgment ⚷153(2)—Motion to vacate default judgment, made 20 months after entry, held ineffective; not being within 6 months after clerk's entry date (Code Civ. Proc. § 473).

Motion to vacate default judgment, made 20 months after entry of default, *held* ineffective; application to vacate being required by Code Civ. Proc. § 473, to be made within reasonable time, not exceeding 6 months from date of clerk's entry of default.

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Hunt, Mirk & Co., Incorporated, against H. B. Patterson and the Hesperides Mining Company. Default judgments were entered against both defendants, and subsequently motion of last defendant named to vacate default judgment was granted, and plaintiff appeals. Reversed.

E. D. Knight, of San Francisco, for appellant.

D. P. Eicke and Frank G. Warren, both of Stockton, and William Grant and J. B. Zimdars, both of San Francisco, for respondents.

PER CURIAM. This appeal was placed upon a special calendar of this court, upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. The appeal herein is from an order of the superior court in and for the city and county of San Francisco setting aside and vacating a default judgment theretofore entered in the above-entitled action against the defendant Hesperides Mining Company, a corporation. An examination of the record reveals that the clerk of said superior court duly entered the default of the Hesperides Mining Company on June 19, 1922, for failure to appear and plead within the time allowed by law. Thereafter and on November 9, 1923, the default of the other defendant, H. B. Patterson, was likewise and for the same reasons entered by said clerk. On the same day a judgment of default was entered by said superior court as against both defendants. Subsequently, and on January 4, 1924, the defendant Hesperides Mining Company filed a notice of motion to vacate and set aside the default judgment theretofore entered against it. This notice, though inartificially worded, may be interpreted to indicate that said motion would be made under and pursuant to the provisions of section 473 of the Code of Civil Procedure. On February 4, 1924, the motion to vacate and set aside the default judgment, entered against said defendant Hesperides Mining Company, was made in open court, and, after submission, was granted on the following day. This appeal was thereupon taken.

The appellant's contention touching the asserted abuse in the discretion exercised by the trial court is without merit. However, under the provisions of section 473, Code of Civil Procedure, a motion or application to vacate and set aside a default on the grounds therein enumerated must be made within a "reasonable time" not exceeding 6 months. The authorities declare that "the clerk's entry of the default, and not the entry of the judgment by the court, fixes the beginning of the 6 months within which the application must be made." McLain v. Llewellyn Iron Works, 56 Cal. App. 58, 59, 204 P. 869; Mader v. Christie, 52 Cal. App. 138, 141, 198 P. 45; Title Insurance Co. v. King Co. 162 Cal. 44, 46, 120 P. 1066. It is readily apparent, from the above chronological statement of the case, that the application to vacate and set aside the judgment entered herein was

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

made approximately 20 months after entry by the clerk of the respondent's default, and therefore not within the time prescribed by law.

For the foregoing reasons, the order appealed from is hereby reversed.

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200 Cal. 414

PEOPLE v. ALLISON. (Cr. 2960.)

(Supreme Court of California. Feb. 11, 1927.)

1. Criminal law 🔑507(1)—Witness for state to whom burglars handed hams from railroad car held accomplice, requiring corroboration as matter of law, and submission of question to jury was reversible error (Pen. Code, §§ 459, 1111, 1181, subd. 6).

In prosecution under Pen. Code, § 459, for burglary of railroad car, where a codefendant testified that defendant and another inside of the car handed hams to him which he piled on the ground and which they later carried away, *held* the entry of such witness was sufficient to constitute his crime burglary and not merely larceny and make him an accomplice; hence submission of special issue whether such witness was an accomplice to the crime of burglary was reversible error, under sections 1111, 1181, subd. 6.

2. Criminal law 🔑780(1)—State's witness, who had received hams handed out by persons, held accomplice as matter of law in burglary of railroad car.

In prosecution for burglary of railroad car, state's witness, testifying that defendant and a companion within the car handed hams to him, *held* an accomplice as a matter of law, and instruction that if he did not encourage the breaking or entering or had no part in it he was not an accomplice was erroneous.

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Bernard P. Allison was convicted of burglary, and after affirmance in the District Court of Appeal, and denial of rehearing, he petitions the Supreme Court for a hearing. Reversed.

Donald McKisick and J. S. Daly, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PRESTON, J. Defendant was convicted by a jury in the superior court of Sacramento county of the crime of burglary. He petitions this court for a hearing after decision of the District Court of Appeal, Third Appellate District, on hearing and rehearing, affirming the judgment of conviction and order denying his motion for a new trial.

Appellant contends that the evidence is insufficient to support the verdict of conviction in that there was no testimony introduced by the people to support a conviction but that of an accomplice, uncorroborated by other testimony or evidence tending to connect the accused with the commission of the crime; also that the trial court erred in admitting hearsay testimony against the defendant, in submitting to the jury a special verdict as to whether the witness Speascock was an accomplice, in allowing the district attorney to misstate the law during his argument to the jury, and in giving instructions to the jury which were erroneous and prejudicial to the rights of defendant.

[1] The facts are briefly: On February 1, 1926, between the hour of 8 p. m., when it was inspected and seals found intact, and the hour of 10:30 p. m., when it was scheduled for departure, car No. 2100 stationed in Haggins yards attached to a freight train and loaded with freight, including a crate of hams, was broken open and about one-half the hams contained in the crate were removed. Subsequently, one Daniel E. Speascock and later defendant and one Hudson were arrested and charged with commission of the offense. The information in the court below read in part as follows:

> "The said Dewey Hudson, alias Roy Allen, Daniel E. Speascock, and Bernard P. Allison on or about the 1st day of February, A. D. 1926, * * * did then and there willfully, unlawfully, feloniously, and burglariously enter car S. N. 2100, * * * with the felonious intent then and there to commit the crime of larceny. * * *"

On March 6, 1926, Speascock pleaded guilty to the information and asked for probation; he then became a witness against this defendant. There was no other testimony directly connecting defendant with commission of the crime.

Speascock testified in substance as follows: That on the evening of February 1st, he went with this defendant and Hudson to Haggins yards. They entered an empty box car to sleep. Shortly afterward defendant left the car and later called Hudson, who joined him; shortly thereafter he, Speascock, also left the car, and upon getting out saw defendant and Hudson in car No. 2100, the door being open. He stated:

> "I stood there just a few minutes, I don't remember which one of the boys first handed me the hams, but he told me to take them, and I did. * * * I took them on the other side of the track and laid them in the lot."

He testified that he did know they were going to break into this box car and had nothing to do with the breaking; that he piled the hams on the ground and after a large number were taken the three of them wrapped them in defendant's overcoat and secreted them at a point about 150 feet from the car. After the arrest Speascock accompanied a police officer to the spot and the hams were recovered.

Section 1111 of the Penal Code provides:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense. * * * An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

The question is: Was Speascock an accomplice? It is perfectly clear that not only was he "liable to prosecution for the identical offense charged against the defendant," but he was in fact convicted on a plea of guilty of the identical offense charged against defendant herein. Nevertheless, it is urged that as Speascock did not enter the car, he was guilty of larceny according to the facts and not of burglary; that therefore he could not be an accomplice to the crime of burglary; that the evidence was such as clearly to make the question one of fact for the jury to determine, and, in this instance, relying upon certain alleged erroneous instructions, the jury rendered a special verdict as follows: "Was Daniel E. Speascock an accomplice in the commission of the crime of burglary as charged in the information? No."

Section 459 of the Penal Code provides:

> "Every person who enters any * * * railroad car, * * * with intent to commit grand or petit larceny or any felony is guilty of burglary."

There is certainly no evidence to disprove the fact that Speascock did enter the car. If he reached up into the car, as he must have done to take the hams from the persons inside, his reaching in was an entry, coupled with the intent to abstract the hams, sufficient to constitute the crime of burglary. Or even if it be argued that the evidence does not prove the actual introduction of his arm into the car, nevertheless, it is clear that whenever he took a ham from his confederate inside, his arm was extended by the length of the ham to its contact with the hand of the other within the car, and, under the authorities, as will be shown by those hereinafter cited, this too would be deemed an entry, coupled with the specified intent, sufficient to constitute the crime of burglary, just as though he had reached into the car with the aid of a hooked stick or other artificial appliance and extracted the hams.

> "It is not necessary that the party shall get his whole body into the house. The least entry of any part of the body is sufficient, as the entry of the hand, or a finger only, or of the head or the foot." 9 Corp. Jur. 1020, § 24; State v. McCall, 4 Ala. 643, 39 Am. Dec. 314; Fisher v. State, 43 Ala. 17.
>
> "However, we do not construe the statute as meaning that there should be an entering of the whole body into the car, but an entry into the car, however slight, such as putting the hand through the opening with the intent to steal property, etc., therefrom, would be an entry in the meaning of the statute. * * *" Price v. Commonwealth, 129 Ky. 716, 112 S. W. 855.
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> "When the thief breaks the house, and his body or any part thereof, as his foot or his arm, is within any part of the house, it is deemed an entry; or when he puts a gun into a window which he has broken (though the hand be not in), * * * this is an entry. * * * The same is true of the mere introduction of the offender's finger. * * * It has been said that discharging a loaded gun into a house is a sufficient entry." 1 Wharton's Criminal Law (10th Ed.) pp. 695, 696, §§ 774—776.
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> "The statute dispenses with breaking but clearly contemplates the necessity for an entry. * * * No words are found in the statute qualifying the character, kind, time or manner of entry, save that such entry must be accompanied with the specified intent." 4 Cal. Jur. p. 718, § 3. See, also, People v. Barry, 94 Cal. 481, 29 P. 1026.
>
> "A breaking is not an essential element of the crime of burglary, as an entry of any character made for the purpose and with the intent to commit the crime of grand or petty larceny is sufficient." Syllabus People v. Ferns, 27 Cal. App. 285, 149 P. 802.

In view of these authorities, in our opinion, it was error to submit to the jury the special verdict above quoted. There was no conflict in the evidence, and it called for a finding not upon a question of fact, but upon a question of law, and it was in effect prejudicial to defendant. As stated in People v. Coffey, 161 Cal. 433, 436, 119 P. 901, 902 (39 L. R. A. [N. S.] 704):

> "When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am. St. Rep. 65. Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. For the law declares in mandatory terms that 'A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.' Pen. Code, § 1111. Therefore, whenever upon appeal it is argued that the conviction was had upon the uncorroborated testimony of an accomplice, it is equivalent to a declaration that the verdict is contrary to the law and the evidence, and this is always a legal question. Pen. Code, § 1181,

subd. 6. Hence, in every proper case, a Court of Appeals is called upon to consider whether or not the witness is an accomplice, and, if so, whether his evidence has received the corroboration demanded by the law before a defendant may be convicted upon it."

[2] It is also apparent from the foregoing authorities that appellant's complaint that the following instruction was erroneous is justified:

> "You are instructed that if the witness Speascock did not aid or encourage the breaking or entering of the car, if you find such car was broken and entered, and if you further find that he took no part in the breaking and entering of the car, if you find such car was broken and entered, then you are instructed he is not an accomplice within the meaning of the law although he may have received hams while standing outside from persons who were on the inside of the car, if you find such hams were so received."

In further support of this view we quote again from People v. Coffey, supra:

> "Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals."

This conclusion renders unnecessary a consideration of the other points urged by appellant.

Judgment reversed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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200 Cal. 428

FARREN v. HOBBS. (Sac. 3766.)

(Supreme Court of California. Feb. 16, 1927.)

1. Sales 🔑52(5)—Evidence justified finding of contract for sale of pump and appliances, in action for purchase price.

In action for services in boring well and for purchase price of pump installed in well, evidence justified finding that contract was made between defendant's testator and manufacturer for sale of pump and appliances.

2. Frauds, statute of 🔑89(3)—Where pump received and used by purchaser without denial of liability until action for price, case held not within statute.

Where purchaser of pump received pump shipped to him, paid freight, installed and used it, and ordered several extensions without denying liability under bills rendered him until action for purchase price, case was taken out of statute of frauds.

3. Sales 🔑284(1, 2)—Owner must guard against sand pouring into well after completion, and injury to pump by sand is not chargeable to seller installing pump.

Where contract for drilling water well was fully performed, subsequent danger of sand and gravel pouring into well, which might be anticipated for years after completion of well, was one which owner must guard against, and seller of pump installed in well was not responsible, under manufacturers' warranties, for injuries to pump caused by infiltration of sand.

In Bank.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by R. C. Farren against Alice B. Hobbs as executrix of the estate of A. L. Hobbs, deceased, substituted in place of A. L. Hobbs, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, and Brown & Albery, of Colusa, for appellant.

C. D. McComish, of Colusa, for respondent.

LANGDON, J. This is an appeal by the defendant from a judgment against her, in her capacity as executrix of the estate of A. L. Hobbs, deceased, for $4,286.95, in an action upon two assigned claims. One of these claims was for boring a well and the other for the purchase price of a pump for the well.

The appellant, while approaching the matter from many directions, in substance, presents by her brief a determined attack upon the sufficiency of the evidence to sustain findings regarding the making of the contract for the pump and the performance of either the contract for the pump or for the boring of the well by the assignors of plaintiff.

Defendant's decedent, A. L. Hobbs, was the owner of a piece of land in Colusa county, part of which he had planted with trees and vines. In March, 1921, he made a contract with I. E. Florey, a well driller, under which Florey was to bore a twelve-inch well upon this land, so that a 9-stage 90-foot pump of Western Well Works manufacture could be installed satisfactorily. The depth of the well was to be determined by Hobbs, who agreed to pay Florey 75 per cent. of the money due him after the first 100 feet had been drilled, and 75 per cent. of the amount due him after each additional 50 feet had been drilled, and the balance in full when pump "is satisfactorily installed and operated." Florey also agreed to furnish "one 12-inch No. 9 State Western Well Works Vertical Turbine pump, with sufficient line shaft, line shaft couplings, discharge columns, oil conduits, etc., to place the bowls of the pump approximately 90 feet below the surface of the ground. * * * Pump to be delivered within 30 days." The price of this pump was to be $2,070 installed complete, less 2½ per cent.

There is no dispute about the execution of the foregoing contract. It was in writing and signed by the parties. After signing this contract, Florey contracted with the Western Well Works of San Jose for a pump in accordance with the specifications of his contract with Hobbs. He then proceeded to bore the well. He bored it 12 inches in diameter to a depth of 370 feet, and then engaged another well digger, Steele, to carry it down at a diameter of 10 inches; this reduction of diameter being decided upon by Hobbs and the drillers because there was danger of a collapse in the 12-inch casing. Steele carried the well down to 494 feet, according to his testimony, and at this point Hobbs, after consultation with the drillers, decided there might be water enough to suit his needs, and ordered Steele to make the perforations to let the water into the well. Steele did so and cleaned the well of sand and gravel to the bottom. Presumably the well was now ready for the pump. At this point Hobbs measured the depth of the well, and, according to his testimony and that of the man who assisted him, it measured only 472 feet in depth. The prior measurement of Florey, according to his testimony, had disclosed a greater depth by about 20 feet. There is some uncertainty about the record as to how this occurred—perhaps through a mistake of one or the other of the parties, or perhaps through the filling in of sand and gravel; but, however it occurred, the discrepancy caused a dispute over the amount due for boring the well. Because of this dispute, Florey refused to install the pump.

There is some variation in the testimony as to the next phase of the transaction, and we shall recite the evidence most favorable to the findings made by the trial court. Mr. Hobbs telephoned to the Western Well Works personally and ordered a change in the pump which they were to supply under their contract with Florey. He ordered it changed from a 9-stage 90-foot pump to a 12-stage 140-foot pump, and the company agreed to change it at an additional price of $585. The company confirmed this new order in a letter appearing in the transcript which, in part, reads as follows:

> "This will confirm our receipt of your telephone order to change the depth of your pump on contract dated March 17, 1921, from a 9-stage 90-foot pump to a 12-stage 140-foot Pump. The price of this additional material will be $585."

This letter was dated June 20, 1921. A clerk in the office of the Western Well Works testified that she had a telephone conversation with Hobbs on or about July 1, 1921, in which Hobbs told her that his pump was on his land, and that Florey refused to install it. He also stated that Mr. Lavendar was present, and that Mr. Lavendar was the man who was to install the pump under the Florey contract, but that Lavendar did not wish to install the pump over Florey's objections unless instructed so to do by the Western Well Works. Lavendar and Hobbs were together at the telephone, and, after the situation had been explained to the Western Well Works, the clerk representing that company consulted with its attorney, who happened to be present, and then asked Hobbs if he would pay the company directly for the pump if it ordered it installed. Hobbs stated that he would do so, and in reliance upon this promise Lavendar was called to the telephone and instructed by the company to install the pump. Hobbs was also told that the pump would be billed to him f. o. b. San Jose, and he said he would pay the Western Well Works for it. Lavendar proceeded to install the pump. It was ascertained that more extensions were required, and from time to time Hobbs telegraphed to the Western Well Works for such extensions, which were furnished. The pump and extensions were shipped directly to Hobbs. A statement of his account was sent to Hobbs each month by the Western Well Works, to which he made no objection.

On September 2, 1921, Hobbs wrote to the Western Well Works as follows:

> "Yours of the 30th just received and in reply will say that the pump you have in my well is not satisfactory. It is pumping 350 to 150 gallons per min. and using 55 H. P. Using the same amount of H. P. pumping 150 as it does 350. The water does not break. * * * I do not know the pull down is so am not sure at this time whether the trouble is in the quantity of water or the pump. But I do know it is not satisfactory. It would seem to me that it would be well for you to determine the draw down of the water in the well—and why using power enough for 500 gal. and only getting 150—is it up to me to determine this or you. I feel that it is up to you to prove the efficiency of the pump. So please let me hear from you."

Mr. Lavendar was delegated to collect from Mr. Hobbs the money due to the Western Well Works, but could not make the collection. Nothing was said in the telephonic conversation between Hobbs and the Western Well Works about the disposition of the contract between that company and Florey, and as a matter of fact, when Florey learned that the company had ordered the pump installed at the request of Hobbs, Florey telegraphed to the company as follows: "You ordered pump in over me wire release on contract at once." Florey also went to Hobbs about the matter, and Hobbs told him he was dealing directly with the Western Well Works. So much for the formation of the contracts involved here.

Many practical difficulties developed. Quantities of sand and gravel poured into the well and went through the pump with the water, and the water supply was inadequate. Hobbs evidently attempted to exhaust the sand and gravel through the pump, and ran the pump at times during the months of July August, and September, making no complaint other than the foregoing letter complaining about the amount of horsepower the pump was using, which was made after another demand for payment. In June, 1922, Hobbs had the pump taken out of the well, and found it was badly cut and worn by sand and gravel passing through it.

Florey assigned his claim for services in boring the well and the Western Well Works assigned their claim for the pump and extensions to the plaintiff, and, during the pendency of the action which followed, Hobbs died, and his executrix was substituted in his place and stead.

The trial court found that Florey had performed all the conditions of his contract so far as the drilling of the well was concerned, and had drilled the well to a depth of 492 feet, and completed the same on or about July 1, 1921; that Florey did not install the pump provided for in said contract for the reason that the defendant Hobbs prevented him from doing so; that the wearing out of the parts of the said pump were caused by an improper use thereof by the defendant Hobbs, and that it is not true that the materials or workmanship employed in constructing the said pump were faulty or defective; that it is not true that the Western Well Works were ever duly advised or at all advised concerning any defects of said pump, appliances, or equipment.

There are also specific findings against the special defenses interposed by defendant, although they are also negatived in the findings above set forth.

[1, 2] The foregoing evidence justifies the finding that a contract was made between Hobbs and the Western Well Works for the purchase and sale of a pump and appliances. The objection of appellant that such contract was not in writing is met by the evidence in the record showing that the pump was shipped to Hobbs at Arbuckle; he received it at the station, paid the freight on it, had it hauled to his ranch, installed it, and tried it out, found that it exhausted the water quickly and would have to be placed deeper, and ordered several extensions for this purpose; that he operated the pump for several months, made no objection to it except the letter from which we have quoted herein and did not deny liability under the bills rendered to him until the action was brought. These facts and circumstances take the case out of the statute of frauds.

[3] An attempt is made by appellant to fasten upon either Western Well Works or Florey the responsibility for the infiltration of sand and gravel which ruined the pump and made the well unsatisfactory. Assuredly, this was not a risk assumed by the Western Well Works, nor a danger against which they contracted. Florey has testified that he cleaned out the well when Hobbs directed that it be perforated for water, and the court has found that Florey performed his contract in the matter of drilling the well. The subsequent danger of sand and gravel pouring into the well appears from the record to be one which might be anticipated perhaps for years after the well was completed, and was one which the owner of the land must necessarily guard against.

The respondent claims, and the record and findings bear him out, that the pump was ruined by operation under improper conditions, and that its condition was not chargeable in any way to any defects for which Western Well Works would be liable under a manufacturer's warranties.

The appellant's argument is divided and subdivided, but many of the matters urged are merely attacks from different angles upon the same ultimate facts found by the court, and there is no necessity for discussing these subdivisions separately. The foregoing discussion of the findings and the evidence supporting them disposes of every objection made by appellant.

The judgment appealed from is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

200 Cal. 381

PENGELLY v. PENGELLY. (S. F. 10983.)

(Supreme Court of California. Feb. 7, 1927.)

1. Divorce 🔑312—Appeal from order transferring custody of child after expiration of period for transfer presented moot question and will be dismissed.

Where single period of time during which defendant in divorce action was to have custody of child expired, appeal from order transferring custody during such period presented moot question and appeal will be dismissed.

2. Divorce 🔑312—Where order for temporary transfer of custody of child of divorced parents was clearly not abuse of discretion, appeal will be dismissed as frivolous.

Where order making temporary transfer of custody of child of divorced parents is clearly not abuse of discretion, appeal therefrom will be dismissed as frivolous.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by Gertrude C. Pengelly against Wilbert F. Pengelly. From an order of the superior court modifying an interlocutory and final decree of divorce relating to custody of minor child, plaintiff appeals. Appeal dismissed.

Jos. A. Brown, of San Francisco, for appellant.

Timothy Healy, of San Francisco, for respondent.

PER CURIAM. [1, 2] This appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. It appears that the appeal is from an order of the superior court in and for the city and county of San Francisco modifying the interlocutory and final decrees of divorce entered in the above-entitled action. The custody of the minor child of the parties was awarded to the plaintiff under said interlocutory and final decrees. Thereafter and on October 30, 1923, the modifying order appealed from was made and entered. This latter order provided that the custody of said minor child be in the defendant for the period from November 1, 1923, to April 30, 1924.

It appears upon the face of the order complained of that the custody of said minor, theretofore exclusively in the plaintiff, was to be given to the defendant *only* for the six months' period designated therein and for no other period of time. Aside from the fact that the child has now reached an age when he might properly select his own guardian, an examination of the appellant's brief and the record reveals that the period of time within which the transfer of custody was to take place has long since passed by and the question presented herein has therefore become moot. Furthermore, such examination discloses that the trial court did not abuse its discretion in thus ordering a temporary transfer of custody of said minor, and the appeal is, therefore, entirely without merit and is a frivolous appeal.

It is ordered that the appeal be and the same is hereby dismissed.

LONDON GUARANTEE & ACCIDENT CO., Limited, v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5358.)★

(District Court of Appeal, Second District, Division 2. California. Jan. 29, 1927. Hearing Granted by Supreme Court March 28, 1927.)

1. Master and servant 🔑373—Rules of negligence are of assistance in compensation proceedings to determine proximate cause of injury during earthquake (Workmen's Compensation, Insurance, and Safety Act, § 6a).

In action to recover compensation for death of employé, killed during earthquake, resulting either from act of God or from defective construction of walls, rules in negligence cases are of assistance in determining liability under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), § 6a, only in so far as they furnish guide in identifying proximate cause of injury.

2. Master and servant 🔑417(7)—Decision of Industrial Accident Commission on conflicting evidence as to risk of employment is conclusive.

If evidence is conflicting as to whether employé was subjected to greater risk than that to which the community as whole was subjected to by reason of his employment, decision of Industrial Accident Commission could not be disturbed by appellate court.

3. Master and servant 🔑373—Janitor, killed in collapse of building during earthquake, held not subjected to peculiar risk incident to employment.

In proceedings to obtain compensation for death of janitor, killed in earthquake, where witnesses unanimously agreed that buildings other than one in which janitor was killed collapsed at same time, and from same cause, and concrete out of which employer's building was made was above the average in quality and higher grade than that of other buildings that collapsed, there was no testimony to show that

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★Superseded by opinion of Supreme Court, 259 P. 1096.

janitor was subjected to peculiar risk incident to employment.

4. Master and servant 🔑371—Employer is under duty to furnish place of employment and safety devices reasonably adequate to make employment safe (Workmen's Compensation, Insurance, and Safety Act, §§ 34, 35, and § 33, as amended by St. 1919, p. 922, § 10, and St. 1923, p. 165).

Under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), §§ 34, 35, and section 33, as amended by St. 1919, p. 922, § 10, and St. 1923, p. 165, employer is under duty to furnish place of employment and safety devices as are reasonably adequate to render employment safe.

5. Master and servant 🔑373—"Act of God" for which there is no liability is one due to natural causes not preventable by human foresight.

Injury resulting from "act of God," for which there is no liability, is one due to natural causes, without human agency, which could not have been prevented by exercise of diligence or use of appliances which proprietor should reasonably have employed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Act of God.]

6. Master and servant 🔑372—Employer is not required to compensate for occurrences which human foresight could not reasonably have foreseen (Workmen's Compensation, Insurance, and Safety Act).

Under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), employer is required to furnish safeguards against injury which are reasonably adequate, or be liable for injuries attributable to failure to provide reasonable safeguards, but is not required to compensate for occurrences which human foresight could not reasonably have foreseen.

7. Master and servant 🔑371—Accident must result from risk reasonably incident to employment to impose liability on employer (Workmen's Compensation, Insurance, and Safety Act).

Accident resulting from injury for which master is liable, under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), must be one resulting from risk reasonably incident to employment.

8. Master and servant 🔑373—Employer held not negligent in failing to provide against earthquake destroying building constructed of standard materials.

In proceedings to recover compensation for death of janitor in building destroyed by earthquake, where adequate materials of standard quality were installed in building with reasonable care, owners of building were not negligent in failing to provide against unknown forces, or in building in particular place.

9. Master and servant 🔑373—Death of janitor, in building destroyed by earthquake, held not compensable. (Workmen's Compensation, Insurance, and Safety Act).

Injury resulting in death of janitor, employed in apartment building collapsing as result of earthquake, *held* proximately caused by act of God, and owners of building were not liable to compensate for death of janitor under Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831).

10. Master and servant 🔑371—Humanitarian purpose of Workmen's Compensation, Insurance, and Safety Act does not furnish additional ground for compensation to be paid by employer not responsible for risk.

Humanitarian purpose of Workmen's Compensation, Insurance, and Safety Act (St. 1917, p. 831), to relieve victims of industrial mishaps of resulting burden, does not furnish additional ground for compensation by way of exception to recognized rights of employer, when no act or omission on his part necessarily accentuated the natural hazard.

Proceeding under the Workmen's Compensation, Insurance, and Safety Act by Louisa Mosteiro for death of Segismundo Mosteiro, her husband, claimant, opposed by the London Guarantee & Accident Company, Limited, insurer. From an order of the Industrial Accident Commission awarding compensation for injuries resulting in death, the insurer brings certiorari. Award annulled.

Heaney, Price & Postel, of Santa Barbara, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, J. On June 29, 1925, at about 6:45 o'clock in the morning, a severe earthquake occurred at the city of Santa Barbara, which destroyed many buildings in the business section of the city and caused at least 13 persons to lose their lives. One Segismundo Mosteiro was at that time performing the duties of janitor on the fourth floor of the San Marcos building in said city, in the employ and under the direction of the owners of the building. As a result of the earthquake, a large portion of the walls of said building collapsed, crushing Mosteiro, and causing his death. Thereafter his widow, the respondent, Louisa Mosteiro, for herself and on behalf of two minor children of the decedent and his surviving spouse, filed with the respondent commission an application for adjustment of claim, wherein she alleged that Segismundo Mosteiro was killed by reason of an injury arising out of and in the course of his employment.

After a hearing upon such petition, an award of $5,000 was granted the applicant, and therein directed to be paid in amounts and at times specified by the commission, to which no objection is made by the petitioner herein if the casualty be here held to have been compensable under the provisions of the Workmen's Compensation, Insurance, and Safety Act. Petitioner demanded a rehearing before said commission upon the ground that the evidence and findings did not support or justify any award, and, the same having been denied, this proceeding was instituted, praying that the findings and award be annulled.

The principal question presented is as to whether or not the fatal injuries suffered by the decedent proximately resulted from an act of God, or from the defective construction of walls, which would not have succumbed to seismic vibration but for the alleged inferior quality of materials used in their composition.

It appears that the San Marcos building was a four-story reinforced concrete structure; that it was erected in 1913, and in 1925 it was enlarged; the original building was placed on the corner of State and Anapamu streets, and subsequent additions were built onto the sides thereof, which faced approximately southwesterly and southeasterly, thus forming a triangle, or "L." The first story was devoted to stores, and the upper floors to offices, which were occupied by various professional men and tradesmen.

It is admitted that the earthquake came suddenly, without warning, and with great violence; that such a disturbance had not been recorded during the known history of the city for a period of 112 years. It is also conceded that the shock was so severe that the walls of the San Marcos building and others in the vicinity began to crumble. A contractor who had just left his office therein and descended the stairs was thrown to the floor at the doorway, immediately following which the walls of the main building collapsed, killing a dentist in one of the offices, burying a janitor who lay unconscious for a period of an hour, and was not rescued until four hours thereafter, and crushing Mosteiro in one of the hallways. In the immediate vicinity of this building two churches, the Elks building, public library, county jail, and courthouse, two hotels, a high school, and other buildings were substantially destroyed by the impact. In one of said hotels two persons lost their lives, and it was estimated by witnesses at the hearing that the buildings, photographs of which are furnished with the record, suffered a 75 to 80 per cent. demolition.

It is contended by the petitioner that the walls of the San Marcos building were as carefully and substantially constructed as the reasonable diligence and skill of the times would permit, and that they were as strong and as safe as those of the average reinforced concrete building in California. The respondents sought to show, and here insist, that inferior sand and gravel, containing loam and other dirt and foreign materials, were used in constructing said walls, that, had they not been defective, the earthquake would not have shaken them down, and hence that their collapse, rather than the seismic shock, constituted the proximate cause of the injuries which resulted in the death of Segismundo Mosteiro.

We note at the outset that one observation of respondents in their briefs is not warranted by the testimony relied upon by them. It is stated that sand and gravel were found to be inferior during the process of construction, and were rejected, but that they were used in the building. It is apparent that respondents have misapprehended the testimony of Hawley, one of the builders and owners of the building. The testimony in this respect was as follows:

> "A. The rock and sand was originally purchased from the Santa Barbara Lumber Company, and the sand was rejected before we had more than two or three carloads, which was used principally in the corner wall on the outside of the building; thereafter we purchased our rock and sand from Mr. A. R. Edmundson.
>
> "Q. With reference to the sand that went into the corner wall, were these that were rejected—did they fall? A. In every case they stood; they were below ground."

It further appears from the record that the building was constructed in accordance with plans and specifications of a qualified architect, by structural engineers; all sand, rock, and steel were tested by experts; a sufficient number of columns, reinforced according to the general practice for the estimated load, were installed; that the building was constructed by generally accepted standards used throughout the state, and elsewhere, and was designed in a practical manner, to withstand the wear and tear of ordinary business trade conditions. Certain witnesses swore that an examination of specimens of concrete, which they examined after the disaster, revealed a tendency to crumble, or cleave from the pieces of rock, rather than to adhere and break through the mass as a homogeneous whole, and that this indicated either improper mixing, the use of too much water, or the presence of dirt in the sand. A chemist, however, who had subjected the concrete to scientific tests after the earthquake, testified that specimens which he tested showed a sustaining strength of more than 1,400 pounds, whereas the general average for all standard concretes is approximately 1,000 pounds. From the testimony of scientists and building experts, it appeared that engineers, architects, and scientists, the American Society of Civil Engineers, and others are constantly gathering scientific data "and embodying it in the design of the modern building of the future, with the end in view that it will be so designed that it can reasonably be expected to resist any moderate earthquake, or an earthquake of average severity"; that "they do not know the forces that they have to build against, because nobody can prophesy as to the intensity of the earthquake." One of the witnesses, called on behalf of the applicant, asserted under oath that "it is beyond human engineering or calculation to design a building, steel, reinforced concrete, or otherwise, that will withstand unusual stress and strain; it is not common practice to do that, not expecting these unusual conditions."

[1] The petitioner cites numerous authorities bearing upon the question of negligence in actions for damages, whereas the respondents insist that the question of negligence is eliminated. Section 6a of the Workmen's Compensation Act (St. 1917, p. 831), provides for compensation when injury is sustained arising out of and in the course of employment, and is proximately caused thereby, either with or without negligence. We think, from a careful review of the authorities in this state and in other jurisdictions, that the rules applicable to negligence cases are of assistance in determining the question of liability in those such as we have before us only in so far as they furnish a guide in identifying the proximate cause of the injury.

[2, 3] The question is presented, and argued in the briefs, as to whether or not the employment of the deceased subjected him to a greater risk than that to which the community as a whole was subjected. If there were presented here a conflict of evidence as to the facts, the decision of the Industrial Accident Commission could not be disturbed in this proceeding, but the witnesses were unanimously agreed that other reinforced concrete buildings in the immediate vicinity of the San Marcos building here involved collapsed at the same time and from the same cause; that the whole community was subjected to a calamity which caused the death of many people, and which, as we have observed, it is beyond the ingenuity of human engineering and calculation to safely and with assurance guard against. The three sections of the San Marcos building, though built side by side, were not joined by interlacing steel bars, and it is contended that, since the separate buildings or structures acted as battering rams upon each other, this fact indicated faulty construction, but the situation would have been the same in the case of independent adjoining buildings. Further, such evidence does not pretend to suggest more than that the architects could have erected the structures differently. It was also testified that a test of the concrete indicated that a drill would go through it "like a piece of cheese," yet, as we have seen, the concrete in the San Marcos building was far above the average in quality, and there is no evidence that the concrete taken from other buildings which collapsed was or could have been of higher grade. Hence, there is no testimony showing a peculiar risk incident to the employment. To hold that the employment of a janitor subjected him to peculiar exposure to which others in the community were not subject would be to say that this is true, because earthquakes occur in the city of Santa Barbara in the early morning hours, whereas none of consequence had been known to occur in that city before the one in question.

Respondents seek to rely upon cases sustaining awards for injuries from the bite of a cat, from cyclone, from lightning which struck an employee who was working on a high scaffold, and from attack by robbers upon a person employed to carry large sums of money. Merely to state such propositions is to furnish their own distinction from the case at bar. A vicious cat is not dangerous to the community in general, and its attack may not have been unexpected; it surely constitutes a danger against which an employer could be expected to guard an employee. In the cyclone case it appeared that such danger had been experienced at other times, in the same neighborhood, and that the employee who was injured was compelled to remain in the building for the purpose of closing the windows, after the foreman and all other employees had been warned and had fled from the premises. The fact that an employee was required to work on an elevated structure during a storm, or to carry valuables, at once segregates such cases from any possible analogy to the one before us, since it is self-evident that no other person in the community was subjected by the employer to a like peril. In each such case, although the employer may not have failed to adopt or use methods and processes reasonably adequate to render the employment and place of employment safe, or to do everything necessary to protect life and safety, the risk was obviously incidental to the employment.

[4] The Workmen's Compensation, Insurance, and Safety Act requires only that an employer shall furnish a place of employment and such safety devices and safeguards as are reasonably adequate to render such employment and place of employment safe; that he shall not require, permit, or suffer an employee to enter a place of employment which is not safe, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, or to do everything reasonably necessary to protect life and safety. Section 33, as amended by St. 1919, p. 922, § 10, and St. 1923, p. 165, and sections 34, 35.

[5] It has been held by our Supreme Court that an act of God for which an employer shall not be liable is an accidental or providential event, excluding the idea of human agency or the intervention of man, which human foresight could not reasonably have foreseen or guarded against. Ryan v. Rogers, 96 Cal. 349, 353, 31 P. 244; Newman v.

City of Alhambra, 179 Cal. 42, 175 P. 414. And that an injury resulting from an act of God for which there is no liability is one which, although sustained during employment, is due directly and exclusively to natural causes, without human agency or intervention in part, the effect of which could not have been prevented by the exercise of prudence, diligence, and care and the use of appliances which the situation renders it reasonable that the proprietor should have employed. Polack v. Pioche, 35 Cal. 416, 423, 95 Am. Dec. 115; Newman v. City of Alhambra, supra; Fay v. Pacific Improvement Co., 93 Cal. 253, 261, 26 P. 1099, 28 P. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198.

[6, 7] One of the most striking features of the Compensation, Insurance, and Safety Act, and which permeates and is emphasized by decisions construing it, is its reasonable protection of the rights of the employer and the employee alike. The employer is required to furnish safeguards against injury which are reasonably adequate, yet he is not required to compensate for occurrences which human foresight could not reasonably have foreseen. An accident must be one resulting from a risk reasonably incident to the employment, else he will not be held responsible for consequent injury. Coronado Beach Co. v. Pillsbury, 172 Cal. 682, 158 P. 212, L. R. A. 1916F, 1164. And yet an employee whose injury may be traced to the delinquency of the employer for having failed in his duty to provide such reasonable safeguard is entitled to compensation.

In Storm v. Industrial Accident Commission, 191 Cal. 4, 214 P. 874, the applicant recited, and the commission found, that the employee was injured by an explosion of dynamite caps which in some unknown manner had been placed in a room which the latter had been employed to sandpaper. Neither the employer nor the employee was responsible for the presence of the caps in the room, and there was no other reasonable or possible purpose for their use on the premises. Some of the authorities cited by counsel in this proceeding were relied upon by the respective parties interested in that case, and are distinguished by the Supreme Court, as we feel that they must be in the instant case. It was there held that, while Kimbol v. Industrial Accident Commission, 173 Cal. 351, 160 P. 150, L. R. A. 1917B, 595, Ann. Cas. 1917E, 312, presented points of similarity to the case at bar—

"that conclusion was predicated, at least in part, upon the fact that 'the danger was a constant one, inherent in the place itself under the conditions there existing,' and that it 'was peculiar to the particular place in which the employee was required to work.' No such conditions obtained here."

In annulling an award which was granted by the commission, it was said:

"To render an injury compensable there must be discernible some relationship of cause and effect between the employment and the injury. 'It is not sufficient for a workman to say "I should not have been injured unless I had been where I was and doing the work which I was employed to do."' Cooper v. North Eastern Ry. Co., 9 B. W. C. C. 129. It must be shown, in addition, that the injury was a natural or probable result of the employment, or of the conditions thereof. Such would seem to be the meaning of the requirement that it must have been 'proximately caused by the employment.'"

[8, 9] From what has been said, it becomes manifest that the only human intervention between the earthquake and the ultimate injuries to Segismundo Mosteiro was the fact that Hawley caused the San Marcos building to be constructed at all, which is not a ground for compensation. Adequate materials, of standard quality, scientifically tested and approved, were installed with reasonable diligence, care, and skill; all the methods, processes, and appliances reasonably adequate to insure safety were adopted. It cannot be said that, because in building the structure which fell those responsible for its erection did not look beyond the bounds of finite experience and genius, and avail themselves of safeguards against unknown and irresistible forces, they were negligent, or that their initiative in building at Santa Barbara constituted the proximate cause of the disaster.

[10] Attention is directed to the fact that the underlying principle of the Workmen's Compensation Act is to lift from the shoulders of unfortunate victims of industrial mishaps and their dependents some measure of the resulting burden, casting it upon industry, and through it, upon society at large.

Such has been held to be the purpose of the legislation authorizing the allowance of compensation in appropriate cases, but in no instance can it be said that this theoretical basis for humanitarian aid and distribution of burdens furnishes an additional ground for compensation by way of exception to the recognized rights of the employer, when no act or omission upon his part, or any avoidable risks attendant upon the industry, shall have necessarily accentuated the natural hazard.

We are therefore constrained to hold that the injuries sustained by the deceased, which resulted in his death, were proximately caused by an act of God, and the award of the commission is therefore annulled.

We concur: WORKS, P. J.; THOMPSON, J.

81 Cal. App. 295

BATES v. UNITED CONST. CO. et al. ★
(Civ. 4831.)

(District Court of Appeal, Second District, Division 1, California. Feb. 11, 1927. Hearing Denied by Supreme Court April 11, 1927.)

1. Cancellation of instruments 🔑60—Judgment reciting plaintiff was entitled to have contract returned meant that contract was rescinded; "rescission" (Civ. Code, § 1688).

Judgment, which decreed that plaintiff was entitled to have contract forming subject-matter of action returned to her, meant that contract was extinguished or rescinded, even though word "rescission" was not used, in view of Civ. Code, § 1688; "rescission" meaning act of abrogating, canceling, vacating, or annulling it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rescission.]

2. Appeal and error 🔑1071(6)—Where it appeared that, had omitted finding been made, it would have been adverse to appellant, failure to make finding was no ground for reversal.

Where it satisfactorily appeared that, had omitted finding been made, it necessarily would have been adverse to appellant, he could not avail himself of failure to make such finding as ground for reversal of judgment.

3. Cancellation of instruments 🔑47—Evidence held to support finding that defendants received plaintiff's equity in conditional sales contract as payment on building contract made with plaintiff, as principals.

Where evidence showed that, before defendants executed contract to construct building for plaintiff and received plaintiff's conditional sales contract covering property previously owned by her, all defendants had discussed proposition, including manner of handling, and that, shortly after building contract was signed, defendant M. purchased conditional sales contract from defendant U., and defendant S. received money for services in connection with execution of building contract, finding that all defendants received conditional sales contract as principals was justified.

4. Appeal and error 🔑1011(1)—Appellate court could not interfere with conclusion of trial court on conflicting evidence.

Where evidence on question was conflicting, decision was primarily one for trial court to determine, and appellate court could not interfere with conclusion reached thereon.

5. Contracts 🔑99(3)—Evidence held to justify finding that defendants made fraudulent promises in inducing plaintiff to part with conditional sales contract, with no intention of performing promises.

In action for money had and received and for rescission of contract, evidence *held* to justify finding that defendants made fraudulent promises to plaintiff to construct building to induce her to part with conditional sales contract covering property previously owned by her, with no intention of performing promises.

6. Contracts 🔑99(3)—Evidence held to support finding that defendants represented to plaintiff, when inducing her to part with equity in sales contract, that they were acting as her agents (Civ. Code, § 1572).

In action for money had and received and for rescission of contract, evidence *held* to support finding that defendants, in inducing plaintiff to turn over equity in conditional sales contract covering property previously owned by her and sign building contract, represented that they were acting as her agent, and would charge no commission, and that they had no intention of performing their promise, which made promise fraudulent under Civ. Code, § 1572.

7. Contracts 🔑99(3)—Evidence held to support finding that plaintiff relied on and was deceived by representations of defendants in signing building contract and delivering conditional sales contract.

In action for money had and received and for rescission of contract, evidence *held* to show that plaintiff relied upon representations made her by defendants that they would construct building for her, was deceived thereby, and was thereby induced to sign building contract and deliver sales contract covering property previously owned by her to defendants.

8. Trial 🔑396(4)—Any substantial evidence is sufficient to support finding.

Where there was some substantial evidence presented to trial court on which to base finding, finding was justified.

9. Contracts 🔑90—Evidence held to support finding that there was no consideration for plaintiff's delivery to defendants of conditional sales contract.

In action for money had and received and for rescission of contract, where defendants had promised to construct building for plaintiff's equity in conditional sales contract, but had not done so, evidence *held* to support finding that there was no consideration for plaintiff's delivery of conditional sales contract.

10. Appeal and error 🔑994(3)—Matter of giving full credence to plaintiff's testimony was within discretion of trial court.

Where evidence was conflicting, matter of giving full credence to plaintiff's testimony was within discretion of trial court.

11. Appeal and error 🔑994(3) — Unless court's discretion is abused in giving full credence to party's testimony, appellate court cannot disturb conclusion reached.

Where evidence was conflicting, and trial court gave full credence to plaintiff's testimony, which was within discretion of trial court, appellate court could not disturb conclusion reached, where it did not appear that court had abused discretion.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action for money had and received and for rescission of contract by Jennie Bates, against the United Construction Company, W. G. Magoon, and Elmer Salomon. From a

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★Hearing denied by Supreme Court.

judgment for plaintiff, W. G. Magoon and Elmer Salomon appeal. Affirmed.

C. W. Stahl, Jarrott & Jarrott, and James S. Jarrott, all of Los Angeles, for appellants.

Davis & Thorne and Tillman E. Justice, all of Los Angeles, for respondent.

HOUSER, J. The action upon which the appeal herein was founded contained three counts; the first being for money had and received and each of the two others for rescission of the contract. Briefly, but in substance, the findings of the court show the following basic facts: That all the defendants represented to plaintiff that, if she would sign a certain building contract to be entered into between her and United Construction Company and turn over to defendants her equity of $8,500 in a conditional sales contract covering property theretofore owned by plaintiff, the defendants would finance, or cause to be financed, and construct the building referred to in the building contract which they wished plaintiff to sign; that plaintiff relied upon such representations, signed the said contract, and turned over to defendants as first payment thereon the conditional sales contract, upon which was then due to plaintiff the sum of $8,500; that defendants Magoon and Salomon represented to plaintiff that each of them was acting as plaintiff's agent, and that no commission would be charged for services rendered in that behalf, but that each of the defendants received the conditional sales contract as a principal; that the building proposed to be constructed by defendants was never built nor financed by either or all of the defendants, or by any other persons; that each of the said representations made by defendants was false, and that upon such discovery by plaintiff she immediately demanded of defendants the return to her of the said conditional sales contract in the sum of $8,500; that plaintiff offered to return to defendants everything of value received by plaintiff from defendants, and served on defendants notice of rescission of said building construction contract, but that defendants refused to deliver or return to plaintiff said $8,500 conditional sales contract, or any part thereof, or any money paid or due thereon; that "defendants and each of them knew of the claims of plaintiff on the defendant the United Construction Company, and the United Construction Company and defendant W. G. Magoon received, with the exception of $500, the entire benefit and total value of the $8,500 conditional sales contract; that the other $500 remaining value of the same was received by defendant Elmer Salomon; that each of them received the same with due notice and a full knowledge of the fraud on plaintiff and of plaintiff's claims."

On such findings and on conclusions of law made thereon by the court, judgment was ordered in favor of plaintiff and against the defendants for the return to plaintiff of the $8,500 conditional sales contract, or, as an alternative, in the event of inability of said defendants to deliver said contract to plaintiff, damages against United Construction Company and W. G. Magoon in the sum of $8,500, and as against defendant Elmer Salomon damages in the sum of $500. It is from such judgment that defendants Magoon and Salomon prosecute the appeal herein.

[1] The first point presented by appellants is that the judgment is invalid, for the reason that "it is for the recovery of money as return of consideration on an action for rescission, while the judgment does not adjudge a rescission."

As applied to a contract, the word "rescission" may be defined as the act of abrogating, canceling, vacating, or annulling it; or, as illustrated by section 1688 of the Civil Code, "A contract is *extinguished* by its rescission." While in terms the judgment fails to use the word "rescission," among other things it does decree that, in accordance with the findings of fact and conclusions of law, plaintiff is entitled to have returned to her the conditional sales contract which formed the subject-matter of the action; which was a sufficient indication that, so far as the trial court was concerned, the building contract under the terms of which plaintiff delivered to defendants the conditional sales contract, was annulled and vacated. There is no "magic" in the use of a particular word to convey a thought, and it is apparent that the facts found by the trial court and the judgment rendered thereon mean nothing other than that the contract between the parties was "extinguished" or rescinded.

[2] Appellants' next contention, to wit, that "there is no conclusion of law stating that a rescission has been effected," is subject to the same conclusions as are applied to the preceding point made by appellants.

It is next urged by appellants that, because no direct finding was made by the trial court as to the value of the consideration paid by plaintiff to the defendants, the judgment is not supported by the findings. As a matter of fact, the findings contain many references to the value of the conditional sales contract, including the finding that on such contract "there was due and owing plaintiff the sum of $8,500"; also that "there was due the plaintiff, after one installment had been paid, the sum of $8,500"; furthermore that "the defendants and each of them knew of the claims of plaintiff on the defendant the United Construction Company, and the United Construction Company and defendant W. G. Magoon received, with the exception of $500, the entire benefit and total value of the $8,500 conditional sales contract, that the other $500 remaining value of the same was received by defendant Elmer Salomon. * * *"

While strictly speaking, it may be said that none of such findings makes a clean-cut statement that the value of the conditional sales contract was $8,500; nevertheless it is clear that no other or different meaning could be attached thereto than that the intention of the court, as measured by the entire findings, conclusions of law, and judgment, was that the value of such contract was the sum of $8,500. It is apparent that, had any express finding been made by the court as to the value of the contract, it would have been that the said contract was worth $8,500. The rule is that, where it satisfactorily appears that, had an omitted finding been made, it necessarily would have been adverse to appellant, he cannot avail himself of the failure to make such finding as a ground for a reversal of the judgment. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Krasky v. Wollpert, 134 Cal. 338, 342, 66 P. 309. See, also, vol. 24, Cal. Jur. § 188, p. 944, and cases there cited.

[3, 4] Appellants also complain that each of several of the findings of the court is not supported by the evidence. The first of such objections is to the finding "that said defendants and each of them received said conditional sales contract as principals." Without quoting the evidence with reference thereto at length, it may suffice to state that it appears to be sufficient, in that it shows that, prior to the execution of the building contract and the delivery to the defendants of the conditional sales contract all the defendants had together discussed in detail the proposition, including the manner in which it should be handled; that each of the defendants was much interested in the outcome of the negotiations in the matter, and within four days after the building contract was signed defendant Magoon purchased the conditional sales contract from the defendant United Construction Company at a discount of $1,000 from its face value, and defendant Salomon received $500 for services rendered by him in connection with the execution of the building contract. While some evidence was offered tending to offset such facts, the decision of the question as to whether the defendants were acting in concert was one primarily for the trial court to determine, from which it follows that this court may not interfere with the conclusion reached thereon.

[5] Within the general contention that the findings are not supported by the evidence is the specification of error as to the finding that Magoon and Salomon made fraudulent promises, with no intention of performing them. The intention of either or both of such defendants in the premises could be ascertained principally from the conduct of, and the statements made by, each of them. From the facts to which reference heretofore has been had, together with the additional circumstances that, before the building contract was entered into, defendants Magoon and Salomon advised plaintiff to get the conditional sales contract out of her hands just as quickly as possible, and that then the construction company "would sign it over in haste," also that, after the building contract was executed each of defendants consistently avoided plaintiff, and, as a finality, that the building was neither financed nor constructed—it would appear that the evidence was sufficient to justify the trial court in its conclusion as to the intention of the defendants.

[6] It is also urged by appellants that the finding that they further represented to plaintiff that they were acting as her agents and would charge no commission for their services, and that plaintiff could rely absolutely upon the representations made by said defendants to plaintiff, had no support in the evidence.

While the transcript of the proceedings fails to show that defendants Magoon and Salomon made a representation in so many words to plaintiff that they were acting as "agents" for plaintiff, nevertheless plaintiff testified that "they promised to get me a contractor who would obtain a loan for me and there would be sufficient funds. * * *" Furthermore, as testified by plaintiff:

> "Well, he just said through friendship—I had been going to Mr. Salomon for five years for advice—he said just through friendship he would be willing to find somebody for me; he was to lease the building and get his commission for that; he was not to receive anything from this deal."
>
> "Q. Did Mr. Magoon say anything with reference to that? A. The same things—all three talked together."

It would therefore appear that the statement in the findings that said defendants represented that they were acting as plaintiff's agents in effect is supported by the evidence. As to the remainder of the finding to which objection is made, appellants contend that it constitutes a promise, and that, in order that such promise be fraudulent as to plaintiff, it must be shown that it was made without any intention of performing it (section 1572, Civ. Code), which objection involves a question which has heretofore received consideration herein, whereby it has been attempted to show that the evidence was sufficient to warrant the conclusion here under consideration.

[7, 8] Under the same general heading appellants make further specification of error to the effect that the evidence was insufficient to support the findings by the court, in substance, that plaintiff relied upon the several promises and representations made to her by the defendants; that she was deceived thereby and was thereby induced to sign the building contract and to deliver the conditional sales contract to the defendants—together with other findings identical in meaning with those which heretofore have received consideration herein. No special argument is made

by appellants with reference thereto other than the statement in effect that the weight of the evidence was against the conclusion that plaintiff relied upon the representations made by the defendants. The testimony of plaintiff in this regard includes the following:

> "Q. Now, did Mr. Magoon ever state anything with reference to you receiving the advice of anybody else other than himself? A. He objected to my taking Dr. Hudson with me. Q. What did he say? A. He and Mr. Salomon both said to rely absolutely on their judgment, not to listen to him. Q. To whom? A. To Dr. Hudson. He said if I would listen to them, and do as they said, I would come out all right —which I did do. Q. Did you follow the advice of Mr. Magoon and Mr. Salomon? A. I certainly did. I have already answered that."

It is therefore clear that some substantial evidence was presented to the trial court upon which to base the finding to which exception is taken, and the authorities are practically unanimous on the point that such a showing is sufficient.

[9] In addition to the findings which have already received consideration herein, appellants contend that there was no evidence to support the finding:

> "That no consideration, either in part or in whole, was ever given to plaintiff by defendants for the $8,500 conditional sales contract assigned by plaintiff to them."

In one sense, as is suggested by appellants, the promise on the part of defendants to construct the building was consideration for the delivery of the conditional sales contract; but manifestly such a construction on the acts of the parties is not what is meant by the finding in question. The context of the entire body of the findings, conclusions of law, and the judgment plainly indicates that the significance to be attached to the finding under consideration is that plaintiff delivered to defendants the $8,500 conditional sales contract, and that defendants failed to carry out the building contract or any part thereof. So construed, the finding to which objection is made would appear to be correct and not subject to the criticism to which reference has been had.

It is also urged by appellants that the evidence was not sufficient to support one of the findings, which declares that each of the defendants had knowledge of the claims of plaintiff on the United Construction Company, notwithstanding which said Construction Company and defendant Magoon, with the exception of $500, received the entire benefit and total value of the $8,500 conditional sales contract, and that the remaining $500 of the conditional sales contract was received by the defendant Salomon, and that each of said defendants received the same with due notice and full knowledge of the fraud and of plaintiff's claims.

[10, 11] An examination of the evidence discloses the fact that the most that may be said in favor of such contention on the part of appellants is that the evidence touching such finding is conflicting. If the trial court gave full credence to plaintiff's testimony, which it had the right and power to do, there can be no doubt but that the finding was correct and truly represented the facts with reference thereto. That was a matter which rested within the discretion of the trial court. Unless such discretion was abused, this court has no authority to disturb the conclusion reached. No direct claim is made by appellants to the contrary; nor is this court impressed with the implied suggestion that the discretion of the judge of the trial court was not wisely exercised.

Without in any manner touching upon the sufficiency of the findings and the evidence to sustain the judgment on the common count of money had and received, it sufficiently appears that, considering the question solely from a standpoint of any alleged errors with reference to the counts having to do with rescission, a conclusion free from errors prejudicial to appellants was rendered by the trial court.

It is therefore ordered that the judgment be and it is affirmed.

We concur: CONREY, P. J.; YORK, J.

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81 Cal. App. 304

IWATA et al. v. GOLDBERG et al.
(Civ. 4659.)

(District Court of Appeal, Second District, Division 1, California. Feb. 11, 1927.)

1. Sales ⚿8—Contract whereby consignee agreed to honor drafts for cost of goods and account for sales was contract for consignment by principal to agent.

Where consignor agreed to ship cantaloupes, and consignee agreed to honor drafts drawn by consignors for estimated cost and to account for sale of each shipment and deduct amount of drafts, contract was one for consignment of merchandise by principal to agent and not sales contract.

2. Principal and agent ⚿78(1)—Where agent accounted to principal for sales of merchandise received, principal could not recover unpaid drafts on agent for estimated cost of goods.

Where principal shipped cantaloupes to agent under agreement that agent should honor drafts drawn by principal for estimated cost of cantaloupes, and agent accounted to principal for all sales, in accordance with agreement, so that principal received net profits of transaction, principal could not recover for unpaid drafts.

Appeal from Superior Court, Los Angeles County; Percy S. King, Judge.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action to recover money claimed as due on contract, by K. C. Iwata and others, doing business as K. C. Iwata & Co., against A. Goldberg and another, doing business as Goldberg Bros. From the judgment, plaintiffs appeal. Affirmed.

Walter H. Sprague and Moote & Patterson, all of Los Angeles, for appellants.

Milton M. Cohen, James S. Roche, and C. O. Bacon, all of Los Angeles, for respondents.

CONREY, P. J. This is an action to recover money claimed under a written contract for shipment of cantaloupes by plaintiffs to defendants. The demand of plaintiffs is for the sum of $2,999, balance claimed to be due in accordance with the contract, the purport of which plaintiffs attempted to state in their complaint, and therein described the contract as a contract of sale. The defendants included in their answer a complete copy of said contract. Defendants admitted their liability to the extent of $232.41 and no more, which admitted sum was duly tendered to the plaintiffs. After trial of the action, the court made its findings of fact, and awarded judgment for said sum of $232.41. The plaintiffs have appealed from the judgment.

The contract between the parties reads as follows:

"This agreement, made by and between K. C. Iwata & Co., of Brawley, California, hereinafter referred to as the consignor and Goldberg Bros. of Youngstown, Ohio, hereinafter referred to as the consignee, witnesseth:

"That for and in consideration of three thousand seven hundred and fifty dollars ($3,750) to be paid by consignee to the consignor immediately upon signing of this contract the consignor will ship to the consignee at his place of business fifty (50) cars cantaloupes to be grown in Brawley district, Imperial Valley, Cal.; said shipment to be made regularly during the shipping season of 1922 at the rate of one or two cars daily commencing on or about June 1, 1922.

"The consignor assumes the obligation of routing and regulation of shipments to conform to the time of maturity of the cantaloupes which must be in merchantable condition and suitable for shipment to Eastern markets, and labeled Serenity Brand.

"The consignee agrees to accept and dispose of, for the account of the consignor, all cars to be shipped in accordance with the above terms and to use his best efforts to obtain the highest price obtainable at the time of arrival at destination.

"Consignee agrees to render detailed and accurate account of sale immediately after each car shall have been sold, and such account sale shall be accompanied by check in full, less amount advanced on account of price guaranteed, also less all freight, demurrage, icing charges, etc., also less commission of ten (10%) per cent. of the amount of the gross sale. Remittances as above to be mailed forthwith to the consignor at his Brawley, Cal., office. All records relating to transactions under this contract in possession of, or that come into possession of, the consignee, shall be and shall remain open for inspection by the consignor or his appointed representative. Consignee agrees to wire at his own expense to the consignor the gross sale of each car as sold.

"The consignor shall draw at sight upon the consignee for an amount equal to the cost (approximately $1.10 per standard and pony crate and $0.45 per flat crate) on each car at time of shipment and the consignee guarantees to honor such drafts when presented for payment with bill of lading attached, less $75 per car advanced.

"The consignee shall furnish to the consignor, at the earliest possible date, all information and data relating to loss or damage to the cantaloupes while in possession of the railroad company, together with all paid freight bills, bills of lading, copy of protest, and inspection reports; and all claims for loss or damage shall be controlled and collected by the consignor for his account.

"It is understood that consignor shall not be held responsible for failure to ship the number of cars stipulated in this agreement, if prevented from doing so by acts of Providence, crop failure, or other causes beyond the control of the consignor, and, in the event that all cars are not shipped as agreed, then the consignor agrees to refund immediately at the close of the shipping season an amount equivalent to the money advanced ($75) on each car not shipped."

On examining the record, we find that there was no controversy about any of the facts found by the court, other than the controversy about the amount of balance due. The determination of that balance would depend, first, upon evidence showing the amounts advanced by the defendants to the plaintiffs, together with the items of charges and credits shown by the statements of account and other documents connected with the shipments and sales of 47 different carloads of cantaloupes. Apparently it has been assumed by counsel that the results of the figures would be such that, on one interpretation of the contract, the plaintiffs would be entitled to recover the amount demanded by them, and, upon the other, the alternative interpretation of the contract, plaintiffs would not be entitled to any more than the sum admitted and tendered by the defendants. We shall follow that assumption of fact.

It is shown that, pursuant to said contract, plaintiffs shipped 47 cars, and that by mutual agreement the remaining 3 cars named were not shipped. With each shipment of a carload of fruit, plaintiffs sent a draft on defendants for a sum purporting to cover the cost of each car, less $75 per car advanced, at the time of shipment. It appears to be conceded that 36 of these amounts were paid (in three instances by check, without any draft), and on the last

11 drafts payment was refused, although the consignments were received and disposition and accounting made of them in the usual manner. In substance, the fact is that plaintiffs are suing for the amounts which they claim were left unpaid by reason of the failure to honor those drafts.

[1, 2] The contract, as we look upon it, was not a sales contract, but was a contract for consignment of merchandise by principal to agent. There was a promise on the part of the consignees to honor drafts drawn by the consignors, on account of each carload shipment, for an amount not less than the stated estimate of cost. In accounting for the sale of each such shipment, the consignees were to deduct and retain the amounts of these drafts, which were described as amounts advanced "on account of price guaranteed." But there is not in the contract any definite or intelligibly certain guaranty of price, or warrant by consignees that consignors should go without loss on any one of these shipments, or even on all of them together. Nevertheless, the consignors, plaintiffs herein, seek to recover on such supposed guaranty as a separate guaranty of the cost of each shipment, independent and apart from any other. So it is attempted here to compel the assignees to pay the amounts of said drafts covering estimated costs of the last eleven carloads, notwithstanding the fact that the defendants, although they did not make any advancements on these eleven carloads, have in fact accounted to plaintiffs for all sales of the merchandise shipped, and that the aggregate sum thus received leaves in the hands of the plaintiffs all of the net profits of the entire transaction.

Upon the facts stated, and our interpretation of the contract, plaintiffs are not entitled to any larger amount than that which was conceded to them.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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81 Cal. App. 258

McKENRY v. WESTERN UNION TELEGRAPH CO. (Civ. 5677.)

(District Court of Appeal, First District, Division 2, California. Feb. 8, 1927.)

1. Telegraphs and telephones 🔑67(4)—Damages for failure to deliver telegram, which were not too remote and were capable of being ascertained with certainty, were recoverable.

In action by person to whom telegram was addressed, sounding in tort, for breach of contract by telegraph company in failing to deliver telegram, plaintiff could recover all damages sustained from defendant's breach, provided such damages were not too remote and were capable of being ascertained with sufficient certainty.

2. Telegraphs and telephones 🔑70(2)—Amount paid for sending telegram held element of damages for nondelivery.

In action by addressee of telegram against telegraph company, sounding in tort, for failure to deliver telegram, amount paid for transmission was item of damages.

3. Telegraphs and telephones 🔑67(2)—Addressee could not recover special damages for failure to transmit telegram, without showing telegraph company knew special purpose.

Where, in action against telegraph company by addressee of telegram for failure to make delivery, special circumstances were claimed to exist entitling purchaser to damages for defeat of special purpose, it was necessary for plaintiff to show knowledge of telegraph company of special purpose intended to be accomplished by sending telegram.

4. Telegraphs and telephones 🔑67(2)—Right to special damages for failure to transmit telegram are recoverable, ascertained from face of message.

In action by addressee of telegram for failure to deliver, face of message, as well as averments of facts, brought to attention of defendant at time message was delivered for transmission, will be considered affecting right to special damages.

5. Telegraphs and telephones 🔑67(2)—Addressee, claiming damages for failure to deliver telegram, could not resort to custom to show meaning giving notice of special circumstances.

In action for damages for failure to transmit telegram, where terms of message were unambiguous, plaintiff could not resort to usage and custom or other rules aiding in interpretation of written instruments to show defendant knew special purpose for which message was sent.

6. Telegraphs and telephones 🔑67(4)—Nondelivery of telegram inquiring concerning employment held not proximate cause of failure to obtain employment.

When message is merely inquiry as to whether addressee desires or will accept position of employment, nondelivery of telegram cannot be *held* natural and proximate cause of failure to obtain employment.

7. Telegraphs and telephones 🔑67(2)—Baseball player held not entitled to special damages for nondelivery of telegram offering employment, in absence of showing notice of circumstances.

Baseball pitcher *held* not entitled to special damages for failure to deliver telegram, "If free to sign wire terms to Oakland Baseball Club," in absence of averment of special circumstance known to defendant.

8. Telegraphs and telephones 🔑67(2)—Telegraph company is not liable for special damages, if message is in cipher.

Since liability of telegraph company for special damages rests on fact that it has not taken such precautions as facts brought to its attention required, such companies are not liable where message is worded in cipher or language obscure and unintelligible to them.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Peter McKenry against the Western Union Telegraph Company. Judgment dismissing plaintiff's action on demurrer, and he appeals. Affirmed.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for appellant.

Beverly L. Hodghead, of San Francisco (Francis R. Stark, of New York City, of counsel), for respondent.

STURTEVANT, J. To the plaintiff's second amended complaint the defendant interposed a demurrer which was general and special. The trial court sustained the demurrer without leave to amend. Thereafter a judgment of dismissal was entered. From that judgment the plaintiff has appealed, bringing up the judgment roll.

The plaintiff duly pleaded the incorporation of the Western Union Telegraph Company, etc. It also pleaded that the Oakland Association, Incorporated, was a corporation which owns and operates the Oakland Baseball Club, and that said club is a member of the Pacific Coast Baseball League. Continuing, the allegations of the plaintiff's pleading are as follows:

"That on the 8th day of June, 1925, said Oakland Association, Inc., a corporation, wrote and delivered to the defendant at defendant's office in said city of Oakland, a telegraphic message addressed to plaintiff herein at Fresno, Cal., which said message was in the words and figures following, to wit:

" 'Oakland, Cal., June 8, 1925.

" 'Pete McKenry, Baseball Pitcher, Fresno, Cal. (Personal) If free to sign, wire terms to Oakland Baseball Club. G. E. Howard.'

"That thereafter said defendant demanded and received of the said Oakland Association, Inc., a corporation, the sum of 32 cents lawful money of the United States for the transmission and delivery of said message to the said plaintiff herein at Fresno, Cal., in due course, and the said defendant at the time of the filing of said message agreed with the said Oakland Association, Inc., a corporation, in consideration of said money so paid to forward the said message at once and to deliver the same to plaintiff in this action in the usual course of business; that at said time plaintiff was well known in and around the city of Fresno, county of Fresno, state of California, and his residence and headquarters were within a distance of two miles of the main office of defendant in the city of Fresno, as the agents and employees of the defendant corporation in the city of Fresno, county of Fresno, state of California, well knew.

"That said defendant carelessly and negligently failed and neglected to forward or deliver said message to the address thereof, and the said message was not delivered to or received by the plaintiff in this action, whereas the same in the ordinary course of prompt transmission and delivery should have been delivered to plaintiff, as aforesaid, on the 8th day of June, 1925.

"That according to the usage and custom of baseball clubs in said Pacific Coast Baseball League said telegram constituted an unconditional offer to employ plaintiff; that said Oakland Baseball Club had decided to employ plaintiff and to pay him for said services the sum of $600 per month from the 8th day of June, 1925, to the 18th day of October, 1925, and said plaintiff herein was at all times cognizant of said custom and usage and was ready, able, and willing to accept said employment at said sum of $600 per month from the 8th day of June, 1925, to the 18th day of October, 1925, and that said plaintiff was at said times a free agent according to the terms and meaning of said telegram; that if plaintiff had received said telegram from the Oakland Association, Inc., a corporation, in due course, there would have been a contract entered into by and between the said plaintiff and the said Oakland Association, Inc., a corporation, immediately whereby the said plaintiff would have been employed as a pitcher by the Oakland Association, Inc., a corporation, from the 8th day of June, 1925, to and including the 18th day of October, 1925, at a salary of $600 per month.

"That plaintiff is and was at all times herein mentioned a professional baseball pitcher of recognized ability and would have accepted said salary of $600 per month for the term aforesaid, had said telegram been delivered to him in due course, all of which said Oakland Association, Inc., a corporation, well knew.

"That during the period intervening between the 8th day of June, 1925, up to and including the 18th day of August, 1925, plaintiff was temporarily employed as a baseball pitcher by the Fresno Baseball Association at a salary of $150 per month under an agreement with said association, providing that plaintiff could terminate said employment at will; that on the 18th day of August, 1925, the Oakland Association, Inc., a corporation, accidentally got in touch with the said plaintiff in this action, and that the said Oakland Association, Inc., immediately employed said plaintiff at a salary of $450 per month for a period from the 18th day of August, 1925, to and including the 18th day of October, 1925; that the said Oakland Association, Inc., a corporation, was at the time of the filing of said telegram herein set forth and referred to, a strong contender for the pennant in the Pacific Coast League, an organization of baseball clubs, of which the said Oakland Association, Inc., was a member, operating in the Pacific coast states; that the reason for the employment of the plaintiff by the Oakland Association, Inc., a corporation, at the sum of $450 per month in lieu of $600 per month, as aforesaid, was due to the fact that on the 18th day of August, 1925, the pennant race in the Pacific Coast Baseball League was practically over so far as the Oakland Baseball Club was concerned, as said Oakland Baseball Club was eliminated as a contender therein; that by reason of the said carelessness, negligence, and failure of the said defendant, as aforesaid, to deliver the said telegram, this plaintiff has been damaged in the sum of $1,350."

[1] From the facts pleaded it may be conceded that there was a breach of contract on the part of the defendant, and that the plaintiff, the sendee, is entitled to recover, in an action sounding in tort, all damages he sustained from the defendant's breach of contract, provided such damages are not too remote and are capable of being ascertained with sufficient certainty. Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 P. 75. The plaintiff's complaint properly sounds in tort, but the measure of his recovery is as stated above. M. M. Stone & Co. v. Postal Telegraph Cable Co., 35 R. I. 498, 87 A. 319, 46 L. R. A. (N. S.) 180; Frazier v. Western Union Tel. Co., 45 Or. 414, 78 P. 330, 67 L. R. A. 319, 2 Ann. Cas. 396. Primarily, the first element of those damages is the amount paid for the transmission of the telegram. 37 Cyc. 1750.

[2, 3] However, in the instant case the plaintiff's pleading avers that the cost of sending the telegram was paid by the sender, and this plaintiff has not in his prayer asked to recover that sum, nor is the question as to the liability of the defendant to repay the cost of the transmission presented or argued in the briefs. In 1854 the leading case (Hadley v. Baxendale, 9 Exch. 341) was decided. In Mitchell v. Clarke, 71 Cal. 163, 11 P. 882, 60 Am. St. Rep. 529, in writing the opinion, Mr. Justice McKinstry referred to the Hadley Case, and then he said:

> "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury. 1 Sutherland on Damages, 764."

The rule so stated for estimating damages has frequently been cited and followed in this state. As applicable to a case based on the failure to deliver a telegram, we are not aware of the principle having been in terms applied by any decision in this state. As early as 1887 the Supreme Court of the United States applied the rule in Hadley v. Baxendale in such a case (Western Union Tel. Co. v. Hall, 124 U. S. 444, 8 S. Ct. 577, 31 L. Ed. 479), and that court has done so in other cases (Primrose v. Western Union Tel. Co., 154 U. S. 1, 14 S. Ct. 1098, 38 L. Ed. 883). The same rule has been followed in the same line of cases in nearly all of the jurisdictions in America. Clark Manufacturing Co. v. Western Union Tel. Co., 152 N. C. 157, 67 S. E. 329, 27 L. R. A. (N. S.) 643, 644.

[4, 5] Following that rule, it is patent that the courts will consider everything contained on the face of the message and likewise all proper averments contained in the plaintiff's pleading, showing or tending to show what facts were brought to the attention of the defendant or its agent at the time that the message was delivered to it for transmission. The plaintiff's amended complaint does not contain any allegations to the effect that any extrinsic fact was called to the attention of the agents of the defendant. His rights are therefore to be ascertained from what appeared on the face of the telegram. The telegram was free and clear of ambiguities, or it was not. If we assume for the moment that it was free and clear of ambiguities, then the plaintiff was not entitled to resort to usage and custom or any other rules aiding in the interpretation of written instruments.

> "Where the terms are plain and certain, * * * the court will be guided by the language used and construe the intention of the parties to have been in accordance with their agreement." Pierce v. Merrill, 128 Cal. 464, 472, 61 P. 64, 66 (79 Am. St. Rep. 56).

[6, 7] As so construed, the telegram was an inquiry as to whether the plaintiff would accept employment, and if so on what terms. When a message is a mere inquiry as to whether the addressee desires or will accept a position of employment a nondelivery or delay cannot be said to be the natural and proximate cause of a failure to obtain such employment. 37 Cyc. 1766; McQuilkin v. Postal Tel. Cable Co., 27 Cal. App. 698, 701, 151 P. 21.

[8, 9] However, it is made plain by the plaintiff's pleading that he contends from facts known to him that the telegram was, in effect, as follows:

> "Oakland Baseball Club unconditionally offers to employ you as pitcher $600 per month June eighth to October eighteenth, 1925 wire acceptance."

[10] Assuming, solely for the purposes of this case, that such was the meaning of the message, the ruling of the lower court is cor-

rect. As the liability of a telegraph company for special damages rests on the fact that it has not taken such precautions as the facts brought to its attention called upon it to take, such companies are not liable when the message sent is worded in a private cipher or when the language is very obscure and unintelligible, because such language gives no information to the defendant or its agents. 37 Cyc. 1752. Applying that principle to the appellant's contention regarding the meaning of the message involved in the instant case, it is patent that the meaning claimed by the appellant is almost the reverse of the actual words used in the message. Under these circumstances, it is quite clear that the face of the message did not bring to the attention of the defendant any special circumstances which would warrant the courts in awarding special damages against the defendant. It follows that the plaintiff was not entitled to recover any sum on the face of his pleading as it was written.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

81 Cal. App. 276

HONN v. HAMER et al. (Civ. 5709.)

(District Court of Appeal, First District, Division 1, California. Feb. 8, 1927.)

Licenses ⚷39—One buying stock under agreement void because in violation of statute held not estopped to deny stockholder's liability as against creditors (Corporate Securities Act, § 3).

Where sale of stock was void because in violation of Corporate Securities Act (St. 1917, p. 673) § 3, buyer, not estopped by attendance on corporation meeting or other conduct, from asserting invalidity of contract as to corporation, *held* not estopped as to creditors from denying stockholder's liability.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action to enforce stockholder's liability by Harlan Honn, assignee of the trustees of the creditors of the American Ice Machine Company, against Margaret E. Hamer and others. From the judgment, plaintiff appeals. Affirmed.

Austin Lewis, of San Francisco, for appellant.

Carr & Guiler, of San Francisco, for respondent.

TYLER, P. J. Action to enforce a stockholder's liability. The case is presented under stipulated facts. It appears therefrom that plaintiff is the assignee of the trustees of the creditors of American Ice Machine Company, a corporation. The record is silent as to the rights of defendants Hamer and Hodges. The alleged liability of defendant Reno is based upon an agreement entered into by him for the purchase of stock in the corporation named. At the date of the agreement of the sale the corporation did not have, nor had it applied for or obtained, a permit from the corporation commissioner to sell or dispose of its capital stock as required by the Corporate Securities Act (St. 1917, p. 673). Subsequent to the time the agreement was entered into the stockholders of the corporation held certain meetings, at which time Reno was present and he participated in the proceedings. The agreement upon which this action is based was before this court in a former proceeding. It appears therefrom that Reno had sued the corporation to recover payments which he had made on the stock, and it was there held that the contract was void by reason of the fact that the company had failed to comply with section 3 of the Corporate Securities Act, which provides that no corporation shall take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner of corporations a permit authorizing it so to do, and that, as such company had not made the necessary application, it was never possible for it to have lawfully issued its stock, and the contract for the sale of the same was accordingly void, and plaintiff was therefore entitled to recover the amount of his payment. Reno v. American Ice Machine Co., 72 Cal. App. 409, 237 P. 784. It was there further held that the fact that plaintiff had attended meetings of the stockholders and directors, and participated in the proceedings, in no manner affected the question, as the doctrine of estoppel by conduct and ratification has no application to a contract which is void for the reason that it violates an express mandate of the law or the dictates of public policy; that such a contract has no legal existence for any purpose, and neither action nor inaction of a party to it can validate it and no conduct on his part can be invoked as an estoppel against asserting its invalidity. The question, therefore, so far as the rights of the immediate parties to the contract are concerned, has been definitely settled and determined. The question here presented has to do with the rights of the creditors of the corporation in the premises.

Appellant claims that the rule above announced has no application to a case where, as here, the rights of innocent creditors are concerned; that as to them the rule is suspended in their interests under the principles of estoppel, and we are cited to the case of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, as supporting this contention. The record before us does not show that estoppel was pleaded or proved. However this may be, as above pointed out, the contract being absolutely void, it could not be enforced or rendered enforceable by the application of the doctrine invoked (Knowles v. Sandercock, 107 Cal. 629, 631, 40 P. 1047), for where an issue of stock is wholly without sanction the principle of estoppel does not apply (Helliwell on Stock and Stockholders, § 455). Nor does the Moffatt Case, relied upon, support appellant in his contention. That case was one brought by trustees in bankruptcy of a corporation to recover an unpaid subscription of stock for the benefit of the creditors of the corporation. It appeared therein that the stock was issued before a permit was obtained. It further appeared, however, that after the granting of the same the parties had made a new contract for its purchase, and it was under these conditions that it was held the inhibition of the statute did not attach. The instant case does not present this situation. As lack of authority to issue the stock prevents the corporation from enforcing the subscription agreement, by the same token this lack of authority is a good defense instituted by the receiver of the corporation upon its insolvency. Kampman v. Tarver, 87 Tex. 491, 29 S. W. 768. In other words, the corporation having no legal rights against Reno, its creditors could have none. The learned trial court so held and we think properly so.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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81 Cal. App. 254

LUCKEHE v. FIRST NAT. BANK OF MARYSVILLE. (Civ. 3103.)

(District Court of Appeal, Third District, California. Feb. 7, 1927.)

1. Appeal and error 🔑1011(1)—Finding on conflicting evidence as to bank's ability to pay certificate of deposit held conclusive in action on certificate delivered by defendant to plaintiff for collection.

In action against bank for failure to use due care in collecting certificate of deposit, finding of trial court as to issuing bank's ability to pay at time certificate was given defendant for collection, based on conflicting testimony, *held* not to be set aside.

2. Appeal and error 🔑1011(1)—Finding on conflicting evidence as to existence of custom in collecting certificate of deposit held not to be set aside.

In action against bank for failure to use due care in collecting certificate of deposit, finding of trial court as to existence of custom in accordance with which collecting bank claims to have acted in making collection, based on conflicting evidence, *held* not to be set aside.

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by C. J. Luckehe against the First National Bank of Marysville, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Carlin, of Marysville, for appellant.

J. C. Saylor, of Fresno, Charles W. Johnson, of San Francisco, and W. E. Davies, of Marysville, for respondent.

BUCK, Justice pro tem. This is an appeal from a judgment rendered against the defendant National Bank for the sum of $1,050, with interest, being the amount evidenced by a certain certificate of deposit made and delivered by the defendant to the plaintiff.

Upon a former appeal in this case an opinion was rendered by the Supreme Court (193 Cal. 185, 223 P. 547), wherein the law covering every phase of the case was fully expounded. As was stated by the Supreme Court in regard to the first trial of the case, it may be also said of the second trial that the case was shifted to one of negligence, based, not upon contract arising out of the issuance of the certificate of deposit sued upon, but arising out of negligence based upon the defendant's liability to the plaintiff for its failure to use due care in the collection of a different certificate of deposit, issued to plaintiff by the First National Bank of Gridley. In its amended answer defendant sets up defenses alleging, in effect, first, that plaintiff suffered no injury on account of any alleged negligence in the attempted collection of the certificate of deposit on the Gridley bank, because the bank, at the time the certificate was presented for collection, "was unable to pay the same, or any portion thereof, and did not have sufficient money either on hand or which it could procure to pay said certificate, or any portion thereof, and its refusal to pay the same upon demand * * * was because of its inability so to pay and lack of money for payment thereof," which said inability continued from the time of the presentation of said certificate on December 13, 1920, up to and including the 17th day of December, 1920. And for a second defense it was alleged, in effect, that there was no neglect of duty on the part of defendant for its failure to make the collection, because, in seeking to serve plaintiff, the defendant acted in all respects in accordance with "a general custom or usage in the matter, practice, and manner of making collections by a bank or banking institution of a draft, certificate of deposit, or other paper delivered and received by a bank from the drawer or owner upon and for collection" upon some other bank. The trial court made special findings against each of these defenses, and on this appeal it is defendant's contention that the evidence was insufficient to sustain these findings.

As regards the claimed insufficiency of the evidence to sustain the finding touching the inability of the Gridley bank to pay its certificate of deposit upon demand, counsel relies upon the testimony of J. R. Craig, who testified that on December 13, 1920, he took the certificate after banking hours over to the First National Bank of Gridley, and "rapped on the door, and they admitted me"; that he saw the cashier, Mr. Charles Serene, and asked for cash on the draft. "I asked for cash on the certificate of deposit, stating our exchanges were closed, and he said they were short. He didn't say he could give it to me, but he said he was short. He did not give me the cash. He assured me that the exchanges in San Francisco banks were sufficient, that he would give me a draft for it. Q. Did he say he could give you the cash there? A. He said he could not; no. He said he was coming over the next morning to get cash from me. * * * He said he was short; he would be over the next morning and get cash to carry on. Q. Did he go over next morning? A. He did. Q. What did he get? He got $1,500 in currency from the Gridley branch of the Rideout bank."

[1] As against the foregoing testimony touching "shortness" of money on the 13th day of December after banking hours, the trial court evidently accepted as substantial evidence of the bank's actual ability to pay in due course the tangible fact that its cashier on the following morning could and did get money to the extent of $1,500 from a rival bank. And there was further testimony received by the trial court tending to show that for four days up to and including the 17th day of December the bank was doing business as usual. Under the well-established rule touching the binding effect of findings made by the trial court on conflicting testimony, or upon conflicting inferences that may be drawn from the same testimony, we do not feel inclined to set aside the finding made by the trial court on the foregoing issues.

[2] And, second, as regards the defense setting up usage and custom: Assuming, but not deciding, that the custom pleaded was a reasonable one, and was such a one "as to fasten an implied knowledge on the parties," an examination of the evidence discloses such a conflict in the testimony of substantial bankers as to preclude this court from setting aside the findings of the trial court. Though bankers P. T. Smith, J. R. Craig, and E. E. Briggs testified, in substance, that the method pursued in attempting to make the collection herein was in accordance with the custom and practice in the locality, bankers Temple Crane and H. B. P. Carden testify that in their experience as bankers in the same locality, though they are each familiar with the customs of banks in making collections similar to the one attempted in the case at bar, they never followed or knew of such a custom.

The foregoing findings of the trial court at the last trial of the case therefore leaves the case, so far as its material facts are concerned, in the same situation as it was when it was submitted to the Supreme Court on the previous appeal. And since the law applicable to the facts as established by the trial court herein was absolutely fixed and settled by the Supreme Court in favor of the respondent herein, the judgment appealed from herein is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

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81 Cal. App. 207

PEOPLE v. CHIAPPARI et al. (Cr. 1305.)

(District Court of Appeal, First District, Division 2, California. Feb. 5, 1927.)

1. Rape 🔑51(1)—Evidence held to sustain convictions of rape.

Convictions of rape *held* sustained by evidence, testimony of prosecutrix not being unbelievable.

2. Criminal law 🔑822(13)—In instruction that jury were supreme judges of fact, and that "neither the counsel nor court has anything to say to you about that," quoted words held not error, in view of entire instruction.

In instruction that jury must determine defendants' guilt of either or both of crimes charged and in this respect were the supreme judges in the matters of fact, and that "neither the counsel nor the court has anything to say to you about that," quoted words *held* not error, in view of further portions of instruction.

3. Criminal law 🔑822(11)—Instruction that defendants, at outset of trial, are presumed to be innocent held not error, in view of entire instruction.

Instruction, "that these defendants at the outset of the trial are presumed to be innocent," *held* not error, in view of further portion of instruction to effect that presumption of innocence abides throughout the trial.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Angelo Chiappari and others were convicted of rape, and they appeal. Affirmed.

Albert Mansfield and J. J. Bullock, both of Redwood City, and Nathan C. Coghlan, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Lionel B. Browne, of San Francisco, for the People.

NOURSE, J. The three defendants were tried jointly upon an information framed in two counts, one charging robbery and the other charging rape. The jury returned a verdict of guilty upon the second count, having failed to agree as to the charge of robbery. Judgments following the verdict were entered in each instance on September 30, 1925, and three separate appeals were taken, based upon one typewritten transcript filed November 6, 1925. These appeals are from the judgment and the order denying a new trial as to each of the three defendants. On June 10, 1926, a brief was filed on behalf of the defendant Chiappari, and, upon request of his counsel, the time was extended to enable him to file briefs for the other defendants, but these briefs have not been filed.

The facts of the case are recited in People v. Piero (Cal. App.) 249 P. 541, and nothing would be served by repeating them here. It should be stated, however, that the defendants Ghio and Piexotto were members of the original party which picked up the prosecutrix on the streets of San Francisco and took her to the Brighton Beach Café in San Mateo county; that the defendant Chiappari joined the party at the cafe and that he, Craib, and the two other defendants formed the party of four who forcibly committed the assault upon the prosecutrix. It should also be stated that after this occurrence the four members of the party returned to the café, left the prosecutrix out on the road, and that some time later, at the request of the proprietor of the café, the defendant Chiappari got in another automobile and with a companion picked up the prosecutrix and returned her to Colma.

[1] On this appeal it is argued on behalf of Chiappari that the testimony of the prosecutrix is confused and unbelievable. To support the argument disconnected excerpts from her testimony are copied from the record, and by this method it is made to appear that this defendant was not present at the time of the assault. This is done by confusing the proof of the use of two automobiles by members of the party and by disconnected references to the "machine" and "car." The story of the prosecutrix is complete and sufficient to support the verdict, but, in addition to this, her story in all material respects was corroborated by other witnesses.

[2] The appellant Chiappari has also advanced the argument that the trial judge erred in his instructions to the jury. Error is made to appear by taking disconnected excerpts from instructions, which place an entirely different meaning upon the instruction as given. The trial judge instructed the jury that, the defendants having pleaded not guilty, it was the duty of the jury to determine whether they were guilty of either or of both of the crimes charged, and that in this respect they were the supreme judges in the matters of fact. In this connection, it was added that:

> "Neither counsel nor the court has anything to say to you about that."

This appellant claims that the language just quoted was error. But it was merely a part of an instruction wherein the trial judge instructed the jury that it was his duty to instruct them upon the law governing the consideration of the case, but that they should not imply from anything said by him that he had any particular views as to what the facts were; that they were charged with the duty to determine the facts; and that this must be done from their own judgment without influence by what they might conceive to be the views of counsel or of the court upon these questions. There was no error in the instructions as given.

[3] Similar criticism is made of the instructions on the subject of the presumption of innocence resting with the defendants. This appellant copies a portion of the instructions reading, "These defendants at the outset of the trial are presumed to be innocent," and from this argues that the jury was left to believe that this presumption applied to the defendants at the outset of the trial only. However, in the same instruction the jury was told that the presumption of innocence abides with the defendants "throughout the trial, and goes with you to your jury room until the evidence convinces you to the contrary and beyond all reasonable doubt."

Upon review of the entire record, we are satisfied that the defendants were all fairly tried and fairly convicted upon evidence which is not subject to legal criticism.

The judgments and the orders denying a new trial as to each of the three defendants are affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

81 Cal. App. 265

ENGELBERG v. SEBASTIANI. (Civ. 3242.)

(District Court of Appeal, Third District, California. Feb. 8, 1927.)

1. New trial 🔑116(2)—Power of trial court to pass on motion for new trial does not expire before notice of entry of judgment is served.

Where it did not appear whether notice of entry of judgment had been served on defendant, it was not shown that power of trial court to pass on motion for new trial had expired.

2. Exceptions, bill of 🔑36(3)—Time within which to prepare bill of exceptions or request transcript begins to run on termination of pending proceeding for new trial (Code Civ. Proc. §§ 650, 953a).

Time within which to prepare bill of exceptions, under Code Civ. Proc. § 650, or to request transcript under section 953a, does not begin to run until termination of pending proceeding for new trial.

Appeal from Superior Court, Sonoma County.

Action by Louis Engelberg against Sam Sebastiani. Motion to dismiss defendant's appeal from the judgment. Motion denied.

W. F. Cowan, of Santa Rosa, for appellant.

Barrett & McConnell, of Santa Rosa, and Samuel M. Samter, of San Francisco, for respondent.

FINCH, P. J. This is a motion to dismiss the defendant's appeal from the judgment herein on the ground that appellant has failed to have prepared and to file a record on appeal within the time required. The facts upon which respondent relies are certified by the clerk of the trial court to be as follows:

Judgment was entered September 28, 1926. Thereafter on the same day the defendant filed his notice of appeal from the judgment and notice of motion for a new trial. The "said motion for a new trial has never been argued nor presented to said superior court, and no order granting or denying a new trial has ever been made or entered in said cause." No request has been made "for a transcript under the provisions of section 953a of the Code of Civil Procedure"; "no bill of exceptions has ever been filed, * * * nor has any transcript in said action been prepared or filed under the provisions of said section 953a; * * * no order has been made or entered by said superior court allowing additional time within which to prepare or serve a draft of a proposed bill of exceptions upon said appeal; * * * and * * * no proceedings for a bill of exceptions or transcript, under said section 953a, are pending in said trial court, as appears of record." The clerk's certificate is dated December 13, 1926.

[1, 2] It does not appear whether notice of entry of the judgment has ever been served upon defendant. It has not been made to appear, therefore, that the power of the trial court to pass on the motion for a new trial has expired. Strehlow v. Mothorn, 197 Cal. 112, 239 P. 850. Since it does not appear that the proceeding on motion for a new trial has been terminated, the motion to dismiss must be denied. The time within which to prepare a bill of exceptions, under the provisions of section 650 of the Code of Civil Procedure, or to request a transcript, under section 953a of the Code of Civil Procedure, does not begin to run until the termination of a pending proceeding for a new trial.

The motion to dismiss the appeal is denied.

We concur: PLUMMER, J.; BUCK, Justice pro tem.

81 Cal. App. 281

PEOPLE v. FRASER. (Cr. 1397.)★

(District Court of Appeal, Second District, Division 2, California. Feb. 10, 1927. Hearing Denied by Supreme Court April 11, 1927.)

1. False pretenses 🔑38—Where sufficient false representations were proved to show defendant obtained money under false pretenses, it was immaterial that all false representations alleged were not proved.

In prosecution for obtaining money under false pretenses, conviction would stand though all representations alleged were not proved, where evidence as to some of false representations alleged was sufficient to convince jury that those shown were material in inducing complaining witness to part with his money.

2. Criminal law 🔑1032(7)—Question of variance cannot be raised for first time on appeal.

Question of variance between allegations of information and evidence cannot be presented for first time on appeal.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

B. R. Fraser was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Stanley Visel, L. V. Beaulieu, and Henry E. Carter, all of Los Angeles (Albert E. Sherman, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

WORKS, P. J. [1] Defendant was convicted of the crime of obtaining money by false pretenses under two counts. He appeals from the judgment of conviction. It is contended that the evidence was insufficient to support the verdict. Having in mind the rule that it is unnecessary to prove all of the false representations alleged in a charge of obtaining money

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★Hearing denied by Supreme Court.

by false pretenses, provided that enough be proven to convince the jury that those shown were material in inducing the complaining witness to part with his money (People v. Griesheimer, 176 Cal. 44, 167 P. 521), we are satisfied that the evidence was sufficient to support the conclusion reached by the jury on each count. Some of the alleged false representations were not proved, it is true, but the evidence as to others was so complete that we find it unnecessary to consume the time necessary to state the showing actually made.

[2] It is insisted by appellant that there was a variance between the allegations of the information and the evidence. In each count it was averred that the complaining witness was induced by the misrepresentations of appellant to invest money in a certain business conducted by him, and that the money was agreed to be returned if he became dissatisfied with the business. It is said that the evidence shows only that the complaining witnesses loaned money to appellant for the purposes of his business. If we admit for the sake of argument only that this is the showing made by the record, we are not required to decide whether the variance was a material one. The question of variance was not presented to the trial court, and it cannot be presented for the first time on appeal. People v. Fuski, 49 Cal. App. 4, 192 P. 552; People v. Gonzales, 69 Cal. App. 609, 231 P. 1014.

Other points are made by appellant, but they are so plainly without merit, from the mere statement of them, that we find it unnecessary to discuss them.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

MINNIS v. EQUITABLE LIFE ASSUR. SOC. OF THE UNITED STATES. (Civ. 3127.)★

(District Court of Appeal, Third District, California. Feb. 7, 1927. Hearing Granted by Supreme Court April 8, 1927.)

1. Judgment 🔑719—Former judgment conclusive in action between parties involving same questions as to all matters belonging to controversy and within issues.

Former final judgment between same parties to action is conclusive in all subsequent actions involving same questions, not only as to matters actually decided, but as to all matters belonging to subject of controversy and properly within scope of issues which might have been raised and decided.

2. Judgment 🔑720—Adjudication that insured did not die on certain date barred subsequent action on same life policy involving same question.

Adjudication, in previous action on insurance policy, that insured did not die November 2, 1915, and was not dead on August 31, 1916, date of commencement of action, was bar to subsequent action on same policy in which it was alleged that insured died November 2, 1915.

3. Judgment 🔑576(1)—Whether action is barred by previous judgment does not depend on correctness thereof.

Whether action is barred by former judgment does not depend on correctness of judgment, but question is, Did court decide question and is decision final?

4. Judgment 🔑587, 689—Where only difference was that first action was commenced by another administratrix of insured, and in second action presumption of death from seven years' absence was relied on, former judgment barred second action.

Where only difference was that action in which former judgment adjudicating that insured was not dead was commenced by different administratrix, and presumption of death arising from seven years' absence was relied on in present action, actions were same, so that former judgment was bar to present action.

5. Judgment 🔑725(2)—Presumption of insured's death from seven years' absence had no weight in face of judgment within seven years that insured had not died.

Disputable presumption of death from insured's absence for seven years without having been heard from had no weight in face of judgment within seven-year period that insured was not dead.

6. Death 🔑2(2)—Presumption of death from seven years' absence does not arise until expiration of seven years, unless circumstances quicken time (Code Civ. Proc. § 1963, subd. 26).

Presumption, provided for under Code Civ. Proc. § 1963, subd. 26, that person not heard from in seven years is dead, does not arise until after expiration of seven years, unless there are circumstances in evidence to quicken time.

7. Judgment 🔑725(2)—That plaintiff fixed date of insured's death did not quicken time of presumption of death from absence of seven years, where previous judgment adjudicated that insured was alive on that date.

Where insured disappeared November 2, 1915, fact that plaintiff fixed that date as date of his death was of no avail to plaintiff in quickening time of presumption of death arising from absence for seven years in face of previous judgment adjudicating that insured was alive at that time.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action on a policy of life insurance by Hannah Minnis, administratrix of the estate of Emil Lesser, deceased, against the Equitable Life Assurance Society of the United States. From a judgment for plaintiff, defendant appeals. Reversed.

Newlin & Ashburn and W. C. Mathes, all of Los Angeles, for appellant.

★Superseded by opinion of Supreme Court 267 P. 538.

Clark & Law, of Los Angeles, for respondent.

PRESTON, Justice pro tem. The jury returned a verdict in favor of plaintiff for $1,950.40, and judgment was duly entered thereon. From this judgment the defendant, the Equitable Life Assurance Society of the United States, a corporation, prosecutes this appeal.

The record is brought before this court upon a bill of exceptions. The facts are these: On February 12, 1894, the defendant, the Equitable Life Assurance Society of the United States, issued to Emil Lesser a life insurance policy in the sum of $3,000. By the written terms of said policy the insurer (defendant and appellant herein) promised, in consideration of the application for the policy, and the payment of the annual premium of $90 in advance, to pay "to Emil Lesser, his executors, administrators, or assigns. $3,000, upon satisfactory proof of the death of said Emil Lesser." On January 30, 1914, Emil Lesser borrowed from the defendant $987, and executed to defendant a written agreement which provided that repayment be made on February 9, 1915, and by this agreement assigned the policy above mentioned, and all rights thereunder, to defendant as collateral security for said loan. All premium payments on the original policy were made up to and including the premium due on February 9, 1915, but no payments of premium have been made since that date, and no part of the loan of $987, or any interest thereon, has ever been paid.

Emil Lesser disappeared from his home on November 2, 1915, and has not been seen or heard from since that time. On February 9, 1916, the defendant declared that the policy had lapsed for nonpayment of the premium and, under the terms of the policy, the defendant converted said policy into a paid-up policy of $1,764. On April 10, 1916, the defendant was notified that Emil Lesser was dead, and, the policy not being paid, Alice Lesser, the wife of Emil Lesser, was, on June 17, 1916, appointed administratrix of his estate, and on August 31, 1916, commenced an action in the superior court of the county of Los Angeles against the defendant to recover the sum of $3,000, the original amount called for in said policy. The complaint in that action alleged, in part, as follows:

> "That thereafter, to wit, and on the 2d day of November, 1915, the said Emil Lesser, the insured, at the city of Venice, county of Los Angeles, state of California, and while said policy was in full force, was accidentally drowned while bathing in the ocean at said city of Venice, county of Los Angeles, state of California."

The answer of the defendant therein alleged in part:

> "Said defendant denies that on the 2d day of November, 1915, or at any other time, said Emil Lesser, or the insured in any policy issued by this defendant, referred to in said complaint, or at the city of Venice or county of Los Angeles, or state of California, or any other place, or while said policy was in full or any force or effect, was accidentally or at all drowned, or was accidentally or at all drowned while bathing in the ocean at the city of Venice or county of Los Angeles, or state of California, or that on the 2d day of November, 1915, Emil Lesser was accidentally or at all drowned at the city of Venice, in the county of Los Angeles, state of California, or at any other place. * * * Said defendant denies that said Emil Lesser is dead or that there is any estate of Emil Lesser. * * *"

Therefore the question of fact as to whether or not Emil Lesser died on the 2d day of November, 1915, was squarely put in issue and after a trial of this issue, and other issues involved in the case, extending over a period of five days, in which oral and documentary evidence was offered and received on behalf of the plaintiff, the trial court, on the 15th of March, 1919, made certain findings of fact, among them being the following:

> "That plaintiff has failed to prove the allegations of paragraph III of her complaint by a preponderance of the evidence, and the court, therefore, finds that it is not true that on the 2d day of November, 1915, or at all, the said Emil Lesser was accidentally, or at all, drowned, either at the city of Venice, or elsewhere, or while bathing in the ocean at said city, or while said policy was in full force. * * * The court finds, with reference to the allegation of paragraph VI of the defendant's first defense, that the plaintiff has failed to prove by a preponderance of the evidence that the said Emil Lesser is dead, and the court, therefore, finds that the said Emil Lesser is not dead. * * *"

As conclusions of law from the foregoing facts and other facts found by the court, the court made the following conclusion of law:

> "That the plaintiff shall take nothing by her complaint herein, and that the defendant shall recover of the plaintiff its costs of action herein incurred and to be taxed herein.
>
> "Let judgment be entered accordingly."

Judgment in conformity with the findings was duly entered on the said 15th day of March, 1919, and no motion for a new trial was made, and no appeal taken from said judgment, and the same became final, and is still in full force and effect.

On April 5, 1919, no payments of premium having been made since February 9, 1915, on the policy, and the said loan of $987 remaining unpaid, the defendant insurance company foreclosed the policy and applied the proceeds to the payment of the amounts due. The surrender value of the policy at that time, as contended by defendant, was $1,130.43, and the indebtedness on the loan amounted to $1,142.73.

In November, 1920, Alice Lesser was removed as administratrix of the estate of Emil Lesser, and the plaintiff in this action, Hannah Minnis, was on February 6, 1923, duly and regularly appointed administratrix of the estate of Emil Lesser, deceased, and, after duly qualifying as such administratrix, and on April 12, 1923, commenced the present action, which was tried by the court, sitting with a jury, and resulted in a verdict in favor of the plaintiff for the sum of $1,950.40, as above mentioned.

The complaint in the present action alleges in part:

> "That on November 2, 1915, and for many years prior thereto, said Emil Lesser resided in the city of Los Angeles, state of California; that he disappeared upon said day and has not been seen nor heard from since; the plaintiff is informed and believes, and therefore alleges, that the said Emil Lesser died upon said 2d day of November, 1915."

The answer in the present action, like that in the first action, denied the death of Emil Lesser on the 2d day of November, 1915, and in addition thereto set up as a bar and as an estoppel to the present action the findings and judgment in the former action of Alice Lesser, Administratrix of the Estate of Emil Lesser, Deceased, v. Equitable Life Assurance Society of the United States, above mentioned. The trial court denied defendant's plea of res judicata, and held that the former judgment was not a bar to the present action.

The principal contention made by the defendant is that the court erred in denying its plea of res judicata, or, to state it in the language of the defendant:

> "The judgment of the superior court for Los Angeles county in the case of Alice Lesser, Administratrix of the Estate of Emil Lesser, Deceased, plaintiff, v. Equitable Life Assurance Society of the United States, a Corporation, Defendant, numbered B-41790 on the records of that court, constitutes an absolute bar to the present action."

[1] The rule is well established and has long been adhered to in this state that a former final judgment between the same parties to an action is conclusive in all subsequent actions involving the same questions, not only as to matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues, which also might have been raised and decided; the presumption being that all such issues were presented and decided. Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Rucker v. Langford, 138 Cal. 611, 71 P. 1123; Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66; Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597; Erving v. James H. Goodman & Co. Bank, 171 Cal. 559, 153 P. 945; Whittier v. Visscher, 189 Cal. 454, 209 P. 23; Estate of Clark, 190 Cal. 360, 212 P. 622.

[2, 3] It seems clear, therefore, from the record before us, that the issue as to whether Emil Lesser died on the 2d day of November, 1915, or at any time prior to the filing of the complaint in the former action on August 31, 1916, was thoroughly litigated in the former action, and decided by the court in that action that he did not die on November 2, 1915, and was not dead on the 31st of August, 1916. It seems also equally clear that the adjudication of that issue was essential to the determination of the former action.

Thus we have it adjudicated in a court of competent jurisdiction that Emil Lesser did not die on the 2d day of November, 1915, and did not die any time thereafter prior to August 31, 1916, and plaintiff, not having appealed from this former judgment, and allowed it to become final, such judgment is available to the defendant as a defense to any subsequent action against defendant involving the same questions, and this is true no matter how erroneous the former judgment may have been, it is none the less a bar, because the question is not whether the trial court in the former action reached a correct conclusion upon the evidence submitted to it that Emil Lesser did not die on the 2d day of November, 1915, or at any time thereafter prior to August 31, 1916; but the question is, did the court decide the question and is the decision final? Lamb v. Wahlenmaier, supra.

[4] The same parties are parties to the two actions. It is true that Alice Lesser sued as administratrix of the estate of Emil Lesser in the first action, and Hannah Minnis sued as administratrix of the estate of Emil Lesser in the case at bar, but both sued as the personal representative of Emil Lesser, the insured, and for the benefit of the estate of the insured, and the defendant in both cases is the same corporation, the same subject-matter is involved in the two actions, both actions were brought to recover on the same policy of insurance, and the same cause of action is stated in both complaints, the only difference in the two complaints is that in the complaint in the case at bar new evidentiary matter is alleged, to wit:

> "That Emil Lesser had not been seen or heard from for more than seven years."

This amounted to nothing more than an assertion by plaintiff that she had now discovered some new evidence with which to prove that the court's finding in the former action was erroneous, or, to state it another way, the disputable presumption that arises from the unexplained absence of seven years being now available to plaintiff, she seeks to have this presumption, which is evidence, considered to show that Emil Lesser did in fact die on the 2d day of November, 1915, which cannot be done in the face of the former final judgment to the contrary.

[5, 6] The presumption of death that the law deduces from the fact that a person has not been heard from in seven years can be of no assistance to the plaintiff in the case at bar, because plaintiff alleged in the former action that Emil Lesser died on the 2d day of November, 1915, and all of the evidence offered in that case tended to establish death on that date. All of the additional evidence that this plaintiff offered in the present case is this presumption, but here she is confronted with a final judgment in the former action that Emil Lesser did not die on November 2, 1915, or any time prior to August 31, 1916. Therefore in the face of this judgment, this disputable presumption has no weight. Plaintiff has not therefore presented a new cause of action, but only new evidence in the form of a legal presumption for the purpose of proving the same issue presented at the former trial. However, if we take the present action as stating a new cause of action, based upon subdivision 26 of section 1963 of the Code of Civil Procedure, and decide that Emil Lesser is dead, by reason of the fact that he has not been heard from in seven years from November 2, 1915, then, and in that event, the plaintiff's cause of action would not arise until seven years from November 2, 1915, or on November 2, 1922; for it has been repeatedly held that the presumption of death that the law deduces from the unexplained absence of seven years does not arise until the expiration of the seven years, unless there are circumstances in evidence to "quicken" the time. Ashbury v. Sanders, 8 Cal. 62, 68 Am. Dec. 300; Solomon v. Redona, 52 Cal. App. 300, 198 P. 643; Rogers v. Manhattan Life Insurance Co., 138 Cal. 285, 71 P. 348; Benjamin v. District Grand Lodge, 171 Cal. 260, 152 P. 731; Western Grain, etc., Co. v. Pillsbury, 173 Cal. 135, 159 P. 423; Lesser v. New York Life Insurance Co., 53 Cal. App. 236, 200 P. 22; McCormick v. Woodmen of the World, 57 Cal. App. 568, 207 P. 943.

[7] The only circumstances in evidence in the case at bar that might be said to "quicken" the time is the fact that plaintiff herself has fixed the 2d day of November, 1915, as the date of death, but such circumstance is of no avail to plaintiff, for, as we have already seen, the former judgment adjudicates the fact that Emil Lesser was alive on that date; but, irrespective of this circumstance tending to "quicken" the time of death, the presumption of law can have no other effect than as evidence that Emil Lesser was dead at the expiration of the seven years, to wit, November 2, 1922.

Therefore, if the complaint in the present action be considered as stating a new cause of action, arising since the commencement of the former action, such new cause of action could not have arisen prior to November 2, 1922, and on that date the said policy of insurance was not in force. The policy had lapsed on February 9, 1916, because of nonpayment of premium, was never thereafter revived by payment of any premium whatever, and this same policy was foreclosed by defendant on April 5, 1919, and the proceeds applied toward the payment of the principal and interest due on account of the loan of $987 to Emil Lesser.

We conclude, therefore, from the record before us, including the judgment in the former action, that Emil Lesser did not die at any time while the insurance policy here sued upon was in force, and that the trial court erred in overruling defendant's plea of res judicata.

It follows that we are of the opinion that the judgment should be reversed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

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81 Cal. App. 278

COSULICH v. STEMPEL. (Civ. 5557.)★

(District Court of Appeal, First District, Division 2, California. Feb. 10, 1927. Hearing Denied by Supreme Court April 11, 1927.)

1. Malicious prosecution ⚿1—Malicious prosecution lies only when party has prosecuted judicial proceeding with malice, and without probable cause.

As general rule, action for malicious prosecution will lie only when party has instituted or prosecuted, with malice, and without reasonable or probable cause, some judicial proceeding against another.

2. Malicious prosecution ⚿12—Commissioner's hearing on misconduct of applicant for real estate broker's license was not "judicial proceeding" within rule applicable to malicious prosecution (Deering's Gen. Laws 1923, Act 112, §§ 12, 13).

Real estate commissioner's hearing on misconduct and dishonesty of plaintiff applying for real estate broker's license after defendant filed information under oath accusing him of dishonesty and misconduct was not a "judicial proceeding" within rule applicable to malicious prosecution, in view of Deering's Gen. Laws 1923, Act 112, §§ 12, 13.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Proceeding.]

3. Appeal and error ⚿1078(3)—Appellate court will not consider complaint to determine whether plaintiff is entitled to other relief than that argued for.

Where only question argued on appeal was whether acts pleaded were sufficient as basis for suit for malicious prosecution, appellate

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★ Hearing denied by Supreme Court.

court would not consider complaint to determine whether stated facts were sufficient to entitle plaintiff to relief under some other theory.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by M. N. Cosulich against R. J. Stempel for damages for malicious prosecution. From a judgment for defendant, plaintiff appeals. Affirmed.

Marion Vecki, of San Francisco, for appellant.

Edwin L. Forster, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for damages for malicious prosecution. Defendant's demurrer to the complaint was sustained without leave to amend, and judgment for the defendant followed. Plaintiff has appealed on the judgment roll.

The complaint alleges that on December 4, 1923, plaintiff filed with the real estate commissioner his application for a license as a real estate broker; that on December 18, 1923, defendant maliciously and falsely filed with the real estate commissioner his information under oath accusing plaintiff of dishonesty and misconduct; that said charges were without probable cause, but resulted in delaying the issuance of plaintiff's license; and that on Januray 11, 1924, after a full hearing of said charges upon the merits, the real estate commissioner found in favor of plaintiff, and caused a broker's license to be issued to him.

[1] The appeal presents the single question whether an action for malicious prosecution may be based upon transactions of this kind before the real estate commissioner. The general rule is that the action will lie only when a party has instituted or prosecuted with malice and without reasonable or probable cause some judicial proceeding against another. 16 Cal. Jur. p. 728. There has been a wide difference of opinion as to whether the action will lie when the proceedings instituted are not criminal in their nature (18 R. C. L. p. 13), but the authorities are in accord that they must be judicial proceedings and brought before some judicial tribunal (38 Cor. Jur. p. 387).

[2] By the statute under which the real estate commissioner functions (Deering's General Laws, 1923, Act 112), it is provided that the commissioner may investigate the actions of "any person, * * * engaged in the business or acting in the capacity of a real estate broker, * * * and shall have the power to temporarily suspend or permanently revoke licenses issued under the provisions of this act." Section 12. For the purpose of this investigation the commissioner is authorized in sections 12 and 13 of the act to issue process, to subpœna witnesses, and to hear and determine the charges against the licensee. Statutes of this nature which confer upon administrative bodies the power to hear and determine controversies incidental to their administrative functions have been held to create a quasi judicial body with jurisdiction to entertain proceedings which, though judicial in their character, are not in conflict, with the constitutional limitations regarding the judicial powers of the state.

It is because of these provisions of the act that the appellant argues that the proceedings instituted against him were judicial proceedings within the rule applicable to malicious prosecution. The difficulty with appellant's position is that his complaint affirmatively shows that he was not a licensed broker under the statute when the acts complained of were done. He had merely applied to the commissioner for a license, and, though the commissioner delayed action because of respondent's affidavit until he satisfied himself that the appellant was a suitable person to be awarded a license, there were no proceedings of a judicial nature either instituted or determined.

[3] We withhold expression of opinion as to whether proceedings for the revocation of a license once issued would come within the rule, because the proceedings pleaded here were not of that character. The only question argued on this appeal is whether the acts pleaded were sufficient as a basis for a suit for malicious prosecution, and for that reason we have not considered the complaint to determine whether it states facts sufficient to entitle plaintiff to relief under some other theory. On the case presented we are satisfied that the demurrer was properly sustained.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

81 Cal. App. 213

BINNEY v. SAN DIMAS LEMON ASS'N.★

(Civ. 4563.)

(District Court of Appeal, Second District, Division 1, California. Feb. 7, 1927. Hearing Denied by Supreme Court April 8, 1927.)

1. Mortgages ⟜197—Order directing receiver to collect proceeds of fruit already picked from mortgaged premises at time of appointment held void.

Order directing receiver to collect proceeds of fruit already picked from mortgaged premises at time of appointment, under mortgage including rents, issues, and profits, *held* void, since mortgagee had no lien or right to fruit picked before appointment of receiver.

2. Mortgages ⟜473—One turning over proceeds of fruit from mortgaged premises to receiver, in accordance with court's order, was protected from demand by mortgagor's assignee.

Where court made invalid order directing receiver to collect proceeds of fruit picked from mortgaged premises, and defendant corporation, which sold fruit, turned over proceeds to receiver on demand, defendant's payment to receiver was defense to action by mortgagor's assignee for money had and received.

Conrey, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action by George A. Binney, Jr., against the San Dimas Lemon Association. From a judgment for defendant, plaintiff appeals. Affirmed.

Clark, Law & Clay, and Clark & Law, all of Los Angeles, for appellant.

Farrand & Slosson, of Los Angeles (Hugh Ward Lutz, of Los Angeles, of counsel), for respondent.

HOUSER, J. The salient facts in this appeal appear to be that George A. Binney was the owner of a citrus grove and that he executed and delivered a mortgage thereon, including the "rents, issues and profits," to Edwin O. Kennard and Flora H. Kennard. The indebtedness secured by the mortgage not having been paid, suit was brought to foreclose the mortgage, and somewhat later a receiver in the action was appointed by the court. Between the time that the suit was commenced and the date of the appointment of the receiver the defendants in that action picked fruit from the mortgaged premises and delivered the fruit to San Dimas Lemon Association (the defendant in this action), which fruit was later sold by said association for the sum of $603.99, and which amount, on demand by the receiver, was paid to him. Thereupon George A. Binney assigned to his son, George A. Binney, Jr., all his interest in the proceeds of the sale of the fruit, and George A. Binney, Jr., commenced the instant action against the San Dimas Lemon Association for the money received by it for the fruit. Judgment was rendered in favor of the defendant, and plaintiff has appealed therefrom to this court. It also appears that the receiver in demanding from San Dimas Lemon Association the amount of money received by it for the fruit was acting within the express powers attempted to be conferred upon him by the trial court.

[1] The first question for the consideration of this court involves the validity of the order made by the trial court in directing the receiver to collect the proceeds of the fruit already picked from the mortgaged premises at the time of the appointment of the receiver.

Although the exact question here presented has not been ruled upon by the appellate tribunals of this state, the reports are by no means silent on the point affecting the validity of such an order.

In the early case of Montgomery v. Merrill, 65 Cal. 432, a mortgage which there was being foreclosed, like the one in the instant case, included the rents, issues, and profits, and a receiver who had been appointed by the court harvested and sold a crop which was growing upon the mortgaged premises at the time the receiver took possession. It appearing that at the foreclosure sale a sum was realized insufficient to pay the debt secured by the mortgage, by order of the trial court the money received by the receiver from the sale of such crop was applied to payment of the deficiency. On appeal the court held in effect that, as is stated in the subsequent case of Treat v. Dorman, 100 Cal. 623, 625, 35 P. 86, 87: "Not only the land described in the complaint, but the rents, issues and profits thereof were mortgaged, so that the crop which the receiver took possession of was a part of the mortgaged property."

In the case of Treat v. Dorman, 100 Cal. 623, 35 P. 86, the principle announced in Montgomery v. Merrill, supra, as applied to the action between the mortgagor and the mortgagee, is extended so as to apply as between a mortgagee of the land and a subsequent mortgagee (with notice) of the crops alone. See, also, Locke v. Klunker, 123 Cal. 231, 236, 55 P. 993.

In the case of Simpson v. Ferguson, 112 Cal. 180, 44 P. 484, 53 Am. St. Rep. 201, the controversy was between a mortgagee of the land, together with the rents, issues and profits thereof, and a subsequent mortgagee (without notice) of the growing crop. Touching the point here at issue, in the course of the opinion the following language (in part) was used by the court:

"* * * While it is perfectly true that growing crops may be either personal or real property, according to circumstances, and while, as suggested by respondent, a mortgage of the

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★ Hearing denied by Supreme Court.

land gives a lien upon everything that would pass by a grant of the land, which includes crops growing thereon, it is, nevertheless, well established that such lien, so far as the growing crops are concerned, is limited in its effect to the crops growing upon and unsevered from the land at the time of foreclosure. It does not vest the mortgagee with a right to the crops grown intermediate the giving of the mortgage and the foreclosure thereof. Until the latter event, where, as in this state, the mortgage creates no estate in the mortgagee, but confers only a lien upon the property, the mortgagor is entitled to such crops, with the same absolute right and dominion over them as if the mortgage did not exist. This doctrine is thoroughly well settled, with no considerable diversity upon the subject among text-writers or the courts."

The court then quotes from Jones on Mortgages (5th Ed.) § 670, which includes the following statement:

> "Even if the rents and profits of the mortgaged property are expressly pledged for the security of the mortgage debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver."

The court also cites several other authorities and reaches the conclusion, notwithstanding the cases of Montgomery v. Merrill, 65 Cal. 432, and Treat v. Dorman, 100 Cal. 623, 35 P. 86, supra (which, according to the court, are distinguishable), that a mortgage of land, together with its rents, issues and profits, is limited in its effect so far as growing crops are concerned to crops growing upon the land at the time of the foreclosure, and as to crops harvested between the time of the giving of the mortgage and its foreclosure the mortgagor may exercise absolute dominion as if the mortgage did not exist.

In Bank of Woodland v. Christie, 6 Cal. Unrep. 545, 62 P. 400, the plaintiff recovered judgment to foreclose a mortgage on certain land, together with the rents, issues and profits thereof. Either on the same day that judgment was rendered, or on the day following (and before the foreclosure sale took place), the mortgagor sold an undivided one-third of the crop on the land. Thereafter the mortgagee made a motion that a receiver be appointed "to take possession and charge of the crops that were growing on the land mortgaged and ordered to be sold by the judgment in said cause * * * at the time of the foreclosure, for the purpose of subjecting them to the payment of the judgment." The motion was denied. On appeal it was held that the right of the mortgagor to dispose of crops growing on the mortgaged premises was not devested by foreclosure preceedings until sale under the decree.

In the case of Modesto Bank v. Owens, 121 Cal. 223, 53 P. 552, where the controversy was between the owner of a mortgage covering land, together with rents, issues and profits thereof, and the owner of a subsequent mortgage on a crop on the land, it was held that the latter mortgage took precedence, even though taken with notice. With reference to that point, the following appears in the opinion:

> "It is said that Haslacher & Kahn had notice of plaintiff's mortgage, and therefore were not incumbrancers in good faith. The plaintiff's mortgage did not cover the crop, but constituted a lien upon the land only, and therefore it did not matter whether they knew it or not. No amount of notice could make it a chattel mortgage."

And regarding the ruling in Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 53 Am. St. Rep. 201, the court, through Temple, J., said:

> "As I understand Simpson v. Ferguson, supra, it is there held that such a mortgage does not constitute a lien upon the growing crops, even as against the mortgagor."

The rule as announced to the effect that a land mortgage, including rents, issues, and profits, not executed in the form prescribed for chattel mortgages, is ineffectual to give to the mortgagee any lien on or right to crops growing on the land, even after the appointment of a receiver, as against third persons, is recognized in Cowdery v. London, etc., Bank, 139 Cal. 298, 308, 73 P. 196, 96 Am. St. Rep. 115, where authorities are cited. Perhaps the same principle is expressed in Freedman's Saving, etc., Co. v. Shepherd, 127 U. S. 494, 8 S. Ct. 1250, 32 L. Ed. 163, where it is said:

> "* * * Even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver [citing authorities]."

The case of Ahern v. Littl, 90 N. J. Eq. 72, 105 A. 597, was a foreclosure suit in which a receiver was appointed to take the growing crops and also grain already cut but not gathered. It was held that a mortgage which covered the "profits, privileges, and advantages, with the appurtenances to the same belonging," created no lien on either the growing crops or those already cut at the time the receiver was appointed. See, also, the following cases: Bank of Woodland v. Heron, 120 Cal. 614, 52 P. 1006; Kountze v. Omaha Hotel Co., 107 U. S. 378, 2 S. Ct. 911, 27 L. Ed. 609; West v. Conant, 100 Cal. 231, 34 P. 705; Freeman v. Campbell, 109 Cal. 360, 42 P. 35; Sexton v. Breese, 135 N. Y. 387, 32 N. E. 133.

Reverting to the two authorities relied upon by respondent herein to sustain the judgment, namely, Montgomery v. Merrill, 65 Cal. 432, and Treat v. Dorman, 100 Cal. 623, 35 P. 86, it will be noted that in the former case the receiver harvested a crop which was growing on the mortgaged premises at the time the receiver was appointed, while in the latter case no claim of priority was made in the trial court by the owner of the subsequent chattel mortgage on the crop, and the decree gave the appellant "everything it asked." Furthermore, with reference thereto, as is stated by the court in the case of Simpson v. Ferguson, 112 Cal. 180, 189, 44 P. 484, 486 (53 Am. St. Rep. 201). "The party's subsequent claim on the appeal to a priority of lien on the crop, and to a right to a different judgment, does not appear to have received very favorable or careful consideration, but apparently the case went off largely upon the theory that appellant had received all it asked in the court below," and the case could not be considered "as binding authority." But whatever view may be taken regarding the point decided in either or both of the cases under consideration, it would appear that if they or either of them may be considered as authority for holding that in the circumstances of the instant case the receiver was legally authorized to demand and receive the proceeds derived from the sale of the fruit taken by the mortgagor from the mortgaged premises prior to the appointment of the receiver, such cases are contrary not only to the general weight of authority, but to cases decided by the Supreme Court of this state.

But in effect it is argued by respondent that, even assuming the exercise by the trial court of jurisdiction which it did not possess and the consequent illegality of the order of the court to which reference has been had, yet that because of the fact that the order was made at least in apparent conformity with the powers of the court, the San Dimas Lemon Association in obeying such order should be protected from civil liability. In answer to such suggestion, appellant cites the following authorities: Staples v. May, 87 Cal. 178, 25 P. 346, California Title Insurance & Trust Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237, 49 P. 1, and Kreling v. Kreling, 118 Cal. 421, 50 P. 549.

In the case first cited (Staples v. May, 87 Cal. 178, 25 P. 346), the action was brought against a receiver for damages arising out of acts committed by him which were alleged to be beyond the authority conferred upon him by the order of his appointment. The court held that the receiver had not "even color of authority" to do the acts of which complaint was made, and consequently that he was liable for the resultant damage. However, in the course of the opinion, in discussing the effect of the order by the court creating a receivership which in terms might include properties not described by a mortgage which was being foreclosed, the following language appears:

> "As to the terms of the order, if they embraced property not included in either of the securities, the order was to that extent in excess of the jurisdiction of the court and void. But construed with reference to the pleadings upon which they were based, the several orders appointing the receiver and defining his powers and duties did not apply to any property except that against which the foreclosure was sought."

The second case (California Title Ins. & Trust Co. v. Consolidated Piedmont Cable Co., 117 Cal. 237, 49 P. 1), was like the first in that it unquestionably appeared that the receiver had exceeded his express authority, and for which acts he was held liable. The third case (Kreling v. Kreling, 118 Cal. 421, 50 P. 549), was an appeal from an order appointing a receiver made after judgment, which order gave power to the receiver to take possession of certain property not included in the judgment. In effect the court ruled that the only property of which the receiver could rightfully take possession was that which was in litigation, and "to the extent, therefore, that the order appointing the receiver embraced this [other] property, it was in excess of the jurisdiction of the court and void."

It will be noted that in none of the cases to which reference has been had were the facts analogous to those present in the instant case; nor was any indication given as to what ruling would have been proper were a receiver erroneously acting under express orders of the court. On the other hand, and as countervailing any inference which might arise from the language of the court in any or all of the authorities cited by appellant, respondent has directed attention to the case of Havemeyer v. Superior Court, 84 Cal. 327, 396, 24 P. 121, 139 (10 L. R. A. 627, 18 Am. St. Rep. 192), where the rights and duties not only of a receiver, but of a stranger to the proceeding as well, are considered. In part, the court spoke as follows:

> "When a receiver holds by a valid appointment containing no directions in excess of the jurisdiction of the court, so long as he acts in pursuance of the orders of the court he cannot ordinarily invade the rights of parties or strangers to the litigation. If he does an injury, he does it by exceeding his authority. In such case the fault is his, and his alone. If he attempts to take property lawfully in the possession of another, and to which he is not entitled, his attempt may be resisted, just as any other trespasser may be resisted, and the person defending his lawful possession is not brought in conflict with the court. If he by any means gains possession of the property claimed by a stranger, the court will either order him to restore it, or if the title is in doubt, per-

mit an action to be brought against him to try the title.

"But when the court has exceeded its jurisdiction in appointing a receiver, or in directing him to take specific property out of the possession of a stranger, the injury that results is directly due to the action of the court; the wrong is in the order of the court, not in the receiver's transgression of the order. In such case it seems clear that the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, and not in the sort of resistance that may be opposed to an ordinary wrongdoer, or in such an action as may be brought against a private person who has committed a trespass. However confident he may be of his right to resist, no prudent man will take the risk of resisting the plain terms of an order of court, and no rule of practice should be laid down which will compel a man in that situation to defend his possession by force in order to avoid the necessity of resorting to an action to recover it. On the contrary, all men should be encouraged to avoid forcible resistance to orders of courts, no matter how plainly in excess of jurisdiction, by firmly upholding and freely administering the remedies provided for the summary correction of such excesses."

The record in the instant case shows that prior to the rendition of judgment in the foreclosure suit the defendant therein assigned to the plaintiff herein all his interest in his claim against the San Dimas Association, and that prior to said assignment the assignee had knowledge of the appointment of the receiver and of all the facts pertinent to the controversy, notwithstanding which he took no appeal, but permitted the judgment to become final; nor did the assignee institute any proceeding in connection with the foreclosure suit to remedy the wrong and the ensuing damage to which he was subjected. His only action in the premises was the commencement of the present litigation. The language of the court in the Havemeyer case is that, "the appropriate remedy is in some writ or proceeding which operates upon the court, as such, to restrain its judicial action, * * *" and may possibly apply not only to the person in possession of the property wrongfully taken by the receiver, but as well to the person claiming to be the lawful owner of such property; at any rate, so far as concerns the person in possession, "however confident he may be of his right to resist" an order of the court, it is his duty to obey; and "no rule of practice should be laid down which will compel a man in that situation to defend his possession by force," or "resist the plain terms of an order of court," especially in view of the fact that the only person having an apparent right to the property in question is unconcerned as to the effect or the consequences of the order.

[2] No authority has been discovered which would indicate that in circumstances such as are here present the duty is thrust upon the person upon whom the demand is made at his own expense and inconvenience to institute appropriate action or proceedings to test the validity of the receiver's order, or to obey it at his peril. If the principle for which appellant contends be correct, no one, will be safe without rigid investigation of the law in complying with any order of court; for example, if money in bank should be levied upon in execution of a judgment, the banker, in order to secure protection from possible civil liability, will be obliged to ascertain the solution of the broad question of whether the court had jurisdiction in the premises, to say nothing of his duty to determine the legality of the various other steps incident to execution. Take another illustration: A receiver for a corporation transacting a considerable volume of business has been appointed by the trial court. Acting under express orders from such court, he demands and collects large sums of money from hundreds of persons owing money to the corporation; likewise under such authority, he commences actions against other persons against whom the corporation has claims—on some of which he recovers judgment, while as to others, judgment is rendered against him. Still other persons, having claims against the corporation, are authorized to sue the receiver thereon, succeeding in some, and failing in others. The receiver finally renders his account, is discharged, and his bond exonerated. Later, it is discovered that the court exceeded its jurisdiction in appointing the receiver and in making the several orders to which reference has been had. Is it the law that each and all of the acts of the receiver are void and must be held for naught? Must the several debtors of the corporation, each of whom has paid his indebtedness, either after demand by the receiver, authorized by the court, or after judgment has regularly been obtained against him, again pay the debt owing by him to the corporation? Is each of the several judgments in the actions brought against the corporation invalid? If the correct answer to each of such queries be "Yes," the human mind will have difficulty in grasping the ultimate effect of such a rule upon the respect which should be accorded courts of justice.

It is clear that if such proposed principle be followed, in every case involving an order to take possession of property supposedly belonging to the defendant, before any person upon whom such order may be served, may safely obey it, he will at least be compelled to determine whether the facts set forth in the complaint state a cause of action, which oftentimes is an exceedingly difficult matter, and frequently involves a question regarding which lawyers, well versed in the law, may differ one from the other. Where no appearance has been made by the defendant, as may occur in a divorce case, and in which matter a receiver may be appointed and an order made on a banking institution to pay money as attorneys' fees or alimony pendente lite, among other things the bank of necessity will be compelled to pass upon the question of whether the defendant has been properly served with process. Then, too, the unsettled and possibly unstable state of the law with reference to the various legal questions involved would have to be taken into consideration. For instance, consider the conditions presented in the instant case: Let it be assumed that the San Dimas Lemon Association was advised that it could obey the order of the court in question only at its peril. Accordingly it investigated the statutes and decisions of the courts of this state with reference to the matter, with the result that it discovered the three authorities heretofore cited herein which indicate that the court had jurisdiction to make the order; also, the other cases to which reference has been had, which point to the opposite conclusion. Which line of cases should the association follow? If the first, and the appellate and the Supreme Court of this state should disagree with the conclusion reached by the association, the result would be a double payment by the association of the amount owing to the mortgagor, to say nothing of costs and attorneys' fees; if the second line of cases were to be followed and the association refuse to obey the order of the trial court, a citation for contempt of court would result, with the probable consequence of a jail commitment (however long) until the order was obeyed. But if it may be assumed that both the appellate and the Supreme Court of this state should decree the legality of the order, the association might still doubt the correctness of the decision; and in view of the possibility of a federal question being involved, the association might wish to secure the judgment of the Supreme Court of the United States with reference thereto, which, of course, would involve the necessity of further investigation of the law, especially of the decisions of the last-named court. The confusion and delay which would result from adherence to a rule which would place such burdens on persons situated as was the defendant herein, if not disastrous, would be well-nigh intolerable. An order in effect decreeing the validity of a former order would be subjected to suspicion and criticism for the same reasons as attached to the original order; and so on to the end at least of all things terrestrial. Rather than establish such a rule, the principle should be indulged that courts and their officers are acting lawfully and in the performance of a duty enjoined by law, and that reliance may safely be placed therein by all persons thrown in contact with such institutions of our government.

The judgment is affirmed.

I concur: YORK, J.

CONREY, P. J. I dissent. I agree with the decision on the first proposition, which is to the effect that the order requiring the receiver to collect from the San Dimas Lemon Association, and ordering that association to pay over to the receiver the money in question, was a void order. I disagree with the second proposition, which runs to the effect that the association, having paid the money to the receiver, may now use the fact of such payment as a defense against the plaintiff's demand in the present action. It may be conceded that if the receiver had been actually seizing physical property and thereby taking it from the custody of the association, the latter would have been justified in submitting to such force, or threatened use of force, and in refraining from any attempt to resist such seizure. That appears to be in accordance with the opinion of the Supreme Court as stated in Havemeyer v. Superior Court, 84 Cal. 327, 397, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192.

But I hesitate to accept an extension of the Havemeyer decision so as to cover an instance of voluntary payment of money, where the money so paid over to the receiver belongs or is owing to a third person, and where the order directing the payment of such money is a void order. In Estate of Pusey, 180 Cal. 368, 181 P. 648, the Supreme Court quoted with approval Forbes v. Hyde, 31 Cal. 342, 348, wherein the court said:

> "A judgment absolutely void may be attacked anywhere, directly or collaterally, whenever it presents itself, either by parties or strangers. It is simply a nullity, and can be neither a basis nor evidence of any right whatever."

A similar question was before this court in Miller v. Superior Court, 63 Cal. App. 1, 217 P. 817. In that case we held that the superior court was without jurisdiction to adjudge the petitioners guilty of contempt by reason of their interference with the enforcement of a void order directing a receiver to take possession of certain property. In Fidelity, etc., Ass'n v. Citizens' T. & S. Bk., 186 Cal. 689, 692, 200 P. 631, 632, the Supreme Court held that a party in possession of property under a claim of right thereto may not be deprived of such property, "except by an order made in a proceeding to which it was a party and in which it had been given an opportunity to be heard." In the present case, the San Dimas Lemon Association was not given any notice or opportunity to be heard before the void order was made. As I construe the pleadings and the findings, the association was not threatened with any actual seizure to be made of cash in its hands. It had collected certain sums of money which it then owed or as agent was under obligation to pay over to George A. Binney. Upon the mere demand of the receiver that in compliance with said order "it pay to him as such receiver all moneys in its hands then owing to said George A. Binney," the association complied with that demand. But since the order was void, since there was no threatened actual seizure, and since the court was without power by contempt proceedings or otherwise to enforce its order, it cannot be said that the payment of the money by the association to the receiver was other than a voluntary act. I do not agree that by such voluntary act the association has been relieved from its obligation to pay the money to Binney or his assignee.

It is my opinion that the judgment should be reversed.

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81 Cal. App. 204

PACIFIC-SOUTHWEST TRUST & SAVINGS BANK v. ROSS, Sheriff, et al. (Civ. 5588.)

(District Court of Appeal, First District, Division 2, California. Feb. 5, 1927.)

1. Husband and wife ⚷257—Crops raised on land leased by wife alone, with seed and labor furnished by husband, held community property (Civ. Code, § 164).

In action in claim and delivery of crops, evidence *held* to show that crops raised on land, leased for year by wife alone, with seed and some labor furnished by husband, was community property, even if a rebuttable presumption, is raised by Civ. Code, § 164, that leasehold and produce therefrom were separate property of wife.

2. Husband and wife ⚷267(5)—Crop mortgage, executed by wife alone on community property, held ineffective against sheriff seizing crops under writ issued in suit against husband.

In action in claim and delivery of crops, shown to be community property, crop mortgage, executed to plaintiff by wife alone, was ineffective to enable plaintiff to recover crops from sheriff taking possession under writ of attachment, or execution issued in action by creditor against husband.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action in claim and delivery by the Pacific-Southwest Trust & Savings Bank against James Ross, Sheriff of the County of Santa Barbara, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellant.

A. B. Bigler, of Santa Maria, for respondents.

KOFORD, P. J. The assignor of the plaintiff herein held a crop mortgage on a quantity of pink beans. This mortgage was executed by Gussie Leal alone, without the signature of her husband, Raul Leal. The defendant, as sheriff, levied upon and took possession of said beans upon a writ of attachment or execution (the record is not clear as to what the writ was), issued in a certain action by the Bank of Italy, a substantial creditor, against Raul Leal, the husband. The sheriff ignored the crop mortgage of plaintiff herein and made no compliance with section 2969, Civil Code. The plaintiff herein, claiming the right of possession under the crop mortgage, brought this action against the sheriff for possession of the beans. The trial court gave judgment for the defendant upon the ground that the beans were community property of the Leals and that, therefore, the crop mortgage executed by the wife alone was ineffective. From this judgment the plaintiff appeals.

The trial proceeded upon the issue of whether the beans were the separate property of the wife or the community property of the spouses.

The evidence, more in detail, follows: Raul A. Leal had for some time farmed the Righetti ranch under a verbal lease from year to year. He had completed his farming operations for the year ending November 1, 1921. He thereafter continued on the ranch as a tenant and cultivated the land for the crop to be planted in the spring of 1922. Leal was indebted to the Union National Bank of San Luis Obispo, the predecessor and assignor of the Bank of Italy, above mentioned, upon a promissory note dated November 21, 1921. In May, 1922, he sought further funds from the bank to carry on his farming operations, but he was refused. He testified that, thereupon, he told the bank officials that he was through; that they could come and get his rig; and that he then turned his horses out to pasture and gave up the ranch. But he continued living on the ranch with his wife, Gussie, as previously. His wife then went to the landowner and procured a written lease from him on May 16, 1922, and four days later, she executed to plaintiff's assignor the crop mortgage upon which the action is based. Thereupon the crop was planted, Mrs. Leal supervising and being assisted with men and horses by her relatives. Raul Leal furnished the bean seed to her without charge. It was a disputed point of evidence as to how much directing and labor was performed by the husband. During the time of planting he was suffering from an injured arm, which partially disabled him. He made the arrangements for sacks and seed. He made a written contract for threshing the beans and even for the sale of the same with his own signature and without his wife's signature, but with her knowledge and consent.

[1, 2] Upon this evidence, and more not recited, the trial court held the produce to be community property of the spouses. We

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

think the decision is well supported by the evidence.

Appellant urges that the one-year lease to Mrs. Leal in her sole name raises a presumption that the leasehold and, therefore, the produce of the same, was separate property, under the provisions of section 164, Civil Code. Respondent argues that the lease does not amount to a conveyance, within the meaning of that section, citing Stafford v. Martinoni, 192 Cal. 724, 221 P. 919. Whether or not the presumption applies to the year lease in this case is a question we need not decide, for it would be, at best, a disputable presumption (Stafford v. Martinoni, supra), and we should still have to hold that the judgment is supported by the evidence, with or without the presumption.

It is ordered, therefore, that the judgment appealed from be and the same is hereby affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

81 Cal. App. 164

DAVIS v. MONTE et al. (Civ. 3144.)

(District Court of Appeal, Third District, California. Jan. 31, 1927.)

1. Appeal and error 🔑1071(6)—Error to defendants' prejudice in court's failure to find on material issues raised by pleadings and sustained by evidence is reversible (Code Civ. Proc. § 632).

Error of court to prejudice of defendants in failing to find on certain material issues raised by pleadings and sustained by evidence is reversible, in view of Code Civ. Proc. § 632.

2. Chattel mortgages 🔑172(9)—In replevin, issue raised by pleadings as to whether mortgagee and seller of cattle made false representations with intent to deceive buyer and mortgagor held material as respects findings.

In replevin by seller and mortgagee of cattle, issue raised by pleadings as to whether he made false representations to buyer and mortgagor with intent to deceive, which buyer relied on, *held* material, since fraud may not be alleged generally.

3. Fraud 🔑41—Facts constituting fraud should be alleged with reasonable certainty.

Fraud may not be alleged generally, but ultimate facts constituting it should be specifically alleged with reasonable certainty.

4. Fraud 🔑11(1)—Expression of opinion, if so understood, does not amount to actionable fraud, though false.

Expression of opinion or belief, if so understood and intended, is not representation of fact, and, though false, does not amount to actionable fraud.

5. Fraud 🔑64(1)—Whether representation was understood as expression of opinion is fact question.

Where there is any doubt as to whether representation alleged to constitute fraud was intended and understood as mere expression of opinion, question is one of fact for court or jury.

6. Fraud 🔑11(1)—Statement of opinion, based on alleged facts, is actionable.

Statement of what might otherwise be opinion is statement of fact, and may be basis of actionable fraud, if based on alleged facts.

7. Chattel mortgages 🔑172(9)—In replevin, failure to find as to whether seller mortgagee made representations intending to deceive buyer mortgagor, who relied thereon, held error.

In replevin by seller and mortgagee of cattle, court erred in not making finding as to whether seller made representations, which buyer and mortgagor relied on, with intent to deceive, notwithstanding that he made finding that representations were made as statement of opinion.

8. Sales 🔑52(7)—Evidence held to show that seller of cattle induced buyer to rely on his opinion as to when they would come fresh.

Evidence *held* sufficient to show that buyer of cattle was by seller's statement as to when they would come fresh induced to rely on seller's special and particular knowledge of them, and relied on seller's opinion as to them.

9. Sales 🔑38(3)—Seller's false statement of opinion may be sufficient ground for relief by rescission.

Under certain circumstances seller's false statement of opinion as to things sold may be sufficient ground for relief by rescission.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action of replevin by J. L. Davis against C. Monte and another. Judgment for plaintiff, and defendants appeal. Reversed.

H. B. Stewart, of Brawley, and Charles L. Childers, of El Centro, for appellants.

C. L. Brown, of El Centro, for respondent.

BUCK, Justice pro tem. Action in replevin, based upon the provisions of a chattel mortgage given by defendants to plaintiff.

The mortgage in question was given as the sole consideration for the sale by plaintiff to defendants of 18 head of dairy cattle, and covered not only the cattle sold, but also 11 other head owned by the defendants. By way of answer the defendants relied on their cross-complaint, wherein they seek to rescind and set aside the mortgage, so far as it pertains to the 11 head of cattle, upon the ground that the plaintiff procured and brought about the sale through false and fraudulent representations inducing the defendants to purchase the cattle.

The court sat with an advisory jury, as in the case of French v. Freeman, 191 Cal. 579, 217 P. 515, and made findings in favor of the plaintiff and against the defendants upon the cross-complaint, and entered judgment accordingly in favor of plaintiff. From this judgment defendants appeal.

[1] In substance, the point urged by the defendants is that the court erred to the prejudice of defendants in failing to find upon certain material issues raised by the pleadings and sustained by the evidence. This contention, of course, if sustained, is a valid ground for the reversal of the judgment. Frascona v. L. A. Ry., 48 Cal. App. 135, 191 P. 968. And further, it is not upon the special verdict of the jury, but upon the findings actually made by the court, that the judgment must stand or fall. Holland v. Kelly, 177 Cal. 43, 169 P. 1000; Hunceker v. Lutz, 65 Cal. App. 649, 224 P. 1001; Schooler v. Williamson, 192 Cal. 472, 221 P. 195.

The pleadings in regard to the misrepresentations relied upon, and which it is claimed require responsive findings, are in substance as follows:

"That on or about the 25th day of September, 1921, the defendant C. Monte met the plaintiff, and plaintiff then and there showed to said defendant C. Monte the cows he proposed to sell to defendants; that at that time the plaintiff urged the defendant C. Monte to buy said cows, being certain of the cows described in plaintiff's complaint, telling said defendant that said cows were or had been picked by him, said plaintiff, from a large number of cows which then were or had recently been belonging to him for his own personal ranch or dairy herd, on account of their good quality; that at the same time and place, plaintiff represented to said defendant that he knew when each of the cows so sought to be sold by him to defendants had been bred, and falsely told the defendant C. Monte that each of the cows so sought to be sold by him, 18 in all, with the exception of two cows which he pointed out and one other cow which then had a calf with her, would come fresh within three to six weeks; * * * that each, all, and every of said representations so made by the plaintiff to the defendant C. Monte were false and untrue, and were known to the plaintiff to be false and untrue when so made by him to said defendant, and were made with the purpose and intent to deceive and defraud the defendants and to induce them to purchase said 18 cows from the plaintiff; that said defendant C. Monte believed said representations to be true and relied upon the same, and, so believing and relying upon said representations, agreed to purchase and did purchase said 18 cows from the plaintiff."

And, furthermore:

"That one of the cows so sold by plaintiff to defendants and no more came fresh within six weeks from the time of the consummation of said transaction; that up to the time of the commencement of this action not more than 4 or 5 of said cows so sold by plaintiff to these defendants came fresh."

There was no denial of the allegation as to the failure of the cows to become fresh, but there were specific denials as to the other specific allegations of fraud.

Evidence was taken upon all the foregoing issues, and the following and no other special verdict was returned by the jury in regard to the specifically alleged fraud.

"Q. 1. Did the plaintiff, Davis, in order to induce defendants to purchase the 18 cows of Davis, represent to defendants that such 18 cows had, with a few exceptions, been so bred that they would come fresh within three to six weeks? Answer: Yes.

"Q. 2. Were any statements made by the plaintiff, Davis, to defendant Monte relative to the times when the cows would come fresh, made as statements of fact or of opinion. Answer: Opinion."

Whereupon the court, in its findings of fact and conclusions of law on the foregoing issues of fraud, found as follows:

"The court therefore and in accordance with the said verdict makes and causes to be filed herein its findings of fact and conclusions of law. * * *

"That the plaintiff, Davis, in order to induce defendants to purchase the 18 cows of Davis, represented to defendants that such 18 cows had, with a few exceptions, been so bred that they would become fresh within three to six weeks, but that said representations so made were made as a statement of opinion, and not as a statement of fact, and that the plaintiff committed no fraud in the sale of said cows."

The rule, and the reason therefor, giving litigant the right to have findings upon the material issues raised by the pleadings, has been most clearly and forcibly enunciated by Presiding Justice Finlayson in the case of Frascona v. Los Angeles Ry., supra, as follows:

"Unless findings are waived—and here, as the record shows, they were not—the trial court must give its decision in writing, i. e., it must file written findings of fact. Section 632, Code Civ. Proc. The right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution. Bard v. Kleeb, 1 Wash. 370 (25 P. 467, 27 P. 273). The Code provision requiring written findings of fact is for the benefit of the court and the parties. To the court it gives an opportunity to place upon record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. To the parties, it furnishes the means, in many instances, of having their cause reviewed without great expense. It also furnishes to the losing party a basis of his motion for a new trial; he is entitled to know the precise facts found by the court before proceeding with his motion for a new trial, in order that he may be able to point out with precision the errors of the court in matters either of fact or law. Bard v. Kleeb, supra; Savings & L. Soc. v. Burnett, 106 Cal. 539 (39 P. 922); Polhemus

v. Carpenter, 42 Cal. 385. 'The right to have a material issue presented by the pleadings in a cause determined by a finding of the court is one important to the parties to a suit, and the failure to make such a finding results in prejudicial error entitling the complaining suitor to reversal.' Huntington v. Vavra, 36 Cal. App. 355 (172 P. 168). See, also, Tucker v. United Railroads, 171 Cal. 704 (154 P. 835).

"While it is not necessary that the findings should follow the precise language of the pleadings, it is essential that they be so drawn that the truth or falsity of every material allegation can be demonstrated therefrom. The purpose of findings 'is to answer the questions put by the pleadings.' Dam v. Zink, 112 Cal. 93 (44 P. 332). The province of the court is to determine, not to raise, issues."

In connection with the foregoing it must be shown, of course, that the failure on the part of the court to find upon the issue in question resulted in prejudice to the rights of the appellant. Consequently, the cases hold that it must appear that the issue failed to be found upon was a material issue, and that there was evidence in the record which would warrant a finding thereon in favor of the appellant. And it must also appear that the findings would be insufficient to support the judgment if, in addition to the findings actually made, the court had also found favorably to appellants' contentions upon the issues in question. Or, as stated in other words, in the case of Sharp v. Pitman, 166 Cal. 501, 505, 137 P. 234, 236:

> "If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues, which if made, would not invalidate the judgment." Klokke v. Escailler, 124 Cal. 297, 56 P. 1113; Buell v. Brown, 131 Cal. 158, 63 P. 167; Sharp v. Pitman, 166 Cal. 501, 137 P. 234; Colver v. Scarborough Co., 238 P. (Cal. App.) 1104, at page 1110; Lincoln v. Hoggard, 66 Cal. App. 196, 225 P. 770.

[2, 3] In the case at bar, the issues raised by the pleadings, and upon which there are no findings, are based upon the allegations of the cross-complaint that the statements, both of fact and opinion, made by plaintiff, were made with intent to deceive, and as a matter of fact were relied upon by the defendants and did induce them to make the purchase which was the consideration for the chattel mortgage. One of these representations particularly alleged to have been relied upon by defendants was the representation that plaintiff knew when each of the cows was bred. Fraud may not be alleged generally, but the ultimate facts constituting fraud should be specifically alleged with reasonable certainty. Kent v. Snyder, 30 Cal. 667, 674; 12 Cal. Jur. pp. 800 to 816. Consequently, the finding omitted would have been upon a material issue.

The next question which arises is whether or not the finding actually made in regard to the expression of opinion would be sufficient to sustain the judgment, even though a finding favorable to defendants' contention were made on the issues referred to above touching plaintiff's statement that he knew when the cows were bred and that they would come fresh in from three to six weeks, and were made with intent to deceive, and did deceive and induce defendants to make a purchase.

[4, 5] As stated in the case of French v. Freeman, 191 Cal. 579, at page 585, 217 P. 515, 517, quoting from Stockton v. Hind, 51 Cal. App. 131, 196 P. 122:

> "It is conceded that the general rule is that an expression of opinion or belief, if nothing more, if so understood and intended, is not a representation of fact, and although false, does not amount to actionable fraud. Ordinarily a person has no right to rely upon such statements, and if he does so rely, he cannot treat them as fraudulent, either for the purpose of maintaining an action in damages for deceit, or for the purpose of rescinding the contract. Where there is any doubt as to whether or not a representation was intended and understood as a mere expression of opinion or a statement of fact, the question is one not of law but of fact for the court or jury."

[6] From the above it will be noted that the court held that the party to whom the alleged expression of opinion was made must have understood it to have been a mere opinion, and, so understanding it, should not be permitted to charge the other party with intent to deceive or to claim that he himself was deceived. In the case at bar, however, it will be noted that the court goes no further than to find that the "said representations so made were made as the statement of opinion." But the court does not find that they were received or understood by the defendants as a statement of opinion. Furthermore, if the court had found in favor of defendants' allegation that the plaintiff stated as a fact "that he knew when each of said cows was bred" when he stated they would come fresh in three to six weeks, and had further found in response to plaintiff's allegation that such statements were believed by defendants and relied upon by them, and were made by plaintiff to deceive defendants, and did deceive them, then it is evident the case would be brought within the rule stated in the case of French v. Freeman, supra, as follows:

> "And it is well established that a statement of what might otherwise be an opinion, if based on alleged facts, is a statement of fact and not a statement merely of an opinion. Tracy v. Smith, 175 Cal. 161, 165, 165 P. 535; Brandt v. Krogh, 14 Cal. App. 39, 49, 111 P. 275; Winkler v. Jerrue, 20 Cal. App. 555, 560, 129 P. 804."

The same rule is stated more succinctly in the case of Henry v. Continental Bldg. etc., Ass'n, 156 Cal. 667, at page 680, 105 P. 960, 965, as follows:

> "The rule that mere expressions of opinion cannot constitute actionable fraud is, no doubt, subject to some qualification. A party inducing another to contract in reliance upon estimates or opinions professedly based upon alleged facts known to the party stating them to be nonexistent will not be permitted to escape responsibility by the plea that he was merely declaring his opinion. A statement that the history of the defendant showed that its stock would mature in seven years is clearly a statement of fact, and, if falsely made and relied on, would furnish ground for relief to the party misled by it."

Also, the same rule as laid down in Haserot v. Keller, 67 Cal. App. 659, at page 670, 228 P. 383, 388, would seem to preclude a general finding for plaintiff in this case, if the court had made a finding favorable to defendants' allegation that the plaintiff, with intent to defraud, represented to defendant that he (plaintiff) knew when each of the cows had been bred when he stated that they would come fresh in six weeks, and that the defendants believed and relied upon said statements and were thereby induced to make the purchase. The court states the rule as follows:

> "When one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject-matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person is not excused if it be false."

The rule stated in the foregoing case is also applied in the recent case of J. B. Colt Co. v. Freitas, Third District (Cal.) Court of Appeal, 244 P. 916, at page 919. See, also, Palladine v. Imperial Valley F. L. Ass'n, 65 Cal. App. 727, at page 737, 225 P. 291, 295, where it is held that an opinion may be actionable "if the party expressing the opinion possesses superior knowledge, such as would reasonably justify the conclusion that his opinion carries with it the implied assertion that he knows the facts which justify it, * * * if he knows that he does not honestly entertain the opinion because it is contrary to the facts." In the case at bar the charge is that there was not merely an implied but an express assertion on the part of the plaintiff that he knew the basic and potent fact as to when the cows were actually bred.

In the recent case of Beckley v. Archer, 241 P. 422, also from the same Court of Appeal, it was held that a representation by a seller of dairy cows to a purchaser that all the cows were with calf and would calve within six weeks was a statement such that the jury were justified in finding was merely a statement of opinion. That was a case where fraud was relied upon as a tort resulting in damages giving rise to a suit at law where the jury returned a general verdict against the party relying upon the alleged fraud, and on appeal the verdict was upheld for the reason that, unlike, as alleged in the case at bar, there was nothing in the testimony of either party which shows "or which may reasonably be said to tend to show, that his opinion was expressed with a design to deceive the defendants as to the matter." And, furthermore, in order to sustain the verdict of the jury, the court indicated that there was evidence which would jusify a finding that they did not rely upon the statement of the seller, but relied "rather than upon their own judgment regarding that matter and the jury, it may be assumed, so viewed that phase of the case." And the court accordingly upheld the verdict of the jury upon the ground that "it is elementary that expressions of opinion honestly made are not actionable. Phelps v. Grady, 168 Cal. 73, 77, 141 P. 926. * * *"

In the case at bar it will be noted that material allegations were made which, if found in favor of the defendants herein, would have led to the conclusion that the "expressions of opinion" herein were made not "honestly," but dishonestly.

The representation that the cows would calve in from three to six weeks was manifestly an opinion, just as the bare statement that they had been so bred as to produce that result would be an opinion. But the question put in issue by the pleadings was not merely whether the statement was an opinion, but whether or not it was made to deceive and did deceive; and, furthermore, that question was presented in accordance with law, not only by general allegations to the foregoing effect, but also by special averment that plaintiff, by his own false statement, to wit, that he knew when the cows were bred, assumed to possess special information, which also led the defendant to believe that he, the plaintiff, did, as a matter of fact, possess special and important information regarding the subject-matter of the representation.

[7] It would therefore appear that all the pleadings in the case brought the case within the rules touching representations of opinion laid down in the foregoing authorities. In accordance with the rule requiring findings, the court should have found to the effect that the plaintiff either did or did not state that he knew when the cows were bred, and also have found whether or not the plaintiff intended to deceive the defendant, and whether the defendant was or was not misled and deceived to his injury.

[8] The next question that necessarily arises is whether or not there was evidence in the record which, if believed by the court,

could have been the basis of a finding of fact that the plaintiff did represent that he knew when all the cows had been bred, and that this statement, and the statement that the cows would come fresh in three to six weeks, were made with intent to deceive, and were relied upon by defendants and induced them to make the purchase. The evidence, without conflict, shows that both parties understood that defendants were in a situation where it was important and necessary to them that they should be able to obtain milk as early as possible from the cows. There is also the evidence of two witnesses to the effect that when the plaintiff told defendant that the cows would come fresh within three to six weeks, he showed the defendant a book which he had in his hand, which showed when the cows were actually bred to the bull, thereby implying that as the result of that breeding so indicated in the book, they would "come fresh in from three to six weeks," all of which was relied upon and believed by the defendant, whose testimony was as follows:

> "And I said, 'When do you breed cows?' and he says—he pulled a little book just about like this (indicating), and he had the breed in there of every cow. He had the whole 18 cows and he had a different date.
>
> "Q. Did he show you that book? A. He show me that book, and he had it right in his hand—a little book.
>
> "Q. Did you see certain names of cows and numbers of cows in the book? A. Some have cow 4, some have cow different numbers, you know, and one cow fresh certain time, and he said the last cows, the 18 cows, was going to come fresh from three to six weeks; the last one wouldn't stay but six weeks, and if she didn't come fresh at that time he make good. That is the proposition he told me the first time."

And the witness Armstrong likewise testified that the plaintiff stated, in answer to defendant's question, "When do these cows come fresh?" that, "Those cows will come fresh from three to six weeks." And also that he recalled seeing the plaintiff take a book out of his pocket and show Monte a record that he had in regard to these cows. The witness said:

> "He took a book out of his pocket and says, 'Now Monte, I have a record of these cows. I have the breed of them.' This one comes fresh such and such a time, and this one comes fresh such and such a time, and he went down the line about the whole 18 cows, when they would come fresh I didn't see what was in the book. I didn't look at the book."

This testimony was in substance denied by the plaintiff. But, if believed by the court, it would warrant a finding of fact to the effect that defendant was by the statement of plaintiff induced to rely upon plaintiff's special and particular knowledge as to the particular and potent fact of the actual breeding of the cows at a particular time, and at such a particular time as would warrant the defendants in believing and relying upon the opinion expressed by plaintiff that they would come fresh within from three to six weeks. And, further, as regards the testimony touching the falsity of the foregoing statements, if they were made, plaintiff himself is the best witness when he testified as follows:

> "Q. Mr. Davis, did you know at all when these cows would become fresh, the exact dates? A. No, sir; I could not tell.
>
> "Q. Did you have any means of knowing? A. Not a bit in the world except from the appearance of the cows.
>
> "Q. You knew no more about it than Mr. Monte did? A. Not a bit.
>
> "Q. You were on equal terms with him; is that right? A. Yes, sir.
>
> "Q. So far as the cows coming fresh was concerned, you had no better knowledge than he did? A. Not a bit, except I knew the males had been running with the females, because I had seen the cattle at different times and knew they were kept with them.
>
> "Q. You didn't have charge of these cattle personally before you sold them to Monte? A. No."

As regards all of the foregoing testimony on behalf of the defendants, if it was disbelieved by the court, as it might very well have been, a finding to the contrary should have been made. But, there being no such finding, it becomes apparent that the defendants were deprived of "a substantial right as inviolate under the statute as trial by jury under the Constitution."

[9] It would also seem that in order to sustain this judgment we would be obliged to ignore an established and wholesome principle of equity that under certain circumstances the false statement of an opinion may be a sufficient ground for relief by rescission.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

81 Cal. App. 142

HENRY v. LINGSWEILER. (Civ. 3132, 3133.)

(District Court of Appeal, Third District, California. Jan. 29, 1927.)

1. Appeal and error 🔑123—Order granting a nonsuit held appealable.

Order granting a nonsuit, being in legal effect a judgment of nonsuit, is appealable.

2. Appeal and error 🔑15—Appeal from formal judgment of nonsuit is superfluous, where appeal is taken from order granting nonsuit (Code Civ. Proc. § 581).

Appeal from formal judgment of nonsuit, entered upon order granting nonsuit, was unnecessary and superfluous, where an appeal was taken from the order granting the nonsuit, under Code Civ. Proc. § 581.

3. Trial 🔑165—Motion for nonsuit presents question of law for court.

Motion for nonsuit presents a question of law for the court; being tantamount to a demurrer to the evidence or an objection that the proved material facts, admitting them to be true, do not in legal effect operate in favor of plaintiff.

4. Trial 🔑165—On motion for nonsuit at close of plaintiff's case, evidence must be accorded full probative force, even if erroneously admitted.

The evidence on motion for nonsuit at close of plaintiff's case must be taken most strongly against the defendant, and must be accorded the benefit of its full probative force, regardless of whether erroneously admitted.

5. Municipal corporations 🔑706(6)—Negligence of driver of automobile injuring pedestrian crossing street held for jury (Motor Vehicle Act 1915, §§ 12, 20 [a]).

In pedestrian's action for injury sustained when struck by defendant's automobile while crossing street near intersection, in which there was evidence that driver of defendant's car was driving at an excessive rate of speed, in violation of Motor Vehicle Act 1915 (St. 1915, p. 406), § 20(a), without warning pedestrian of approach of car, in violation of section 12, the question of driver's negligence was one for the jury.

6. Master and servant 🔑332(1)—Whether daughter driving automobile was acting as owner's agent held for jury.

In action for injuries sustained when struck by defendant's automobile, driven by his stepdaughter, evidence *held* sufficient, on motion for nonsuit, to require submission to jury of question whether stepdaughter, in driving the car at the time of the accident, was acting as defendant's agent.

7. Trial 🔑165—Court can consider evidence to overcome inference of agency of driver for owner of automobile on motion for new trial but not on motion for nonsuit.

In action for injuries sustained when struck by defendant's automobile, driven by person other than defendant, it is within the legal province and discretion of the trial court, on motion for new trial, to say whether defendant has presented evidence sufficient to overcome the inference of agency, raised by plaintiff's proof of ownership of automobile by defendant and operation by another with knowledge and consent of owner, but, on motion for nonsuit, any proof received tending to overcome such inference is to be disregarded.

8. Municipal corporations 🔑706(7)—Contributory negligence of pedestrian injured by automobile held for jury.

In action for injuries to pedestrian struck by automobile while crossing street near intersection, question of pedestrian's contributory negligence *held* for jury.

9. Municipal corporations 🔑705(10)—Pedestrian is required to exercise degree of care required by traffic conditions of thoroughfare.

Pedestrian crossing boulevard was required to exercise that degree of care which the usual traffic conditions of the thoroughfare required.

10. Municipal corporations 🔑705(10)—Pedestrian crossing street near intersection could assume no vehicle would approach from left beyond medial line of intersecting street.

Pedestrian crossing street near intersection had the right to assume that no vehicle would approach him from the left beyond the medial line of the intersecting street.

11. Municipal corporations 🔑706(2)—General allegation of reckless driving held to support proof brakes of automobile were defective (Motor Vehicle Act 1915, § 14).

Defective condition of brakes of automobile in violation of Motor Vehicle Act (St. 1915, p. 406) § 14, could be proved under allegation that automobile "was being operated in a reckless, negligent, and careless manner, and in violation of the laws of the state of California."

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by E. G. Henry against F. I. Lingsweiler. From an order granting a nonsuit and from a formal judgment of nonsuit, the plaintiff appeals. Reversed.

Goudge, Robinson & Hughes and Ben S. Beery, all of Los Angeles, for appellant.

H. T. Morrow and A. R. T. Truex, both of Los Angeles, for respondent.

HART, J. [1, 2] There are two appeals upon the same record, viz.: The one from an order granting a nonsuit; and the other from a formal judgment of nonsuit. The appeal from the original order granting the nonsuit was proper and sufficient to authorize a review of the action of the court in the making of said order. In fact the "order" granting the nonsuit amounted in legal effect to a judgment of nonsuit, since it necessarily involved a final and definitive disposition of the case, and such a judgment is, therefore, one from which an appeal may be taken. The appeal secondly taken, viz. from the "formal judgment" of nonsuit, which means a formal judgment subsequently prepared and entered upon the "order" granting the nonsuit, was wholly unnecessary and, indeed, superfluous. Code Civ. Proc. § 581; Brown v. Sterling Furniture Co., 175 Cal. 563, 166 P. 322. However, we will dispose of both appeals as though both were material and requisite to the decision of the case as it appears before us.

The action was by plaintiff against the defendant, for damages for personal injuries suffered by the former by reason of having been struck by the automobile of the latter through the alleged negligent driving of said automobile.

The accident in which plaintiff was injured occurred on one of the highways of the county of Los Angeles, on the 17th day of October, 1922, near the noon hour of that day. The complaint alleges that plaintiff was at the time walking over and across Santa Monica boulevard, near its intersection with Formosa avenue (about 50 feet from the west side of Formosa avenue), in said county, and "was proceeding in a northerly direction, and was beyond the center of said Santa Monica boulevard, to wit, on the second (street) car tracks"; that, as plaintiff was so proceeding an automobile owned by defendant was traveling over and along Santa Monica boulevard in an easterly direction, said automobile being then "so unskillfully, carelessly, recklessly, and negligently managed and operated that it was driven wantonly and willfully into and against plaintiff" while the latter was, as above indicated, at a point on Santa Monica boulevard; that, by reason of so being "run into and against" him, plaintiff was "violently thrown to the ground with great force and violence underneath its (said automobile's) wheels, which ran over his head and body, thereby causing the injuries hereinafter complained of." It is alleged that said automobile, while owned by defendant, was at the time of the accident "being driven by his agent and servant in charge and control thereof, who was then and there acting within the course and scope of her employment, to wit, the driving and operating of said automobile in and about and for the benefit of the business of the defendant." Further it is alleged that, immediately prior to the time of its collision with plaintiff, said automobile was being operated and driven at a rate of about 30 miles per hour, "when the driver's view of the road was obstructed," and that said car was not "slowed down" nor any attempt made to diminish the speed at which it was then being driven as it approached the plaintiff; that no signal or warning was at said time given plaintiff of its approach; that said car, at said time, was not "being operated as near the right-hand curb of Santa Monica boulevard as possible, but, on the contrary, was being driven over and along the left-hand side of said boulevard." The complaint then describes with some particularity the nature of the several injuries thus inflicted upon the body of plaintiff, alleging further that the latter was, by reason of said injuries confined for a long period of time in a hospital undergoing treatment therefor, and that he "has been informed and believes" that the injuries thereby sustained to his head, thighs, and knees will be permanent. The prayer is for damages in the sum of $5,500.

The answer specifically denies the averments of the complaint, states facts negativing the claim that the driver of the machine was, at the time of the accident, operating and driving the car as the agent of defendant, and pleads the defense of contributory negligence on the part of plaintiff as the efficient or proximate cause of the personal injuries inflicted upon the last-named because of the mishap.

Plaintiff's case, so far as the proofs were concerned, being closed, the defendant moved for a nonsuit, the motion being based upon three grounds, to wit: (1) That, while the defendant's ownership of the car was admitted, the evidence as produced by plaintiff failed to show that the party driving or operating the machine at the time the accident happened, was, as such driver or operator, the agent of defendant, but that she was then thus using the car for her own purposes; (2) that the evidence wholly failed to show that the injuries received by plaintiff were directly or proximately caused by the negligence of said driver; (3) that, to the contrary, the evidence disclosed that the injuries complained of were proximately caused by plaintiff's own negligence—that is to say, that the accident and resulting damage to plaintiff's person was directly due to contributory negligence on his part.

The court below, in disposing of the motion, based its order on the grounds that the evidence failed to show that the driver of the car was, at the time of driving it and at the time the accident occurred, acting as the agent of defendant, and that the evidence showed that the plaintiff's own negligence proximately contributed to or caused the damage. As to the alleged negligence of the driver of the car, the court in effect stated that, upon that question, the testimony was such as to make the case one for the jury, and that but for the other grounds of the motion and upon which the order granting the same was founded, it would probably feel compelled to deny the motion.

Santa Monica boulevard, on which the accident occurred, is a street in the county of Los Angeles running east and west. In the center thereof is a double street car track, one for the east-bound cars and one for the west-bound cars. Said boulevard is approximately 60 feet in width between the curbs, and the distance from the south curb to the south rail of the east-bound car track is approximately 21 feet 3 inches. The distance between the rails of both the east-bound and west-bound car tracks is 4 feet 9 inches. The distance between the east-bound and west-bound car tracks is approximately 8½ feet, and the distance from the north rail of the west-bound car track to the north curb is approximately 21 feet 3 inches.

The driver of the car that struck plaintiff was a Miss Ethel Buser, the stepdaughter of the defendant. It was admitted that the latter was the owner of the car.

It appears that the plaintiff, on the 17th day of October, 1922, was in the employ of a concern known as the King Vidor Studio, at 7250 Santa Monica boulevard, in the county of Los Angeles; that at or near the noon hour of that day one W. L. Harmon, also employed by said concern, and one L. E. Roberts, were about to start in the latter's automobile to lunch; that plaintiff, also desiring to go to lunch, asked Roberts and Harmon and was given by them permission to ride with them to a restaurant known as Nick's Cafe, located on Santa Monica boulevard, about 80 feet east of Formosa street; that plaintiff took a seat in the rear of the automobile, and that, on leaving the studio grounds, Roberts, who was driving, turned east on Santa Monica boulevard and continued so to travel until he reached the point on said boulevard at which the café named was located, when the plaintiff stated, referring to the café, "This is the place where I eat." He testified:

> "I then got out on the running board, and of course, after getting out, I looked back (to the west) to see if there were any cars approaching which were near enough to be dangerous. I noticed that there were not. I stepped off the running board and threw up my hands and said that I was all right. At the time I got off the running board, the car in which we were driving was almost at a standstill, and was directly north and opposite a car parked on the south side of Santa Monica boulevard, opposite Nick's Café. Our car could not get to the curb at that point because this car was parked next to the curb. After getting off the running board, I started walking across the street to the restaurant and walked to and passed the center of the street; *that is, past the center of the space between the east-bound and west-bound car tracks.* After crossing the center of that space, I partially turned, considering that I was safe from automobiles coming from the west, and watched the other automobiles coming from the east and going west. How far I went after that I could not tell, as all I was conscious of was a shock and a fright, and I did not know anything more until I became conscious in the hospital 8½ hours later."

On cross-examination, plaintiff stated that the reason he threw his hands "up in the air" as he alighted from the running board of Roberts' machine was because "they (Roberts and Harmon) would take notice and understand that he was all right and clear of the (their) machine." He also stated, on cross-examination, that when he alighted he was not looking in the direction the Roberts machine was going (towards the east), but was "looking back" or "toward the west." Asked by defendant's counsel whether, as he threw his hands up on leaving the Roberts automobile, either Roberts or Harmon cautioned him to "watch out, or look out," plaintiff testified that he was under the impression that one of the parties named had thus warned him, but that the warning was given before he alighted from the car; that, "before I got off (the Roberts car), I looked back west and kept my eyes turned that way, judging the distance of the cars in back, so that I would be in no immediate danger. I walked into the street, and when I got across the center, I partially turned to look toward the east for the cars going that way."

W. L. Harmon, above mentioned as one of the parties in the Roberts car as it was taking plaintiff to the café, testified:

> "As we approached and were approximately 30 feet from the café, which is known as Nick's Café, we were going about 12 or 15 miles an hour. Mr. Henry said, 'Here is where I get out,' or 'Here is where I eat,' or something to that effect, and in doing so he alighted. Mr. Henry got out on the running board of the car, and I told him to be careful. As we passed a car parked by the south curb of Santa Monica boulevard, opposite the café, and had practically stopped, Mr. Henry alighted facing the restaurant. Mr. Henry gave a wave of his hand practically at the same time as he left the machine and stepped on the ground. He started walking across the street at a medium speed, and had gotten practically to the center of the street when an automobile passed between Mr. Henry and us, and soon thereafter an Oldsmobile coupé came along, riding the center of the car tracks, going east. By that time Mr. Henry was on the north side of the street, north of the center a step or two. The Oldsmobile coupé struck Mr. Henry with the right front fender and right front wheel, both wheels passing over his body. I immediately got out of our car and went into the café to get a towel. * * * Mr. Henry was lying on the north side of the center of Santa Monica boulevard."

On cross-examination, Harmon testified:

> "I actually saw the car strike Mr. Henry, and at the time the car struck Mr. Henry he was walking toward the restaurant. He was not standing still. I saw Mr. Henry from the time he left the machine until the machine which passed between him and us, which was going, I should estimate, around 20 miles an hour, obscured my vision. I did not see the Oldsmobile coupé before Mr. Henry had alighted from our machine, but did see it after he had alighted and just before he was struck. I saw the Oldsmobile coupé when Miss Buser, the driver, turned out of her path on the right-hand side of the street and into the center of the street to pass the other car which went between Mr. Henry and ourselves. Mr. Henry had plenty of time to pass in front of the car which later went

between him and ourselves and to walk to the north of the center of the road before he was struck. Mr. Henry was walking at a medium speed, and was neither walking fast nor slow. After this car passed between Mr. Henry and ourselves, I saw the Oldsmobile coupé for the first time, and it was then running in the west-bound car track in position to hit Mr. Henry. Its left wheels were in the center of the west-bound car track. The car turned suddenly to the right, just before it struck Mr. Henry, turning right into him. After Mr. Henry left the car, he was looking to the left—that is, to the west—sufficient for protection to himself. I cannot say which way he was looking at the exact time he was struck."

Mrs. Helen Schuyler, sister of Miss Ethel Buser, who was at the time of the collision operating the car that struck plaintiff, was in said car with her sister when the accident happened. Mrs. Schuyler testified:

"On or about the 17th day of October, 1922, about noon, I was driving in the Oldsmobile coupé with my sister. The Oldsmobile coupé was owned by my father, and was being driven from my father's home on Ogden drive toward the city. My sister Ethel Buser was driving the car. I first saw Mr. Henry about two minutes before the car struck him. We turned around one car to get past, and were rather in a hurry, and we were right on him before we realized it. I have driven a car for many years, and would judge that we were driving between 25 and 28 miles an hour. When Mr. Henry was struck, he was about in the middle of the street between the two car tracks. No warning was given, and I could not say whether or not the brakes were applied before Mr. Henry was struck. We had turned out to pass a car, and that brought us to the center of the street. We were just passing the car when the accident happened. We struck Mr. Henry while he was between the car tracks, and, as I remember it, we had turned to the extreme left-hand side of the track, and then turned in to the right. I first saw Mr. Henry when he was getting off the running board. I saw him all the time after he got off the running board, perhaps 15 feet away from me at that time, until he was struck. There was a car parked at the curb, and north of that was the car that Mr. Henry got off, and north of that was the car which came between us and the car which Mr. Henry got off, and we drove around all three cars and ran over Mr. Henry. No signal was given before we went to pass the car which was driving ahead of us.

"Q. By Mr. Hughes: Where were you going, or bound for, at the time of this injury? A. We had some shopping to do, and were going down to pay the telephone bill.

"The Court: The telephone bill? A. The bill my father had given my sister to pay—my mother had given it to her to pay it.

"Mr. Morrow: We move to strike out the testimony unless it is shown that it is in the knowledge of the witness.

"The Court: Did you see your mother give her the bill? A. Yes; I did.

"The Court: Motion denied.

"Q. By Mr. Hughes: Now, were you going any other place—bound any other place, rather? A. We were going to do some shopping for my mother, and also going down town to see an attorney on some business."

On cross-examination, Mrs. Schuyler testified:

"At a point 100 or 150 feet from the scene of the accident, my sister was driving on the right-hand side of Santa Monica boulevard between the east-bound tracks. I mean by that that the left wheels of our car were between the rails of the east-bound car track. Her right wheels would be some distance over to the right of the south rail. The car that we passed at the time the injury occurred had passed us previous to the accident, going at a speed of about 30 miles per hour. I don't know how far from the scene of the injury the car which we were passing when the injury occurred, first passed us. I saw Mr. Henry jump off the automobile, but did not see him throw either arm up. Mr. Henry was walking at a medium speed. I do not remember whether or not he looked in our direction. I did not call my sister's attention to the fact that this man was jumping off that car. Mr. Henry passed in front of the machine ahead of us, but I do not know how far in front of it. I think he went in front of the machine and just had time to get by. Then we hit him soon after he got by. When he started to walk in front of that other machine our machine had started to pass up that machine. He stepped right out from in front of that machine right in the pathway of our machine. I judge he was the length of our machine in front of us when he stepped in front of our machine—or about 10 feet. When we passed the other car, I should judge it was going at *about 30 miles an hour, and we turned around to our left.* We were going to speed up, as we were in a hurry, and we went around this car to go past it, and the first thing I knew, Mr. Henry was right under the car. As we started to pull over to the left to go around them, I said I was in a hurry, and my sister put on a little more speed. * * * I should judge the car which we passed was not quite in the middle of the track, and when we went around that car, we went way over on the other track—that is, on the west-bound track—to the north of the center of Santa Monica boulevard. We went around rather quickly to pass the other car, and Mr. Henry was right about the middle of the track, and perhaps over a bit, and we ran over him."

Miss Ethel Buser, driver of the car, testified that the automobile was owned by her stepfather; that some time prior to the date of the accident her father, intending to depart for some other place, gave her possession of the car and the key thereto; that her father was not in Los Angeles county on the day of the accident. She stated that she was the only member of the family that drove the automobile, and that when her father delivered to her the possession of the car he said to her that during his absence she should drive her mother about and do any other service in connection with the household affairs; that they were having "a lot of trouble with the telephone, and my mother told me to go in that day (the day of the accident) and report to Mr. Battery of the telephone company that our phone had been out of service for a number of days. And she (referring to her mother) gave the bill to pay and told me to pay the telephone bill, and also a sample of material for a blue dress she was making; and I was to get that that day." The telephone bill, she stated, was her father's bill, and the telephone was at their home, 1409 Ogden drive.

"Q. Well, then, where were you bound at the time of the accident? A. Down to the telephone company. That was my first mission.

"Q. What other missions were you bound upon, if any? A. I had a sample of blue material. My mother was making a gown, and I was to take the material back to her.

"Q. Before your father went away, had that car been used? A. By whom?

"Q. I am asking the question. Had it been in use? A. My father always drove it.

"Q. For what purpose was the car in use before your father went away? A. He always drove it for his own pleasure and for his business. I had never driven the car in my life for my own pleasure.

"Q. State whether or not you ever drove the car before your father went away. A. Yes; I had down to Gardner Junction to do the marketing.

"Q. From whom did you receive directions to drive the car? A. My father."

The above statement comprehends the salient facts brought out by the testimony presented by the plaintiff in support of his complaint. The sole question submitted for decision is, of course, whether the court below was legally authorized upon that testimony to take the case from the jury.

[3, 4] The rules governing the decision of a motion for a nonsuit are well settled and equally well understood. They may, however, with propriety briefly be restated here. "A motion for a nonsuit," says the court in Bush v. Wood, 8 Cal. App. 650, 97 P. 710, "presents a question of law for determination by the court. The motion is tantamount to a demurrer to the evidence, or an objection that, admitting all the proved material facts to be true, said facts do not in legal effect operate in favor of the plaintiff, or, in other words, do not entitle him to the relief asked for by him." And the evidence, on a motion for a nonsuit on the close of plaintiff's case, must be accorded the benefit of its full probative force, and this is true whether the evidence has been erroneously admitted or not. In re Daly, 15 Cal. App. 329, 331, 114 P. 787. The evidence, on such a motion, must be taken most strongly against the defendant. Goldstone v. Merchants' Ice Co., 123 Cal. 625, 56 P. 776.

"Every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor of the contestants. Where evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All the evidence in favor of the contestants must be taken as true, and if contradictory evidence has been given it must be disregarded. If there is any substantial evidence tending to prove in favor of the contestants all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits." Estate of Arnold, 147 Cal. 583, 84 P. 252.

See, also, Estate of Welch, 6 Cal. App. 45, 91 P. 336.

[5] Tested by the foregoing principles, it is clear, from an examination of the testimony herein, that the judgment of nonsuit from which this appeal is prosecuted cannot be upheld. There can be no question that there is evidence which shows that at the time she drove her car into and against the plaintiff, thereby inflicting the injuries upon the latter of which he here complains, Miss Buser was, in driving the car, guilty of gross carelessness. The testimony of her companion riding with her at the time (her own sister) clearly — indeed, unquestionably — supports this statement. She testified, as seen, that she said to her sister (the driver of the car) that she was in a hurry "and my sister put on a little more speed"; that thereupon Miss Buser speeded up the car so that it was then being driven approximately at the rate of 30 miles an hour; that, while the car was being driven at that rate of speed, it was turned to the left or towards the north side of the boulevard, to "go past another car"; and that it was then that their car struck the plaintiff. She further testified, as will be noted, that her sister gave no warning signal of the approach of her car. Thus driving her car, and without sounding any warning, or giving any signal of its approach, on a much used thoroughfare by both motor vehicles and pedestrians, as the evidence indicates was the traffic situation of Santa Monica boulevard in the block in which the accident occurred, constituted, on the part of the driver, not only intrinsic negligence, but negligence per se, or as a matter of law, since the act of commission and the act of omission mentioned were in violation of the express mandates of the statute. See section 20a of the Motor Vehicle Act, 1915 (St. 1915, p. 406) regulating the rate of speed over highways and the degree of care required in the operation of motor vehicles with respect to the right of pedestrians, and section 12 of same act, requiring motor vehicles to be equipped with sufficient warning apparatus, the same to be used for the purpose of giving warning to pedestrians, etc., of the approach of such vehicles. But the trial court itself, having, as shown above, intimated that there was evidence showing or tending to show that the driver of the car was guilty of negligence in

its operation at the time the plaintiff was struck, further consideration of that phase of the case may be dispensed with.

[6, 7] This leaves for consideration the principal grounds upon which the court seems to have predicated the order or judgment of nonsuit. The first of these involves the question whether there is evidence showing or sufficiently tending to show that, when the accident occurred, Miss Buser, in the operation of the car, was acting as the agent of and for the defendant. That there was some evidence to that effect there can be no manner of doubt, as must be manifest from the testimony, hereinabove reproduced, of Miss Buser herself. She stated, as will be observed, that she was the only member of the family that could drive an automobile, and that her stepfather (defendant) told her when he left for other parts to drive her mother about and do anything for the household that might be necessary, or words to that effect. She further testified, as will be noted, that when the accident occurred she was on the way to the telephone office to attend to some business for the defendant in connection with the telephone at his (defendant's) home, the phone being out of order, and also to pay his telephone bill. She said that, while she had some other matters to attend to, her "first mission" was to attend to the telephone business for the defendant. There was, it is true, some conflict in the testimony regarding the business that she was first to attend to, Mrs. Schuyler having testified that she was first to take her to her (Mrs. Schuyler's) attorney's office; but, as has been above pointed out, the evidence on a motion for a nonsuit must be construed most strongly in plaintiff's favor, and, so construing the testimony upon the question of agency, it is clear that there was sufficient proof to preclude any right in the court to grant a nonsuit against plaintiff upon the ground that there was not evidence supporting that element of the case as it is presented here. In other words, the testimony of Miss Buser to the effect that her first mission was to attend to the matter of paying her stepfather's telephone bill was sufficient to raise the inference that, when operating the machine at the time of the accident, she was acting as the agent of her stepfather. This "inference would be sufficient prima facie to support the verdict herein in the absence of substantial proof, sufficient to destroy such inference." Ransford v. Ainsworth, 196 Cal. 279, 281, 237 P. 747, 748, and the cases cited therein. In Fahey v. Madden, 56 Cal. App. 593, 206 P. 128, the question of agency in cases of this character was considered by Presiding Justice Finch. Therein it was said:

> "It is conceded that such agency may be inferred from proof of Madden's ownership of the car and Boen's operation thereof with the knowledge and consent of the former."

In that case the appeal was from an order granting defendant Madden's motion for a new trial, the action being for personal injuries alleged to have been caused by the negligence of defendant; Madden being the owner of the machine, and the defendant Boen the operator of it at the time of the infliction of the injuries complained of. A different situation would, of course, be presented on such an appeal from that presented here. On a motion for a new trial, it is within the legal province and discretion of the trial court to say whether the defendant has presented evidence sufficient to overcome the inference of agency raised by plaintiff's proof of the ownership of the automobile by one party and the operation of the machine by another party with the knowledge and consent of the owner; but, on a motion for a nonsuit, any proof received tending to overcome such inference is to be disregarded. The case of Spence v. Fisher, 184 Cal. 209, 212, 193 P. 255, 14 A. L. R. 1083, contains an interesting discussion of the question as to the circumstances which would impute to the owner of an automobile liability for the negligence of another driving such automobile for the owner upon the theory that the driver was, when the injury occurred, acting as the agent for the owner. That case may be read with profit.

[8-10] The conclusion of the trial court that the plaintiff, at the time he received his injuries, was guilty of contributory negligence, or, in other words, that his injuries were proximately caused by his own negligence, is entirely without support. It has often been said that:

> "It is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown." Seller v. Market-Street Ry. Co., 139 Cal. 268, 271, 72 P. 1006; Zibbell v. Southern Pac. Co., 160 Cal. 237, 241, 116 P. 513; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 343, 208 P. 125; Rosenbloom v. Southern Pac. Co., 59 Cal. App. 102, 111, 210 P. 53; Wing v. Western Pac. R. R. Co., 41 Cal. App. 251, 257, 182 P. 969; Carey v. Pacific Gas & Electric Co. (Cal. App.) 242 P. 97, 99.

As will be noted, from an examination of the testimony of the plaintiff and others, as hereinabove given, the plaintiff, having, as he was crossing the boulevard, looked toward the west and seen that it was safe for him to proceed so far as vehicles traveling that direction were concerned, proceeded until after he had crossed the center of the street or the space between the east-bound and the west-bound car tracks, and thereupon turned his face to the east to see if any car was approaching from that direction; that he saw automobiles proceeding westward from the east, and regulated his movement so as to escape contact with them; that he had proceeded from the point between the east and west bound car tracks but a short distance when he was struck by defendant's machine. Of course, it was the duty of plaintiff to exercise that degree and amount of care in crossing or attempting to cross the boulevard which the usual traffic conditions of that thoroughfare required. And this, there is testimony to show, was what he did. As was said in Towne v. Godeau, 70 Cal. App. 148, 153, 232 P. 1010, 1011, so it is true in the instant case:

> "Having satisfied himself of the absence of danger from that direction [from the west in this case], it was natural for him [plaintiff] to look to the right for east-bound [west-bound here] vehicles. He had the right to assume that no vehicle would approach him from the left beyond the medial line of the intersecting street."

Considering all the testimony, we are satisfied that the question whether the plaintiff was guilty of negligence contributing proximately to his injuries was not one of law to be determined by the court, but one which it was the duty of the court to leave to decision by the jury.

[11] The plaintiff objects to a ruling of the court denying him the right to prove, as an element of the negligence of the driver of the automobile which did the damage complained of, that the brakes of said automobile were not in good condition. The witness Harmon, it appears, after the plaintiff was struck down, used the car driven by Miss Buser and which struck plaintiff, in which to take him (plaintiff) to a hospital. Harmon drove the car to the hospital. He stated that he had occasion to use the brakes of the car at that time, and he found them in "very poor condition," explaining that "on one occasion, in turning out from Santa Monica to the north on Gower street to go to the Hollywood Community Hospital," he "practically went over the curb with the front right wheel turning to the left up on the curb." On motion of counsel for the defendant, that testimony was stricken out on the ground it was not within the issues as made by the complaint. The ruling was erroneous. As seen, paragraph V of the complaint alleges that the car that struck plaintiff was, at the time, "being operated in a reckless, negligent, and careless manner, and in violation of the laws of the state of California." Section 14 of the Motor Vehicle Act provides that "all motor vehicles must be provided at all times with adequate brakes kept in good working order." The allegation referred to obviously responds to that provision of the act. It has uniformly been held in this state that in cases of this character proof is admissible under a general allegation of negligence that the operator of the automobile at the time the injury was committed was operating the machine in violation of the statute regulating automotive traffic over the roads and highways of the state. In other words, the cases hold where the negligence is charged in general terms it it sufficient, although the complaint does not state the particular acts constituting the negligence imputed to the defendant in the operation of the automobile.

> "No principle seems to be better settled in this state than that 'negligence may be charged in general terms; that is, what was done being stated, it is sufficient to say it was negligently done, without stating the particular omission which rendered the act negligent.'" Wiley v. Cole, 52 Cal. App. 617, 199 P. 550; Smith v. Buttner, 90 Cal. 99, 27 P. 29; Stein v. United Railroads, 159 Cal. 368, 113 P. 663; Bergen v. Tulare County Power Co., 173 Cal. 709, 161 P. 269.

See, also, Scragg v. Sallee, 24 Cal. App. 133, 140 P. 706.

The judgment appealed from in civil No. 3132 and the judgment appealed from in civil No. 3133 are, and each of them is hereby, reversed.

We concur: FINCH, P. J.; PLUMMER, J.

200 Cal. 410

In re THOMPSON'S ESTATE.

THOMPSON v. WATKINS.

(S. F. 11458.)

(Supreme Court of California. Feb. 11, 1927.)

1. Wills 🔑270—Minor legatees, residents of county in which petition for probate of will was filed, must be served with copies of written grounds of opposition (Code Civ. Proc. § 1312).

Minor children who were legatees under will and residents of county in which petition for its probate was filed should have been served with copies of written grounds of opposition to probate of will, under Code Civ. Proc. § 1312.

2. Wills 🔑157—Confidential relationship and opportunity to influence testator are not sufficient to overthrow will, without showing beneficiary's actual participation in making will.

Existence of confidential relationship and opportunity to influence testator by reason of his affection for beneficiary, as evidenced by numerous letters, were not sufficient to overthrow will without showing of actual participation by beneficiary in making of will.

3. Wills 🔑166(4)—Beneficiary's reply of "all right" to testator's statement that he intended to change will was no evidence of her participation in making of will.

Beneficiary's reply of "all right" to testator's statement that he intended to make a change in his will and would mail another will to beneficiary was no evidence of beneficiary's participation in making of will.

4. Wills 🔑82—Unnatural provisions in will made by testator of sound and disposing mind do not destroy its potency as testamentary act.

Unnatural provisions in will do not destroy its potency as testamentary act, if will was freely and voluntarily executed by testator of sound and disposing mind.

5. Wills 🔑166(1)—Jury held not entitled to infer that beneficiary did not narrate all conversation about will and supplement evidence by its imagining.

Jury was not at liberty to decide that beneficiary did not narrate all conversation about will, and that more was said upon that subject, and thus supplement evidence by its own imagining.

6. Wills 🔑297(1)—Testator's statements as to execution of olographic will questioned as forgery held admissible to prove existence of will before testator's death.

Statements of testator to beneficiary and others concerning olographic will questioned as a forgery *held* admissible to establish existence of document prior to testator's death.

In Bank.

Appeal from Superior Court, Alameda County; M. C. Chapman, Judge pro tem.

Proceedings for admission of the will of J. Goodwin Thompson, also known as James Goodwin Thompson, deceased, to probate. Contested by Agenes Boyd Thompson. The superior court refused to admit the will to probate, and Gail Watkins, proponent, appeals. Reversed.

Casper A. Ornbaun and Preston & Duncan, all of San Francisco, and Albert E. Carter, of Oakland, for appellant.

Philip M. Carey, of Oakland, Law T. Freitas, of Stockton, Sullivan & Sullivan and Theo. J. Roche, of San Francisco (Henry G. Tardy, of Oakland, of counsel), for respondent.

FINCH, Justice pro tem. The record in this case does not show whether the minor beneficiaries under the will referred to in the following opinion, who were residents of the county in which the proceeding was instituted, were served with a copy of the written grounds of opposition to the probate of the will or that they appeared in the proceeding. The cause was tried by a judge pro tempore, agreed upon in writing by the proponent of the will and the contestant, it not appearing that the said minor beneficiaries were parties to such agreement. An interesting question has arisen as to whether the agreement of only a part of the persons interested in the estate is sufficient to give the judge pro tempore jurisdiction to try the cause. It is not necessary, however, to decide this question, because the judgment must be reversed on other grounds.

Appellant contends that the court was without jurisdiction to render judgment because of failure to serve such minor heirs. This point was not raised in the trial court. If the objection had been made in the trial court, that court doubtless would have made an appropriate order bringing in the minor beneficiaries, and such beneficiaries should be brought in before the retrial of the cause. The following parts of the opinion of the District Court of Appeal, written by Mr. Presiding Justice Langdon, are adopted as the opinion of this court:

"This appeal is by the defendant Gail Watkins, who was a beneficiary under a purported will of Dr. J. Goodwin Thompson, which will she produced and offered for probate. The mother of Dr. Thompson, Agnes Boyd Thompson, contested the probating of this will, alleging as grounds for the contest: First, that Dr. Thompson was mentally incompetent at the time of the making of the purported will; second, that it was not entirely written, dated, and signed in the handwriting of the testator; and, third, that if said will were executed by decedent, its execution was procured by fraud and undue influence on the part of Gail Watkins, the proponent of the will.

"During the trial the issue of mental incompetency was withdrawn, testimony directed to that issue was stricken from the record, and the case went to the jury upon the other two grounds of contest.

"* * * The purported will * * * reads as follows:

" 'S. P. Limited No. 2, Sept. 26/23.

" 'This is my last will & testament

" 'My residence and grounds between Webster and Franklin Sts. to go to Gail Watkins also the mortgage on her father's ranch. This is done for services rendered & her close attention to duty. The rest of my property after all debts are paid to go equally to Grace's & Bobs (my sister & bro) children on the youngest becoming of age. If any other proven claimant, the sum of $10.

" 'I hereby appoint Gail Watkins my Guardian. Dr. J. Goodwin Thompson.'

"It is apparent that a judgment declaring the foregoing document not to be the last will and testament of Dr. Thompson and denying the petition to have it admitted to probate affects, adversely, not only the rights of Gail Watkins, but the rights of the nieces and nephews of the testator, the residuary legatees. The petition alleges 'that the names, ages, and residences of the legatees and devisees of said deceased, so far as known to the petitioner, are: Boyd Eubank, aged about 13 years, and Rule Eubank, aged about 11 years, children of Grace Eubank, a sister of said deceased, residing with their mother at 1027 Fifty-Ninth street, Oakland, Cal.,' etc.

[1] "The sister of deceased, Mrs. Grace Eubank, was a witness for the contestant, and stated that she had two minor children and resided in Oakland, Cal. These minor children, being legatees under the will and residents of the county in which the petition for its probate was filed, should have been served with copies of the written grounds of opposition to the probate of the will, under the provisions of section 1312, Code of Civil Procedure. There is no showing in the record of an appointment of a guardian to represent the interests of these minors under the provisions of section 372 and 373, Code of Civil Procedure. * * *

"This case well illustrates the possibilities of injustice being done through the failure to have the interests of minors legally represented. Here the proponent of the will was not a blood relative of the deceased. The will left her only a portion of the estate, the balance to minor nephews and nieces of testator. The aged mother of testator, as his only heir at law, was the contestant. The mother of two of the minors who were legatees under the will and the father of the other two minors, also legatees, sister and brother respectively of decedent, testified for the contestant and assisted to their utmost in overthrowing the will and depriving their minor children of their rights thereunder. These two witnesses were the natural guardians of these children, and their desires and interests seem to have been opposed to the interests of these children. * * *

"As we have indicated, the case went to the jury upon two questions; one was the undue influence exercised upon testator. After the contestant had rested her case, the attorney for the proponent of the will made a motion for a nonsuit as to the issue of undue influence, calling attention to the absence of any evidence in the record that any undue influence had been exerted to cause the making of the will. The testimony was undisputed that proponent had known decedent for several years, during most of which time she assisted him in his office as office nurse. She was engaged to be married to him, according to her testimony, and had drawn no salary for her services in connection with the doctor's business. While he was in New York in 1922 he made and executed a will substantially like the one offered for probate. There is no evidence that Miss Watkins exercised any control over this testamentary act. In September, 1923, Dr. Thompson went to Chicago. Miss Watkins and her sister accompanied him to the train. Both women testified that the doctor stated to Miss Watkins that he was going to mail her another will; that he wished to make a slight change, as he had failed to appoint any one to take charge of his estate in the event of his death. Within a day or two after his departure Miss Watkins received the document in controversy through the mails. It was substantially the same as the prior will, with the addition of the provision for a 'guardian.' It was accompanied by a letter. Both were written upon the stationery of the railroad company. This will was placed by Miss Watkins in the doctor's safe, together with the former will made in New York. During his last illness the doctor asked for the two wills, reread them and tore up the earlier one and handed the other back to Miss Watkins, and she again placed it in the safe.

[2] "True, contestant established the existence of a confidential relationship, and, probably—to present the matter most strongly in her favor—she established the ability on the part of Miss Watkins to influence the doctor by reason of his affection for her, as evidenced by his numerous letters over a period of years. But these elements are not sufficient without a showing of actual participation by the beneficiary in the making of the will. Estate of Baird, 176 Cal. 381, 168 P. 561; Estate of Anderson, 185 Cal. 700, at pages 707 et seq., 198 P. 407; Estate of Bryson, 191 Cal. 521, 541, 217 P. 525; Estate of Wall, 187 Cal. 50, 200 P. 929; Estate of Clark, 170 Cal. 418, 149 P. 828; Estate of Lavinburg, 161 Cal. 536, 119 P. 915.

[3] "The court, in denying the motion for nonsuit, gave as its reason that Miss Watkins was a stranger to the blood of the testator; that she benefited by the will; that a confidential relationship existed between her and the testator, and further said: 'So far as I now recall the testimony, there was some participation by Miss Watkins in the preparation of the will. If I am not mistaken, she discussed with him the question of making a will, on the very day that this will is said to have been executed and, as I recall it, at the Sixteenth Street depot, in this city, when he was about to take a train for Chicago, I believe, or some place in the East. Now that is some evidence of participation. It may be slight.' The evidence referred to has been mentioned heretofore. To be exact, it is as follows: 'He (decedent) said, "I am going to mail another will to you." He said, "I want to make a little change in the other one," and I said, "All right," and he said, "I failed to appoint any one to take charge of my estate in the other will in case of my death."' The sister of Miss Watkins, who was present, gave substantially the same account of this conversation.

[4] "This reply of 'all right' made by Miss Watkins to the doctor's statement that he intended to make a change in his will, we think, was no evidence of participation on her part in the making of the will. The respondent, in response to this attack upon the judgment, argues that the undue influence was shown by circumstantial evidence, instancing what she terms the unnatural provisions of the will; that the testator was not in good health; that a confidential relation existed between the testator and Miss Watkins. While unnatural provisions in a will do not destroy its potency as a testamentary act if the will was freely and voluntarily executed by a testator of sound and disposing mind, it might be pertinent to remark that in this case the provisions of the will do not seem as unnatural as respondent contends. The only heir at law of the doctor was his mother, who was 84 years of age and who had sufficient property for her support during her life. His brothers and sisters were, apparently, of full age and had families of their own. He left the bulk of his estate to their minor children. Gail Watkins had worked with him in accumulating his property during a period of four or five years, and, according to her testimony, had received no salary. His numerous letters to her show his constant thought of her and her welfare. His statements to others indicated his appreciation of what he considered her untiring service in his behalf, and the will itself expresses this idea. According to the testimony of Miss Watkins and of others, she and the doctor were to have been married. In view of all these facts, it does not seem unnatural that the doctor, having no one dependent upon him, should make a modest provision for the support of this woman who was apparently his most confidential and closest associate.

"While it is in evidence that the doctor had some weakness or disease of the heart which caused illness from time to time, there is nothing to indicate that his mind and will were impaired. * * * All the authorities herein cited emphasize the rule that a confidential relationship and opportunity to influence testator are not sufficient to overthrow a will, but that there must be proof of the exercise of that influence to actually overpower the mind and will of the testator at the moment of executing the will.

[5] "Respondent urges that the jury was at liberty to decide that Miss Watkins did not narrate all the conversation about the will and that more was said upon that subject. We know of no rule of law by which a jury may thus supplement the evidence by its own imaginings. Miss Watkins also testified that the doctor had given her a diamond ring on one occasion, and respondent makes much of this, saying that the jury had a right to infer (without any evidence to that effect) 'that she had importuned this gift from him, and if she importuned the diamond ring, * * * she also importuned the execution of a will. * * *' Cases are not to be so manufactured by juries, and the necessity of resorting to inference upon inference against the evidence in the record in order to warrant the submission of this issue to the jury demonstrates the error of the ruling upon this question, and that the motion for nonsuit should have been granted.

"Although the appellant points out that the two special verdicts submitted to the jury were inconsistent, one being that the will was not written, dated, and signed by the testator, and the other being that it was procured by undue influence, it is not necessary to go into that objection, but for the purposes of this appeal we may take the position of the respondent—that if the evidence sustains the verdict upon either issue, the judgment should stand. * * * Conceding that there was some testimony for the contestant upon this [the former] issue which would warrant a finding by the jury in her favor, certain erroneous rulings upon evidence relating to this issue, which must have prejudiced greatly proponent's case, demand a reversal of the judgment, even though it be considered as based on this issue alone.

[6] "The court refused to permit proponent to state the conversation she had with testator upon his return from Chicago, which conversation it is claimed would have shown the existence of the will. She was asked: 'What, if any, conversation did you have with Dr. J. Goodwin Thompson upon his return after you

went to the train with him on September 26, 1923, about the will?' This question was objected to, and proponent's attorney stated that its object was to show that the will was in existence and that the doctor saw the will; that it was not an attempt to prove the contents of the will or any of the circumstances of the will. The court refused to admit this testimony, on the ground that it was hearsay.

"During the examination of proponent's sister, the court refused to admit testimony regarding remarks made by testator upon the subject of his will to establish the fact that a will was in existence. These rulings are in direct conflict with the cases of Estate of Thompson, 185 Cal. 763, 767, 198 P. 795; Estate of Sweetman, 185 Cal. 27, 195 P. 918. Whatever doubt may have existed in the past about the application of the rule of these cases where the issue is forgery, is set at rest by the recent case of In re Estate of Morrison, 198 Cal. 1, 242 P. 939, in which our Supreme Court considers most carefully the authorities upon all phases of the general subject and concludes with the adoption of the rule in the case of Hoppe v. Byers, 60 Md. 381, which it summarizes as holding that declarations of a testator that he had made a will and had named therein the proponent thereof as his sole beneficiary were admissible in evidence as tending to show the existence of such a document prior to the death of the decedent. The only real issue between the parties in this action was the genuineness of the purported will —whether or not it was written by the testator. The issue in the Morrison Case was the same as the issue upon which the proponent in this case sought to introduce the excluded testimony, i. e., forgery. The relevancy to that issue of declarations of the testator regarding the disposition of his property is discussed in the case of Adams v. Ristine, 138 Va. 273, 304, 122 S. E. 126, 135 (31 A. L. R. 1413), wherein it is said:

" 'At the request of the contestants, and over the objection of the proponents, the court gave the following instruction: "The court instructs the jury that statements of Lewis M. Adams as to how he intended to dispose of his property at his death go only to the question of the probability or improbability of his making the disposition of his property set forth in the alleged will, and does not affect the question of whether said alleged will is in the genuine handwriting of Lewis M. Adams or not."

" 'It is said by counsel for contestants that: "This instruction was intended to tell the jury that if they believed that the alleged will was not in the genuine handwriting of Lewis M. Adams, any statements made by him before his death, as to how he intended to dispose of his property, would not be sufficient to justify a verdict in favor of the proponent of the alleged will."

" 'But the instruction does not express that intention. It says that the statements of the testator as to the intended disposition of his property do not affect the question of whether or not the will was in the handwriting of Lewis M. Adams, when in fact it might have a very serious effect. If the jury thought that the evidence as to the execution of the will left the question in doubt, they would probably give very serious consideration to the statements of the testator as to his intended disposition of his property.

" 'In Samuel v. Hunter's Ex'x, 122 Va. 636, 95 S. E. 399, it is said that: "Such declarations, standing alone, are not admissible as direct evidence to prove or disprove the genuineness of the will; but that in all cases where its genuineness has been assailed by other proper evidence, the declarations are admissible as circumstances, either to strengthen or weaken the assault, according to their inconsistency or their harmony with the existence or terms of the will"—thus showing not only the admissibility of such testimony, but its influence.

" 'The instruction was at least misleading, if not positively erroneous, and it was error to give it.'

"In the instant case, various declarations of the testator bearing upon the genuineness of the will, in addition to those just discussed, were either disallowed, or, if admitted, deprived of their force, so far as the genuineness of the will was concerned, by the instructions of the court.

"There are numerous other objections urged by appellant regarding rulings upon the admissions of evidence of more or less merit and importance, but it is unnecessary to discuss them all."

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

PRESTON and LANGDON, JJ., being disqualified, do not participate in the foregoing opinion.

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200 Cal. 384

PETER R. GADD, Inc., v. WORKMAN et al., City Councilmen. (S. F. 12183.)

(Supreme Court of California. Feb. 8, 1927.)

Municipal corporations ⚷493(1)—Council's denial of appeals from street assessment held not final order exhausting jurisdiction justifying mandamus to compel confirmation of assessment (Improvement Act 1911, § 21, as amended by St. 1923, p. 113, § 1).

Where city council, after hearing, denied appeals of property owners from street assessments, under improvement Act 1911 (St. 1911, p. 730, as amended) and minutes showed council's intent to further consider validity of assessment before transmitting assessment to board of public works with its official certificate of approval, mandamus to compel council to confirm assessment on the ground that it had exhausted its jurisdiction, and that its decision was so far final, under section 21, as amended by St. 1923, p. 113, § 1, as to require transmission of assessment to board, will be denied.

In Bank.

Application for writ of mandate by Peter R. Gadd, Inc., against Boyle Workman and others, as City Councilmen of the City of Los

Angeles, to compel confirmation of assessments for street improvement. Writ denied.

Anderson & Anderson, Joseph H. Call, and Asa V. Call, all of Los Angeles, and Heller, Ehrman, White & McAuliffe and James L. Atteridge, all of San Francisco, for petitioner.

Jess E. Stephens, City Atty., Lucius P. Green, Asst. City Atty., Herman Mohr, Deputy City Atty., Redwine & Redwine, and Andrew Park, all of Los Angeles, amicus curiæ, for respondents.

RICHARDS, J. The petitioner herein has applied for a writ of mandate wherein it seeks to compel the respondents, the city council of the city of Los Angeles and the members thereof, to confirm a certain assessment made in the course of a certain street improvement proceeding within what is known as the Adams Street and Smiley Drive improvement district, which improvement had been initiated and thus far carried forward under and in pursuance of the "Improvement Act of 1911" (St. 1911, p. 730) and its subsequent supplementary or amendatory enactments. Said public improvement had been initiated through the adoption by the respondents of an ordinance of intention on the 15th day of May, 1925, and had proceeded thereunder up to the time when the assessment therefor had been filed with the city clerk and the notice to property owners required by said original and amendatory acts had been given by said official, fixing the 12th day of July, 1926, as the time when property owners would be heard before said city council upon their appeals from said assessment and objections to the confirmation thereof. The regularity of the proceedings thus far taken in the course of the progress of said improvement and in the levy of said assessment is not an issue in the proceeding before us, since the petitioner herein is here insisting that the respondents, by their action in denying the appeals of the property owners at the hearing upon said last-named date, have thereby confirmed said assessment, and hence of necessity the regularity of the proceedings upon which it was predicated. The respondents are not here making any contention as to the irregularity of the proceedings upon which said assessment was based, but only that the regularity and legality of said assessment has not yet been finally determined. The sole question presented upon the hearing herein relates to the action of said city council taken upon the hearing before it upon said last-named date with respect to the objections and appeals of the property owners then presented and to the finality of its action in that regard.

Section 21 of the Improvement Act of 1911, as amended in 1923 (St. 1923, p. 113, § 1), provides for the making and filing with the city clerk by the street superintendent or city engineer of his assessment made in the course of the improvement in question, and provides for giving notice of the filing of such assessment by said official to all interested parties in order that those who feel themselves aggrieved by the burden of said assessment or by any errors or informalities in the proceeding upon which the same has been based may appeal to the city council by briefly stating in writing the grounds of their said appeal. At the time fixed in said notice for the hearing or hearings upon such appeals said section provides that the city council shall proceed to hear and determine the same. Said section further provides that—

> "When no appeal is taken or when the orders and determinations of the council upon appeal have been complied with, and the council is satisfied with the correctness of the assessment, thereupon the street superintendent shall attach thereto a warrant bearing date of said order of said city council."

Pursuant to the provisions of said act said city council proceeded to hold the meeting provided for in said notice and to hear the appeals and objections of the property owners then or theretotofore presented and filed. There were a large number of such appeals, wherein many and various reasons were presented by the respective property owners objecting to such assessment. The president of the city council instructed the clerk to proceed with the reading of these separate appeals, and as each appeal was read a hearing was had thereon, and after each of such hearings a formal motion was made by one or other of the members of said city council that said appeal be denied, which motion was in each case adopted. The hearing upon these numerous and separate appeals occupied the morning session of the city council, and also, after a brief recess, a considerable portion of the afternoon session of that body. The minutes of the meeting of the city council upon this occasion show that after each and all of said appeals had been separately heard, and after a formal motion had been made in each case denying the same, and "after a full and fair opportunity had been given to all persons desiring to be heard, the president stated that the matter was now before the council for its consideration." Thereupon, as the minutes show, the inspector of public works "was asked to address the council on the matter under consideration." The assistant city attorney also addressed the council and "a general discussion was thereupon entered into by all members of the council, and at the conclusion of the discussion Mr. Randall moved, seconded by Mr. Sparks, that action on the confirmation of assessment for the improvement of Adams between Thirteenth avenue and Moynier lane, and portions of other streets, as contemplated by ordinance of intention No. 51862

N. S. be deferred until the meeting of the council to be held Tuesday, July 27, 1926, at the hour of 10:30 a. m., which motion was adopted by the following vote." The said meeting of the council then adjourned. At the meeting of the council held on July 27, 1926, as its minutes show, the further hearing in confirmation of assessment was continued until August 3, 1926, at which latter meeting counsel for the petitioner herein appeared and presented a written demand for the confirmation of the assessment, whereupon a motion was made and carried that further consideration upon the hearing and confirmation of said assessment be continued until August 10, 1926. The petition for a writ of mandate herein was filed in this court on August 2, 1926.

It is the contention of the petitioner that the city council of Los Angeles by its action in formally moving and carrying a motion to deny each and every one of the appeals presented to and heard before it upon the 12th day of July, 1926, has so far fulfilled the requirements of section 21 of the Improvement Act and its amendments above referred to as to have completely exercised its jurisdiction in that regard, and that, having done so, its determination of said appeals was so far final as to require the transmission of said assessment by said official body to the board of public works of the city of Los Angeles, together with a certificate showing its aforesaid action taken in the premises in the way of the denial by it of each and all of said appeals, and that such action on its part, being administrative in character, may be compelled by the mandate of this court.

We are unable to agree with this contention, both for the reason that by the terms of section 21 of said Improvement Act as amended in 1923 and as above quoted the city council as a prerequisite to its final determination as to the validity and correctness of the assessment must be satisfied therewith whether or not appeals have been taken, and hence of necessity must be entitled to hold the matter of the approval of such assessment under investigation and consideration until it shall have been so satisfied, and for the further reason that the undisputed record embraced in the official minutes of the city council discloses that at and in the course of its meeting upon the above date, and as an immediate part of its consideration of the very matter then before it, the council did determine, notwithstanding its action upon the appeals which were then presented and heard, to give such further consideration to the matter of the validity and correctness of said assessment as might lead to a later determination of its satisfaction with the same and to the propriety of transmitting to the board of public works said assessment with the official certificate of its approval thereof. The minutes of the city council when read as a whole clearly point to this and to no other conclusion. The cases cited by the petitioner as supporting its contention as to the finality of the action of the city council in the denial of the appeals presented before it do not support its present insistence as to the finality of the action of the council in denying said appeals, since in each of the cases cited it is made to appear that the action of the official body upon said appeals and upon the validity of the assessment in each case was completed at the time and meeting at which such action was taken, and that it was some later attempt to reassume a jurisdiction which had been thus completely exercised which led to the proceedings and ruling in each of said cases. In the instant case, however, we are clearly of the opinion that the jurisdiction with which the city council was invested by the terms of section 21 of the Improvement Act above quoted had not been fully exercised when this proceeding was instituted, and, so far as the record herein discloses, has not yet been so exercised.

It follows necessarily that the petition for a writ of mandate herein must be denied, and it is so ordered.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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200 Cal. 400

In re MORGAN'S ESTATE. (S. F. 12092.)★

(Supreme Court of California. Feb. 10, 1927. Rehearing Denied March 10, 1927.)

1. Wills ⚷133—Where signing of olographic will is not in customary place, it must be established upon face of instrument that it is complete.

Where signature of testator in olographic will is not in customary place at end of instrument, it must be established upon face of offered instrument that it is complete and executed document.

2. Wills ⚷133—Olographic will beginning, "Last will and testament of Ynez Morgan," but not signed at end, held complete and executed.

Olographic will beginning, "Last will and testament of Ynez Morgan," and stating, "I, Ynez Morgan, hereby will," but not signed at end of instrument, *held* to show on face as whole that it was a complete and executed document.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Application by Mrs. A. A. Prior for the probate of the will of Ynez Morgan, deceased. From an order admitting the will to probate, Harry D. Morgan, contestant, appeals. Affirmed.

★Rehearing denied.

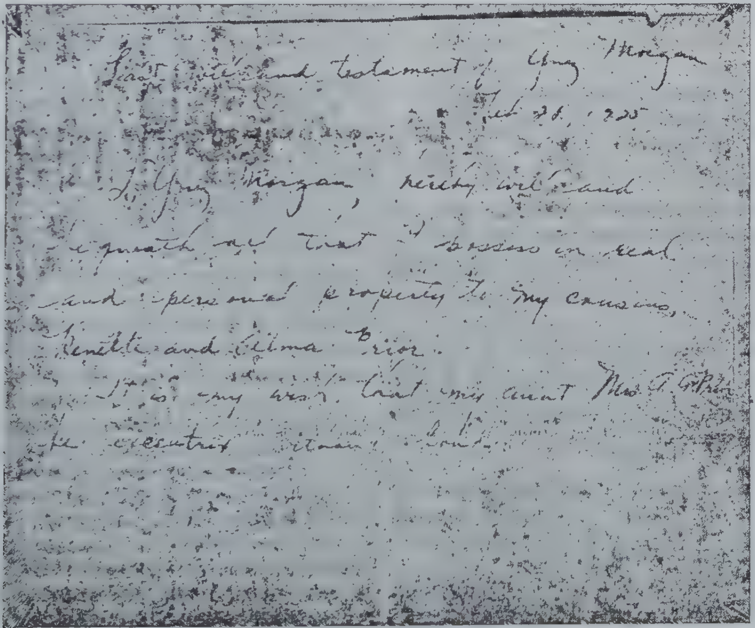
Sapiro & Hayes, of San Francisco, for appellant.

Norman E. Malcolm, of Palo Alto, for proponent and respondent.

Egerton D. Lakin, of Palo Alto, for guardian of minor, legatees, and respondent.

WASTE, C. J. Ynez Morgan died leaving an instrument testamentary in character. After a contest, the probate court found it to be a valid olographic will, entirely written, dated and signed by the testatrix, and made its order admitting the document to probate as the last will and testament of the decedent. From that order this appeal is taken.

The purported will, made ten months prior to the death of the decedent, was found in her writing desk among her papers. No signature appears at the end of the document, which is entirely in the handwriting of the decedent. The name, Ynez Morgan, appears twice in the instrument, and the only question before the court on this appeal is whether or not the decedent, by writing her name in either, or both, of said places, thereby "signed" the will. A photostatic copy of the document is here reproduced:



Last will and testament of Ynez Morgan

Feb 21, 1925

I, Ynez Morgan, hereby will and bequeath all that I possess in real and personal property to my cousins, Lenette and Elma Prior.

It is my wish that my aunt Mrs. T. G. Prior be executrix without bond.

[1] This court has, upon a number of occasions very recently, been called upon to consider the nature of the evidence permissible and sufficient to establish the due execution of an olographic will, where the signing thereof by the testator is not in the customary place at the end of the instrument. The conclusion reached and adhered to in the decisions is that it must be established upon the face of the offered instrument that it is a complete and executed document; that notwithstanding that the usual place of signing, and so of evidencing due execution and completeness, is at the end of the instrument, the signature of a testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and on the instrument itself. Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778. As stated in another case:

> "The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

Estate of Manchester, 174 Cal. 417, 421, 163 P. 358, 360 (L. R. A. 1917D, 629, Ann. Cas. 1918B, 227).

See, also, Estate of Streeton, 183 Cal. 284, 288, 191 P. 16; Estate of Bernard, 197 Cal. 36, 38, 239 P. 404; Estate of Devlin, 198 Cal. 721, 247 P. 577.

[2] The will here in question makes complete disposition of the property of the decedent and designates the person who shall have charge of the administration of her es-

tate. It in all respects appears to be a completed document, which removes it from one of the objections raised in Estate of Bernard, supra, and other cases. If the words, "Last will and testament of Ynez Morgan," appeared at the end of the will, all doubt that the signature was intended to be and was adopted as the final executing signature in authentication of and in execution of the document as a completed testamentary act would be removed. Looking at the instrument as a whole, we are of the view that, by the use of these words in the beginning of the instrument, it was the intention of the testatrix to thereby execute the document as a will.

So recently has this court discussed this question and reviewed the authorities that nothing further need be added. We are satisfied that the finding of the probate court to the effect that the testatrix duly authenticated and executed the instrument as her last will and testament is sustained by the inferences arising from an inspection of the document itself.

The order appealed from is affirmed.

We concur: SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

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200 Cal. 452

CALIFORNIA NAT. BANK OF SACRAMENTO v. EL DORADO LIME & MINERALS CO. et al. (Sac. 3854.)

(Supreme Court of California. Feb. 17, 1927.)

1. Appeal and error 🔑956(2)—Exceptions, bill of 🔑43(1)—Relief from default in preparing and filing bill of exceptions is within trial court's sound discretion, which will not be disturbed unless clearly abused (Code Civ. Proc. § 473).

Motions under Code Civ. Proc. § 473, for relief from default in preparation, service and filing of bill of exceptions, are addressed to trial court's sound discretion, exercise of which will not be disturbed by appellate court, in absence of clear showing of abuse.

2. Appeal and error 🔑1129—Court is more disposed to affirm order when result compels hearing on merits, which law favors, than when default is allowed to stand.

It is the policy of the law to favor, whereever possible, a hearing on the merits, and appellate court is much more disposed to affirm an order when result is to compel such hearing than when a default is allowed to stand.

3. Exceptions, bill of 🔑40(1)—Statute authorizing extension of time to prepare and serve bill of exceptions must be read with statute limiting extended time allowable without respondent's consent (Code Civ. Proc. §§ 650, 1054).

Provision of Code Civ. Proc. § 650, authorizing preparation and service of draft of bill of exceptions within 10 days after notice of entry of order denying motion for new trial, "or such further time as the court * * * may allow," does not authorize court to grant indefinite extension of time, but must be read in connection with section 1054, prohibiting extension for more than 30 days without adverse party's consent.

4. Exceptions, bill of 🔑40(2)—Relief from default in preparing and filing bill of exceptions, in reliance on void orders extending time, held improperly denied (Code Civ. Proc. §§ 473, 1054).

Appellants, having relied in good faith on void orders extending time for preparing and filing bill of exceptions beyond period authorized by Code Civ. Proc. § 1054, and being apparently unable to complete and present bill within statutory period and authorized extensions thereof, their motion under section 473, for relief from default therein, was improperly denied.

5. Exceptions, bill of 🔑40(2)—Mistake of law is ground for relief from default in preparing and filing bill of exceptions (Code Civ. Proc. § 473).

Mistake of law may be availed of in support of motion for relief, under Code Civ. Proc. § 473, from default in preparing and filing bill of exceptions.

In Bank.

Appeal from Superior Court, Sacramento County; George F. Buck, Judge.

Action by the California National Bank of Sacramento against the El Dorado Lime & Minerals Company and others. Judgment for plaintiff, and, from an order denying defendants' motion for relief from a default in the preparation, service, and filing of a proposed bill of exceptions, they appeal. Reversed and remanded, with directions.

Thos. B. Leeper, of Sacramento, for appellants.

Devlin & Devlin, Hinsdale & Pigott and T. A. Farrell, all of Sacramento, for respondent.

PER CURIAM. This is an appeal by certain of the above-named defendants from an order of the superior court of the county of Sacramento denying a motion for relief under section 473 of the Code of Civil Procedure from a default in the preparation, service, and filing of a proposed bill of exceptions to be used on an appeal from the judgment entered in the above-entitled action.

The judgment herein was entered on May 20, 1925. An order denying a motion for new trial was made on July 1, 1925, and notice thereof served on the appellants on July 3, 1925. Thereafter, and on application, the trial court granted to the appellants certain extensions of time within which they might serve and present their proposed bill of exceptions. When read together, the several orders of the court below extended the appellants' time approximately three months from the last day prescribed by statute (section 650, Code Civ. Proc.) for the preparation and service of a proposed bill of exceptions. On October 6, 1925, the proposed bill was served on the respondent, together with a notice of motion for relief from default in said service. The respondent had previously indorsed a reservation of all objections to service of the proposed bill upon a copy of the last order extending time to the appellants.

A reading of the record and the briefs herein discloses that the appellants' delay in the service of the proposed bill of exceptions is traceable to their reliance upon the orders of the court below extending time therefor and to an asserted "physically impossible" task of completing the proposed bill within the statutory period.

[1, 2] The rule of law is well settled that motions for relief from default under the remedial provisions of section 473 of the Code of Civil Procedure are addressed to the sound discretion of the trial court, and an appellate court will not, in the absence of a clear showing of abuse in the exercise thereof, disturb the action of the court below. It is the policy of the law to favor, wherever possible, a hearing on the merits. Waybright v. Anderson, 253 P. 148. Moreover, an appellate court is much more disposed to affirm an order when the result is to compel a hearing upon the merits than it is when the default is allowed to stand. O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105.

[3] Counsel for the appellants herein undoubtedly proceeded under the erroneous theory that the trial court's jurisdiction and power to grant extensions of time for the preparation and service of a proposed bill of exceptions was without statutory limitation. Section 1054 of the Code of Civil Procedure, however, expressly declares that the court below may not, without the consent of the adverse party, extend time for more than 30 days for the performance of certain acts. It has been repeatedly held by this court that the provision in section 650 of the Code of Civil Procedure, providing that the draft of a bill may be prepared and served within 10 days after notice of entry of an order denying a motion for new trial "or such further time as the court in which the action is pending, or a judge thereof, may allow," does not authorize the court to grant an indefinite extension of time for the preparation and service of the draft, but is to be read in connection with the restriction contained in said section 1054 upon the amount of time which may be allowed by the court. Cameron v. Arcata R. R. Co., 129 Cal. 279, 61 P. 955.

[4, 5] The record herein is such as to indicate that the trial court was inclined to deny the appellants' motion to set aside the default solely, for the reason that said default was the result of a mistake of law upon the part of appellants' counsel; the lower court being of the opinion that it was not "within the power of the court to relieve against the situation that has been so created." In so concluding, the trial court cannot be said to have exercised that discretion vested in it by section 473 of the Code of Civil Procedure. While it was not within the power of the trial court to grant to the appellants herein, without the consent of the adverse party, an extension of time in excess of 30 days for the preparation and service of their proposed bill of exceptions (section 1054, Code Civ. Proc.), nevertheless, having exceeded its jurisdiction by extending the time therefor beyond the statutory limitation and the appellants having in good faith relied on such void orders extending time, the case would seem to fairly come within the remedial provisions of section 473 of the Code of Civil Procedure. The authorities indicate that a mistake of law may be availed of in support of a motion for relief under said Code section, for the provisions thereof are broad enough to include such mistakes within their scope. Waite v. So. Pac. Co., 192 Cal. 467, 471, 221 P. 204. In view of the appellants' reliance on the trial court's orders extending time for the preparation and service of the proposed bill and the apparent inability to complete and present the same within the statutory period and authorized extensions thereof, we are of the opinion that a case is presented which would require the lower court, in the sound exercise of its discretion, to grant the relief prayed for. This being so, the appellants' motion to be relieved from default in the preparation and service of their proposed bill of exceptions was improperly denied by the court below.

For the foregoing reasons, the order appealed from is reversed, and the cause is remanded to the trial court, with directions to grant the relief sought by the appellants herein.

200 Cal. 335

DICKEY v. WALROND et al. (S. F. 11304.)

(Supreme Court of California. Jan. 31, 1927.
Rehearing Denied with Modification,
March 1, 1927.)

1. Descent and distribution 🔑6—Provision of statute, when applicable, designates, not only takers of decedent's property, but proportion in which they take (Civ. Code, §§ 1334, 1386).

Civ. Code, § 1334, where legitimately applicable, makes section 1386 applicable, not only for the designation and description of the takers of property of a decedent, but also for the purpose of fixing the proportions in which each shall take.

2. Descent and distribution 🔑1, 21—"Heirs" means persons entitled or appointed by law to succeed to estate not disposed of by will.

The word "heirs" means persons entitled to succeed to another's property on his death in case of intestacy, or persons appointed by law to succeed to an estate not disposed of by will.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs.]

3. Descent and distribution 🔑52(3)—Husband is "heir" of wife.

Husband, under law of California, is an heir of his deceased wife.

4. Descent and distribution 🔑6—Statute held to designate, in every case, persons meeting description of heirs or heirs at law (Civ. Code, § 1386).

Civ. Code, § 1386, must be resorted to in every case for a designation of persons who meet the description, or who take as heirs or heirs at law of a decedent.

5. Wills 🔑529—Where testamentary disposition is to heirs of any person, provision of statute designating persons meeting such description also controls proportion in which they shall take (Civ. Code, §§ 1334, 1386).

Under Civ. Code, § 1334, providing that a testamentary disposition to heirs of any person, without words of qualification, vests the property in those who would be entitled to it, "according to the provisions of the title on succession, in this Code," resort must be had, in every instance, to section 1386 to determine, not only persons meeting description of heirs, but also the proportions in which they are entitled to take.

6. Wills 🔑435—Wills are construed more liberally than grants or contracts.

Wills are to receive a more liberal construction than grants or contracts.

7. Wills 🔑495—Bequest to "heirs at law" of testator's widow, if she died within life of trust, held direct, and controlled by particular statutes as affecting right of husband by remarriage of testator's widow (Civ. Code, §§ 778, 779, 1334, 1335, 1386).

Where will gave property to trustees to hold until testator's two minor sons should reach age of 21 years, and provided that thereafter testator's wife should take an estate in fee in an undivided one-half of the property, and each son an undivided one-fourth, with further provision that, if testator's wife died during continuance of trust, the undivided part that would have gone to her should go to her "heirs at law," and where testator's widow, after remarrying, died during life of trust, *held* words "heirs at law" were used as words of donation, not of limitation, such that the bequest was direct to heirs at law of widow within meaning of Civ. Code, § 1335, and controlled by sections 1334 and 1386 rather than by sections 778 and 779, as affecting right of surviving husband to take as heir at law of widow.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Heirs at Law.]

8. Wills 🔑634(8)—Testator's widow to whom is devised estate in fee in one-half of trust property after life of trust, held not possessed of vested estate.

Where will created trust to continue until testator's youngest son attained age of 21 years, and provided that testator's widow should then take estate in fee in an undivided one-half of the property, but that if she died during life of trust her interest should go to her heirs at law, *held* widow dying during continuance of trust was not possessed of a vested estate with remainder over to her heirs at law.

9. Wills 🔑608(3)—Under rule in Shelley's Case, ancestor taking estate of freehold, limited by way of remainder to his heirs, or heirs of his body, as a class, is entitled to whole estate.

Under rule in Shelley's Case, when person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.

10. Wills 🔑608(1)—If vested and remainder estates are not both legal or equitable, rule in Shelley's Case does not apply.

For rule in Shelley's Case to be applicable, the vested and remainder estates must both be legal or both be equitable.

Shenk, J., and Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action to quiet title by Frank Fletcher Dickey against E. A. Walrond and another as surviving trustees named in decree of final distribution in the matter of the estate of W. J. Dickey, deceased, and others. From a judgment of the superior court, affirmed by the District Court of Appeals, defendant Frank P. Roberts appeals. Reversed.

Walter H. Linforth and Edwin V. McKenzie, both of San Francisco, for appellant.

Harding & Monroe and A. E. Shaw, all of San Francisco, for respondent.

PRESTON, J. This is an appeal by defendant F. P. Roberts from judgment of the superior court of Fresno county in an action to quiet title to an interest under the will and decree of distribution in the estate of W. J. Dickey, deceased.

The testator, W. J. Dickey, left surviving him his wife, Marchisi Josephine Dickey; two minor sons, William James Dickey, Jr., and Robert Bernard Dickey; also Frank Fletcher Dickey, plaintiff, the son of his wife by a former marriage.

His will provided for certain specific bequests; then that the balance of the property should pass to three executors, as trustees, to be by them held until the two minor sons should reach the age of 21 years; that thereupon the estate in fee should pass as follows: An undivided one-half to his wife and an undivided one-fourth to each son, qualified however, by the following language to wit:

> "In the event of the death of my said wife during the life of this trust, then the undivided one-half part that would otherwise have gone to her shall go to her heirs at law."

The language of the will was carried into the decree of distribution.

After the death of the testator, his widow intermarried with defendant Frank P. Roberts, and thereafter, on January 28, 1923, she died, leaving a last will and testament. The two sons of the trustor were living, and still minors; her own son, Frank Fletcher Dickey, and her husband, Frank P. Roberts, also survived her. Frank Fletcher Dickey thereupon commenced this action to quiet title, including as defendants in his complaint the surviving trustees, Frank P. Roberts, individually and as executor of the last will and testament of Marchisi Roberts, deceased, and said two minor sons.

The trial court made a finding as follows:

> "That as heirs of the said Marchisi Roberts, deceased, the said plaintiff and the defendants, Robert Bernard Dickey, William James Dickey and Frank P. Roberts are the owners subject to the trust hereinafter mentioned in equal shares of the undivided one-half of the property of said W. J. Dickey, deceased. * * *"

Being dissatisfied with the portion so decreed to him, Frank P. Roberts took this appeal under section 953a of the Code of Civil Procedure, claiming that the court erred in applying the rule of per capita distribution, and that it should have applied the rule of per stirpes distribution under section 1386 of the Civil Code.

The disposition of said appeal is controlled and determined by the proper interpretation of section 1334 of the Civil Code as explained by section 1335 thereof, when construed in the light of section 1386, and also sections 778 and 779. The relevant portions of these sections are as follows:

> Section 1334: "A testamentary disposition to 'heirs' * * * of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this Code."
>
> Section 1335: "The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person."
>
> Section 1386: "When any person having title to any estate not otherwise limited by marriage contract, dies without disposing thereof by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this Code and the Code of Civil Procedure, * * * in the following manner. * * *"
>
> Section 778: "A remainder may be limited on a contingency which, in case it should happen, will operate to bridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation."
>
> Section 779: "When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life."

Appellant contends that section 1334 above quoted meets and disposes of the question by requiring full application of section 1386, both as to names of takers under the will and as to the proportion in which each heir shall take. On the other hand, respondent contends that section 1334, by reason of sections 778 and 779, is wholly inapplicable under the facts of the present case, and that section 1386 may be resorted to only for the names or description of the class of individuals who are to take, and that, when said class is ascertained, they necessarily take per capita and not per stirpes.

[1] We entertain no doubt that, in a case where section 1334 legitimately applies, the section makes applicable section 1386, not only for the designation and description of the takers, but also for the purpose of fixing the proportions in which each shall take. This construction is forced upon us by reason of its connection with other sections in the same chapter, and also by the provisions of said section itself, for it provides that, if there are qualifying words, or if the words are words of limitation and not of donation, the property does not vest according to the provisions of the title on succession. This means that in some cases the property will vest under the statute, and in other cases it will not so vest. The query at once arises as to what the difference is between the case where the

property does vest and the case where the property does not vest according to the law of succession.

[2-4] "The word 'heirs' * * * means the persons who would be entitled to succeed at his death to his estate in case of intestacy, by virtue of our statutes relative to succession." Estate of Wilson, 184 Cal. 63, 193 P. 581. See, also, Ginochio v. San Francisco, 194 Cal. 159, 167, 228 P. 428. "The 'heirs' of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will." Hochstein v. Berghauser, 123 Cal. 681, 687, 56 P. 547, 549. See, also, to the same effect, Estate of Watt, 179 Cal. 20, 175 P. 415. The husband under our law is, of course, an heir of his deceased wife. In re Dobbel, 104 Cal. 432, 38 P. 87, 43 Am. St. Rep. 123; Hochstein v. Berghauser, 123 Cal. 681, 687, 688, 56 P. 547. These authorities must be interpreted as meaning that section 1386 is the source in every case for a designation of the persons who meet the description of heirs.

[5] Therefore, since we must resort to section 1386 in every case for the designation of persons who take as heirs at law of a decedent, it must follow that the words, "vests the property * * * according to the provisions of the title on succession, in this Code," mean more than a mere designation or description; otherwise these words must be construed as surplusage. But section 1386 contains only two ingredients, to wit, "designation" and "proportions;" if it means more than mere designation, it must include proportions. In other words, it is impossible to give any meaning to the said phrase if it does not mean that the estate shall vest in the persons designated in the proportions declared in said statute.

Then, too, this question was fairly before the court in the Estate of Watt, supra, where it was said:

> "Under section 1327 of the Civil Code, 'Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention. * * *' It is further provided by section 1334 of the same Code that 'a testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin" of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this Code.' Both sections are directly applicable here. The word 'heirs' is a technical term, and is used to designate 'the persons who would by the statute succeed to the real estate (or, in California, estate of any kind) in case of intestacy.' Clarke v. Cordis, 4 Allen (Mass.) 446, 480. 'The "heirs" of a person,' said this court in Hochstein v. Berghauser, 123 Cal. 681, 687, 56 P. 547, 549, 'are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will.' * * *
>
> "In the will of Mrs. Watts there are no qualifying terms to limit or explain the ordinary meaning of the word 'heirs.' The testatrix says simply that she gives the residue to her heirs. The further provision that it is 'to be distributed to them according to law' only serves to strengthen the conclusion that she was directing that the property should go just as it would have gone under the statute of descent in the absence of any testamentary disposition."

This meaning was emphasized in the second appeal (186 Cal. 102, 109, 198 P. 1036, 1039), where this court again said:

> "By the will of Lydia M. Watts, as has been seen, her property was to go to her heirs. In the former decision in this estate it was expressly held that this meant that it should go to her heirs as they were defined in subdivision 8 aforesaid in the same manner as if she had died intestate. We have no disposition now to revise that opinion, and hold that it goes in some other proportions, especially in view of the precise language of the Code just quoted."

It is not a just comment on the decisions in the Estate of Watts, supra, to say that the phrase "and to be distributed according to law" qualifies the words "to my heirs," for the court expressly held that said phrase but emphasized and made clear the meaning of the preceding one. See, also, Estate of Page, 181 Cal. 537, 538, 539, 185 P. 383. It should also be noted that the courts of practically all of the other states are in accord with this holding, and there is like unanimity among the text-writers.

The case of De Laurencel v. De Boom, 67 Cal. 362, 7 P. 758, is cited as being opposed to the above views. We find nothing in that case that would justify such a claim. There is no conflict between De Laurencel v. De Boom, and the Estate of Watts. The "heirs" mentioned in the De Laurencel will were determined by subdivision 5 of section 1386 of the Civil Code. Descent by the terms of this subdivision, it has been held in estate of Nigro, 172 Cal. 474, 479, 156 P. 1019, should be per capita, and not by right of representation.

[6] The other cases relied upon by respondent are Burke v. Modern Woodmen of America, 2 Cal. App. 611, 84 P. 275, and Cooper v. Wilder, 111 Cal. 191, 43 P. 591, 52 Am. St. Rep. 163, but these cases are not subject in any sense to the provisions of the chapter of the Civil Code upon the interpretation of wills, and, indeed, wills are to receive a more liberal construction than grants or contracts. These cases, too, are earlier expressions of the court without any reference to section 1334, and cannot, therefore, be held to control our action in the case now before us.

[7] Having thus concluded that section

1334 controls in cases where the word "heirs" is unqualified, and is a word of donation as distinguished from a word of limitation, we now pass to an examination of the will before us to ascertain its meaning in the use of the term "heirs at law." In other words, we are to ascertain whether the words "heirs at law," as used in the will before us, are to be construed as words of donation or of limitation; there being no words of qualification in the will.

Section 1335 above quoted furnishes the key to this solution by providing that such words are words of donation and not of limitation, "when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person." At this juncture, we are met by the contention of respondent that, in every case where the rule in Shelley's Case would have applied, the words must be considered words of limitation and not of donation, and thereby exclude the application of section 1334. In other words, in a case where the rule in Shelley's Case would apply, had it not been abrogated, the words "heirs at law" are words of limitation, and, since the abrogation of the rule, are to be held as words of purchase. Therefore, by virtue of such decisions as Barnett v. Barnett, 104 Cal. 298, 301, 37 P. 1049, the words must be held to designate a class only, and, so designating, the class take equally and not per stirpes.

This contention brings us face to face with the question: Was there by this will a vested life estate in the widow, Marchisi Dickey Roberts, with a remainder over to her heirs at law? If so, the words are words of limitation and not of purchase, and the said heirs at law are the designation of a class.

[8] We are unable to place any construction upon said testament that would give to the widow a vested estate, with a remainder over to her heirs at law. The devise was an express trust for a definite period of years, to wit, until the youngest son of the testator should reach the age of 21 years. The trust estate was not measured by the life of either the widow or any of the children. It was measured solely by a definite term of years. Indeed, in this very case the trust continued after the death of the widow, and the full measure of the right of the widow during the life of the trust was to compel the performance by the trustees of their duties thereunder, and to secure for herself a portion of the income thereof provided for her in the will. She was in no sense a life tenant. The most that her estate could be during the life of the trust was an equitable one for the period thereof, and perhaps for such less time as she might live.

In Hunt v. Hunt, 124 Mich. 502, 83 N. W. 371, the court had before it a clause in a will reading as follows:

> "I do hereby will, devise, and bequeath, to my executors, hereinafter named, and to the survivor of them, my farm * * * in which Mrs. Henry Hunt, widow, has a life estate, in trust, however, for the following purpose, viz.: To sell and dispose of the same as soon as convenient after the death of Mrs. Henry Hunt and the termination of said life estate, and invest the proceeds * * * and pay over, as fast as received, the income and interest thereof, equally, to my two sons, Charles James Hunt and Joseph Nathan Hunt, share and share alike, as long as they shall live; and, upon the death of either of them, to pay over one-half of the same to his heirs, devisees, or legatees, including principal and interest."

In disposing of the contention of Charles Hunt that by reason of the death of his brother the trust had terminated and was subject to cancellation, the court said:

> "The mistake of Charles lies in his assumption that he is a life tenant, with the devise over to his heirs. There is no life estate created by the will. The absolute title is vested in the trustees, and they alone have the right of possession. Upon them alone is the legal duty to pay the taxes and to protect and care for the property. The interests of Charles and Joseph as cestuis que trustent have none of the attributes of a life tenancy. The trustees alone are charged with the control of the property. * * * They cannot surrender the trust to their cestuis que trustent. They can only surrender it to their successors duly appointed by the chancery court. The only right Charles and Joseph can enforce against the trustees is the payment to them of the income and the faithful performance of the trust. This was all the testatrix intended they should have. There is no legal objection to such a trust. Upon Charles and Joseph she conferred the right to direct a testamentary disposition of the property upon the termination of the trust by their deaths. If they chose not to make such disposition, then the trustees under the will were directed to pay the fund or to deed the land over to the heirs of each. If there were no trust, and the devise were to Charles and Joseph for life, with the remainder over to their heirs, then undoubtedly they would take an allodial estate, under Fraser v. Chene [2 Mich. 81] supra."

It will be noted that the trust provisions in this will are much stronger than the provisions of the will before us. In that case the trust endured during the life of the beneficiaries, while in the case before us it exists only for a term of years. We then conclude that during the life of the trust the widow had only a claim upon the income, and no legal estate in the corpus thereof. See Estate of Shaw, 198 Cal. 352, 246 P. 48.

What was her estate, if any, after the death of her husband, independent of the trust provisions? Plainly it was a fee if she survived the termination of the trust period, and nothing if she did not. In other words, it was an estate on condition precedent as provided in sections 709 and 1346 of our Civil Code. See, also, Estate of Glann, 177 Cal. 347, 350, 352, 170 P. 833.

In the last cited case the court was construing a will which contained the following provision:

> "Fifth. If my said wife and all my children and their children shall die before the death of both of my said brothers Peter and Vincent then it is my will that all my property shall go to my said two brothers Peter and Vincent for their lives and upon their death the same shall go to and vest in my other brothers and sisters in equal shares and as to any brother or sister who is now dead or who may die before the death of the said Peter and Vincent, it is my will that his or her share shall go to his or her heirs."

Speaking of this provision the court said:

> "That the death of the wife and issue before the death of the brothers Peter and Vincent was a condition precedent applying to the entire disposition in the fifth clause to such brothers, with remainder to the other brothers and sisters and heirs, seems too plain for argument. * * *"

Here it is perfectly plain that, with reference to the trust estate, the widow had what is known as a contingent remainder, and so did her heirs at law. Hunt v. Lawton (Cal. App.) 245 P. 803. But, as between themselves, it is impossible to say under the terms of this will that the widow took a life estate with a remainder over to her heirs at law. The estate given the wife and the estate given the children, if either of them took effect, would be a fee. If the fee vested in the wife, the heirs at law were excluded. In other words, both the estate of the wife and the estate of the heirs at law are estates in fee on conditions precedent, and neither of them can be said to be a remainder interest upon a vested estate granted to the other. Their rights are in the alternative. The widow either takes it all, or nothing, and the heirs at law take the whole estate, or nothing.

We therefore have no hesitancy in concluding that the bequest in said will to the heirs at law of Marchisi Dickey Roberts was a direct bequest within the meaning of section 1335 of the Civil Code, and was not in any sense a qualification of an estate given to her.

In this connection respondent also invokes the provisions of section 778 of the Civil Code above quoted. Manifestly that section is inapplicable to the facts in this case, for, as we have found, no estate of any kind vested in Marchisi Dickey Roberts as between her heirs at law and herself. There is in such case no precedent estate which could be abridged or determined by the happening of any contingency. See Civ. Code, § 769; also, Gray v. Union Trust Co., 171 Cal. 638, 642, 154 P. 306.

[9] The fact that the widow had an equitable estate during the life of the trust cannot be held to support a legal estate in remainder predicated thereon so as to make such a set of facts as would have brought into operation the rule in Shelley's Case. That rule, briefly defined, is as follows:

> "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 1 Preston on Estates, §§ 263–419; 4 Kent's Comm., (14th Ed.) marg. pp. 215, 216.

[10] One of the cardinal requirements of that rule was that the vested and remainder estates must both be legal or both be equitable, and, if the two estates did not so conform, it could not be held applicable. "But, if the estate limited to the ancestor be merely an equitable or trust estate, and the subsequent limitation to his heirs carries the legal estate, the two estates will not incorporate into an estate of inheritance in the ancestor, as would have been the case under the rule in Shelley's Case, if they had been of one quality, that is, both legal and both equitable estates; and the limitation to the heirs will operate as a contingent remainder." 4 Kent's Comm. (14th Ed.) marg. p. 211.

"By his deed the grantor gave the legal estate in his property to the trustees named in his deed, and created for himself an equitable life estate, with a contingent remainder to his right heirs, upon his dying leaving no children, or descendants, or widow living at the time of his death; or, in case of his leaving no children so living, and leaving a widow surviving him, then, after providing the equitable life estate for himself, he gave an equitable life estate to such widow, and remainder to his right heirs. As the preceding life estate in the grantor was an equitable estate, and the remainder to the heirs a legal estate, this limitation is not within the rule in Shelley's Case, and the limitation over to the heirs was good as a contingent remainder. Mercer v. Hopkins, 88 Md. 309, 310, 41 A. 156, and cases there cited; 4 Kent, Comm. marg. pp. 210, 211." Mercer v. Safe-Deposit & Trust Co., 91 Md. 102, 45 A. 865.

In Howard v. Trustees, 88 Md. 309, 310, 41 A. 156, 158, we have this language:

> "Some of the appellants earnestly contend that under the rule in Shelley's Case this life estate becomes an absolute estate, and some of them deny this proposition with quite as much earnestness. We may as well dispose of this question here. It is well settled that, in order to coalesce and form one absolute estate under this rule, the two estates must be of the same quality—both must be equitable or both legal. Ware v. Richardson, 3 Md. 505 [56 Am. Dec. 762]; Handy v. McKim, 64 Md. 569, 4 A. 125. In order to make this rule apply to the devisees under consideration, it would be necessary to cast aside the express language used by the

testator by which he declared that the legal estate should be held by the trustees in trust for the life tenant, and from the expiration of the equitable life tenancy in trust for the period of 20 years, when the estate was to vest absolutely in the children or descendants of such life tenant, if any, and, in default of any such issue living at that time, then in the persons who should answer to the description of heirs at law of such life tenant. Here we have the equitable life estate, and a subsequent fee simple or absolute estate. Under such circumstances it is settled the rule in Shelley's Case cannot be invoked."

We thus conclude that the bequest in the will before us was as to the heirs at law of Marchisi Dickey Roberts words of donation and not of limitation. In other words, that they took thereunder, not by virtue of their relationship to her, but as a "designation of persons to take originally in their own right." 1 Preston on Estates, 264.

It is not necessary here to pause to consider the reasons which may have prompted the Legislature in the enactment of section 1334, nor to furnish reasons why wills should be in a class to themselves when questions like this are up for determination. This section doubtless serves to settle many questions which otherwise would be unsettled, and, indeed, announces many rules which are in derogation of the common-law rules governing estates. It may also be noted in passing that reference has been made recently to section 1334, making its provisions applicable without any particular consideration having been given as to whether the words were to be considered words of donation or words of limitation. See Estate of Trickett, 197 Cal. 20, 239 P. 406.

Learned counsel with much earnestness have urged upon the court the harshness of a rule which would give to the surviving husband of his former widow, a greater portion of a decedent's estate than that received by his own children. But the fault, if any, is to be found in section 1386, and not in section 1334. Indeed, cases are easily supposable in which the rule contended for by respondent would create equal harshness; for example, a bequest to the heirs at law of a person, said heirs being two sisters and the children of a deceased sister or brother, say six in number. Under the rule contended for by respondent, the surviving sisters, instead of getting one-third each, would each get only one-eighth, so we must concede there was the proper modicum of wisdom in the enactment of this statute.

These conclusions make necessary a reversal of the judgment of the court below, and it is so ordered, with instructions to said court to enter a decree in accordance with this opinion.

We concur: RICHARDS, J.; SEAWELL, J.; CURTIS, J.

SHENK, J. I dissent. Under the terms of the will in question the estate that vested in the heirs of the widow was, in my opinion, a contingent remainder, with an equitable life estate in the widow. Such being the case, section 1334 of the Civil Code, and Estate of Watts, 179 Cal. 20, 175 P. 415, have no application. On the other hand, section 779 of the same Code, and Barnett v. Barnett, 104 Cal. 298, 37 P. 1049, would compel distribution per capita to the heirs of the widow. I think the superior court was right, and that the judgment should be affirmed.

I concur: WASTE, C. J.

On Petition for Rehearing.

PER CURIAM. Petition for rehearing denied.

SHENK, J., and WASTE, C. J., dissent from that portion of the order denying a petition for a rehearing.

200 Cal. 456

KNOCK et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(S. F. 12126.)

(Supreme Court of California. Feb. 17, 1927.)

1. Master and servant ⚷405(4)—Finding employee's death from acute dilatation of heart was due to previous diseased condition precipitated by high altitude, held sustained by evidence (Workmen's Compensation, Insurance, and Safety Act 1917).

In proceedings under Workmen's Compensation, Insurance, and Safety Act 1917 (St. 1917, p. 831), finding of Industrial Accident Commission that death of employee by acute dilatation of the heart was due to previous condition precipitated by situation in higher altitude than customary *held* proper, under evidence, where compensation was claimed because ranch company employing deceased sent him to high altitude to look over certain peat lands.

2. Master and servant ⚷376(2)—Death of employee from heart disease precipitated by high altitude and overexertion held compensable.

Death of ranch manager employed by ranch company due to dilatation of heart "precipitated" or accelerated by employee's situation in high altitude *held* compensable, under Workmen's Compensation, Insurance and Safety Act 1917 (St. 1917, p. 831), where employee was at high altitude inspecting certain peat lands in course of his employment under circumstances causing overexertion on account of rough contour of country.

3. Master and servant ⚷416—Findings in compensation case must be construed with undisputed evidence.

Findings in compensation case must be read and understood in connection with undisputed evidence in case.

4. Master and servant ⚷376(2)—Injury from exposure of employee having weak heart to high altitude, when directly accompanied by overexertion, is compensable.

Though exposure to high altitude of a weak heart does not constitute industrial injury, when such exposure is directly attended with overexertion on part of employee, injury resulting therefrom is industrial injury compensable, under Workmen's Compensation, Insurance, and Safety Act 1917 (St. 1917, p. 831).

In Bank.

Proceeding under the Workmen's Compensation Act by Carrie M. Knock and others against the Montezuma Ranch Company, Inc., employer, and the United States Fidelity & Guaranty Corporation, insurer, for the death of Malcolm A. Knock, employee. From an award of the Industrial Accident Commission denying compensation, petitioners bring certiorari. Award annulled, and application remanded for further proceedings.

George R. Freeman, of Willows, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondent United States Fidelity & Guaranty Corporation.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

RICHARDS, J. This is a petition for a writ of review wherein the petitioners seek to have reviewed and annulled a decision of the Industrial Accident Commission. The petitioners were refused an award in their favor upon their application for such award against Montezuma Ranch Company, Inc., and its insurance carrier, United States Fidelity & Guaranty Corporation; the former of these having been the employer of one Malcolm A. Knock, deceased, at the time of his death, and who was alleged to have come to his death through injuries received while such employee of said corporation and in the course of his employment.

The undisputed evidence presented before the commission at the time of the hearing upon said application showed that said Malcolm A. Knock had for several years prior to the time of his death been an employee of the Montezuma Ranch Company, Inc.; the principal place of his employment and activities thereunder being upon the properties of said corporation at Collinsville, along the lower reaches of the Sacramento river. During the month of June, 1924, he was required by his employer to go to McArthur, Cal., for the purpose of inspecting certain peat lands in that region in order to gain information as to the best methods of handling such lands in the interest and for the benefit of his employer. Mr. Knock, with a companion, reached McArthur on the afternoon of June 27, 1924, and proceeded immediately to make the investigation of the lands in question. The elevation of McArthur and of the region traversed by Mr. Knock in the course of such investigation is about 3,300 feet above sea level, and the investigation which he was there to make required that he and his companions should walk over the peat lands in question for a distance of some miles. The walking was difficult and laborious at times over rough country and at others wading through mud and water which frequently came over the tops of their high leather boots, or requiring them to jump over small sloughs, or travel lands trodden with cattle tracks and trails, or walk along levees built of peat and volcanic ash material upon which it was difficult to maintain a footing. The party walked rapidly at first, but after going some distance it was observed that Mr. Knock was lagging behind and that he complained of feeling unwell. The party returned to the place where the night was to be spent and where Mr. Knock, still complaining of feeling unwell, retired early, but spent a bad night, and early the next morning left by automobile for Klamath Falls, upon reaching which a doctor was sent for, who undertook to minister to Mr. Knock, and who advised that he be taken to a lower altitude. After another night, during which his condition grew much worse, the party left the following morning to take the train at Ashland, but on the way Mr. Knock died in the automobile, and his body was shipped from Ashland to his home for burial; no autopsy being held.

Upon the hearing before the commission it was further shown in evidence that prior to taking said trip Mr. Knock had been to all appearances an unusually healthy and active man and that if he was afflicted with any heart trouble prior thereto that fact was unknown to himself, his friends, and his family. Upon the hearing before the commission the only evidence bearing upon the existence of any previous disorder of that nature consisted in reports received from two physicians, resident in Honolulu, who had examined Mr. Knock several years previously, one of whom, whose examination was casual, thought he had been consulted as to some heart condition, but could give no details; and the other of whom, whose examination was thorough, stated that there were no indications of any heart affection at that time. The only other evidence upon that subject was that of Dr. Johnson, whose report upon the case of Mr. Knock as it came under his observation at Klamath Falls was submitted; of Dr. Lund, who had known the deceased personally and intimately for years, but who had never been consulted by him professionally, and who, after reading the report of Dr. Johnson, gave it as his opinion that the deceased had died from acute dilatation of the heart, probably caused by his overexertion at a high altitude, but that there may have been some previous heart trouble of which the deceased was not conscious, and, which the overstrain had brought out; of Dr. Walker, who had known the deceased in his lifetime, but had never attended him professionally, but who also, after reading Dr. Johnson's report, together with a statement of the agreed facts attending the presence of the deceased at McArthur and his sudden attack of heart illness there, gave it as his opinion that the cause of the latter's death was acute dilatation of the heart as the result of the high altitude and of his overexertion; of Dr. Kilgore, a medical expert appointed by the commission, who, upon such report of Dr. Johnson and the statement of agreed facts, gave it as his opinion that the deceased must have been affected with a previous heart affection, with respect to which the altitude or exertion, or both together, may possibly have acted as the last straw to precipitate his collapse a few days, weeks, or months sooner than would otherwise have happened. Upon the foregoing state of the record the commission made and filed its findings and decision, as follows:

"Findings of Fact.

"(1) Malcolm A. Knock was employed as a ranch manager on and about June 27, 1924, at Collinsville, Cal., by defendant Montezuma Ranch Company, Inc. At said time said employer's insurance carrier was United States Fidelity & Guaranty Company, and both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917 [St. 1917, p. 831]. (2) The said employee died on June 29, 1924; his death being caused by acute dilatation of the heart. (3) Said heart condition was due to a previous diseased condition being precipitated by the employee's situation in a higher altitude than that to which he had long been accustomed, but such situation and precipitation did not constitute an injury arising out of the employment. Exposure to a high altitude of a weakened heart does not constitute an industrial injury.

"Award.

"It is ordered that the applicants take nothing herein."

A petition for rehearing was presented before the commission and was granted, wherein Dr. Kilgore was called as a witness and repeated in substance the statements made in his former report. Dr. Harbaugh, assistant medical director of the Industrial Accident Commission, was also called and examined, after the submission to him of the same matters upon which the evidence of Dr. Kilgore had been predicated. He testified that, in his opinion, the cause of Mr. Knock's death was acute dilatation of the heart; that in his opinion the previous condition of the heart of the deceased could not have been normal, even though he was unaware of any existing heart trouble, and that it was his opinion that in view of such previous condition the overexertion of the deceased was the direct and precipitating factor in causing his death. Upon resubmission a further rehearing was denied. Whereupon the petitioners herein applied to this court for a writ of review.

[1-3] We are of the opinion that the commission, upon the undisputed evidence presented before it, as above set forth, was correct in its findings that the death of said decedent was caused by acute dilatation of the heart, and that "said heart condition was due to a previous diseased condition being precipitated by the employee's situation in a higher altitude than that to which he had long been accustomed"; but we are also of the opinion that the commission was in error in its conclusion that "such situation and precipitation did not constitute an injury arising out of the employment." The further statement of the commission that "exposure to a high altitude of a weakened heart does not constitute an industrial injury" must be read and understood in connection with the undisputed evidence in the case, which shows that such exposure was connected with a marked degree of overexertion

at such high altitude, and that such overexertion was immediately attendant upon the employment and occupation in which the decedent was engaged at the time of his attack with said heart trouble. The term "precipitation" employed by the commission in its foregoing findings is a term of well-known signification, meaning the act of precipitating or "to hasten the occurrence of" an event; "the causing to happen or come to a crisis suddenly, unexpectedly or too soon." Webster's New International Dictionary, subject, "Precipitation." In other words, to precipitate is to accelerate a casualty. The foregoing finding of the commission to the effect that the death of the decedent was precipitated by his situation in a higher altitude than that to which he had long been accustomed must therefore be read in the light of the foregoing definition, and also in the light of the undisputed evidence in the case, and when so read the case, in our opinion, is brought directly within the principle declared by this court in the case of G. L. Eastman Co. v. Industrial Acc. Comm., 186 Cal. 587, 594, 200 P. 17, 20, wherein this court said:

> "If the disability, although arising from a chronic heart trouble, was brought on by any strain or excitement incident to the employment, the industrial liability still exists. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration. [Citing cases.] It can hardly be doubted under this rule that, if decedent's incapacity to drive his truck was caused by a heart attack brought on by exertion or sudden shock or excitement incident to his employment on the highway, recovery could be had."

The cases from other jurisdictions which have similar statutes relating to industrial injuries are in full accord with the foregoing views. The case of Patrick v. J. B. Ham Co., 119 Me. 510, 111 A. 912, 13 A. L. R. 427, is an illuminating case, wherein the applicant was stricken with a cerebral hemorrhage while lifting some bags of corn, and wherein it was shown that the decedent prior to the occurrence of his injury was suffering from diseased arteries, predisposing him to cerebral hemorrhage. The Supreme Court of Maine in such a case, and after much citation of authority, held that the fact that the employee was suffering from diseased arteries, predisposing him to cerebral hemorrhage, was of no consequence in the case, and that the fact that he might or would have died in a week or a year from cerebral hemorrhage was immaterial in view of the fact that his actual stroke occurred while he was directly engaged in the overexertion which his immediate employment required. The case of Peoria Co. v. Industrial Acc. Board, 279 Ill. 352, 116 N. E. 651, is also much in point, the court in that case holding, after a review of many cases both in this country and in England, that "even where a workman dies from a pre-existing disease, if the disease is aggravated or accelerated under certain circumstances which can be said to be accidental, his death results from injury by accident," and is therefore compensable—citing 1 Bradbury on Workmen's Compensation, 385; Elliott, Workmen's Compensation (7th Ed.) 9, and cited cases.

It is urged, however, on behalf of the respondents, that the further finding of the commission that "said situation and precipitation did not constitute an injury arising out of the employment" is a finding of ultimate fact and as such is sufficient to sustain its conclusion that the resultant death of the decedent did not constitute an industrial injury and that the applicants were not entitled to an award. If the foregoing finding of the commission is to be held to be a finding of ultimate fact, it cannot be sustained in view of the undisputed evidence in the case as above set forth; and, if the foregoing finding of the commission is to be construed as being a conclusion of law, it cannot be sustained under the foregoing authorities.

[4] The statement of the commission that "exposure to a high altitude of a weakened heart does not constitute an industrial injury" may be conceded to be true; but when such exposure is directly attended with an overexertion on the part of the employee, which the undisputed evidence shows and which the findings when reasonably interpreted disclose, the case is taken out of the rule, and becomes an industrial injury.

It follows from the foregoing that the conclusion and award of the commission "that the applicants take nothing herein" was erroneous and that its decision to that effect must be and the same is hereby annulled. The application for an award is remanded to the commission for further proceedings in accord with the views expressed in this opinion.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

200 Cal. 419

KENNY v. CHRISTIANSON et al.

(Sac. 3954.)

(Supreme Court of California. Feb. 14, 1927.)

1. Factors 🔑53—Purchaser of used car from factor, authorized to make sale, held entitled to possession as against former owner, though agent embezzled purchase price.

In action of claim and delivery for recovery of automobile which owner left with factor, giving him authority to sell, defendant who purchased car from agent and paid him therefor *held* entitled to retain possession despite factor's embezzlement of purchase price.

2. Replevin 🔑12(1)—Defendant claiming right of possession prior to action was not required to prove claim under title distinct from plaintiff's.

Where pleadings in action of claim and delivery to recover automobile raised issue of right to possession, evidence of defendant as to claim of ownership and right to possession *held* admissible, although not claimed under source of title opposite to plaintiff's, as defendant was not bound by allegation of his ownership and right of possession to show distinct source of title.

3. Factors 🔑66—Finding that former owner delivered automobile to agent for sale held sustained by evidence in former owner's action against purchaser from agent (Civ. Code, § 2026).

In action to recover possession of automobile by former owner, who had turned it over to agent to be sold at stipulated price, against purchaser of automobile, agent having embezzled purchase price, finding that automobile was delivered to agent with instruction to sell *held* sustained by evidence, though owner undertook to limit agent's authority to merely finding purchaser; agent being factor, under Civ. Code, § 2026.

4. Factors 🔑1—Dealer in used cars who took possession of automobile for purpose of sale held factor (Civ. Code, § 2026).

Person engaged in business of dealer in and seller of used cars at fixed place of business, who took possession of car for owner with agreement to make sale at stipulated price, *held* factor, under Civ. Code, § 2026, defining factor as agent who in pursuit of independent calling is employed by another to sell property and vested with possession or control thereof or authorized to receive payment therefor.

5. Factors 🔑56—Factor embezzling purchase price of car left with him for sale was nevertheless former owner's agent with respect to purchaser.

Factor who took possession of owner's automobile for purpose of making sale continued to act as agent at time of sale thereof with respect to relations between former owner and purchaser, despite wrongful act in embezzling purchase price.

6. Records 🔑9½, New, vol. 12A Key-No. Series—Purchaser of automobile could claim possession, though no certificate of registration and ownership had been issued (Motor Vehicle Act, § 45, subd. [e], as amended by St. 1925, p. 402, § 7).

In action by former owner to recover possession of automobile left with factor and sold to defendant, defendant could assert ownership and right to possession, though certificate of registration and ownership provided for by Motor Vehicle Act, § 45, subd. (e), as amended by St. 1925, p. 402, § 7, which was required by act as prerequisite to passing title to automobile, had never been issued to him.

7. Estoppel 🔑110—Estoppel of former owner to rely on Motor Vehicle Act to defeat purchaser's claim to automobile held not barred by purchaser's failure to plead estoppel, where plaintiff's claim asserted under act was merely secondary (Motor Vehicle Act, § 45, subd. [e], as amended by St. 1925, p. 402, § 7).

In action for recovery of possession of automobile by former owner against purchaser from factor, purchaser could deny former owner's right to rely upon Motor Vehicle Act, § 45, subd. (e), as amended by St. 1925, p. 402, § 7, providing title shall not be deemed to pass until certificate issues, though purchaser had not pleaded estoppel, where former owner failed to plead Motor Vehicle Act and relied thereon only after main contentions had failed.

8. Estoppel 🔑110—Estoppel need be pleaded only where sole reliance for recovery is based upon claim plaintiff is estopped to assert.

Rules that defense of equitable estoppel must be pleaded applies only where plaintiff bases his sole reliance for recovery upon claim of title which he is estopped to urge.

9. Pleading 🔑79—Defendant need not anticipate contentions of plaintiff not pleaded, which may be asserted when main reliance for recovery has failed.

Defendant is not required by his pleadings to anticipate contentions which plaintiff may seek to rely on when main reliance for right of recovery has failed and which do not appear upon face of complaint.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by A. Kenny against Morris Christianson and another for the recovery of an automobile. From a judgment of the superior court in defendants' favor, plaintiff appeals. Affirmed.

John R. Connelly, of Sacramento, for appellant.

William A. Sitton and Elliott, Atkinson & Sitton, all of Sacramento, for respondents.

RICHARDS, J. This appeal is from a judgment of the trial court in favor of the defendant Morris Christianson in an action instituted by the plaintiff for the recovery of the possession of an automobile, or, in the alternative, for the recovery of $600 in case delivery cannot be had. The complaint was in the usual form employed in actions for claim and delivery, wherein the plaintiff alleged that on June 29, 1925, she was and ever since has been and now is the owner and entitled to the possession of said automobile, describing the same, and that on or about August 22, 1925, the defendant had wrongfully taken and since retained said automobile from the possession of the plaintiff, notwithstanding her demand for the return to her of the possession thereof. The defendant in his answer denied, for want of information or belief, that the plaintiff was the owner or entitled to the possession of said personal property, and denied that he had ever taken wrongful possession of the same, or that his detention thereof was unlawful, but on the contrary alleged that from a time prior to the commencement of the action and ever since said time he had been and continued to be the owner of and entitled to the possession thereof.

The cause went to trial before the court upon the issues thus presented, and upon the conclusion of the trial the court made and filed its findings of fact and conclusions of law, in the course of which the court found that the plaintiff on or about July 23, 1925, was the owner and in possession of said car, but that on or about said date she had delivered the same to one Pat E. Patterson in the city of Sacramento, where said Patterson was then and there engaged in the business of selling secondhand or used cars, and had instructed Patterson to sell said automobile, and that said car had thereupon been placed upon the premises used by Patterson in the conduct of his business, and, with other cars of said Patterson, was offered and exposed for sale; that the defendant Christianson, while said car was thus in the possession of Patterson and was being, under his said authority and at his said place of business, offered and exposed for sale, had purchased the said automobile from Patterson on the 22d day of August, 1925, and had thereupon fully paid to him the purchase price thereof, and that thereupon Patterson delivered to said purchaser said car, and that Christianson had ever since continued to be the owner and in rightful possession of the same. The court also in its findings expressly negatived the averments of the plaintiff's complaint to the effect that Christianson's possession and detention of said personal property was wrongful. As a conclusion of law the court found that the plaintiff was not entitled to any relief in said action. From the judgment accordingly entered the plaintiff prosecutes this appeal.

[1, 2] The first contention of the plaintiff is that the trial court was in error in permitting the defendant to introduce certain evidence in support of his claim of ownership and of the right to possession of said car. This contention is based upon the appellant's assertion that, since the defendant by the form of his pleading asserted title to said personal property derived from some source in opposition to and contrary to the source of plaintiff's title, and since the evidence offered by him failed to show such derivation, the court was in error in permitting him to introduce the same. This contention is utterly without merit. The defendant's asserted ownership and right of possession of said machine being alleged by him to exist from a time prior to the commencement of said action, he was entitled to show any source of his said title, whether derived from the plaintiff or not. The pleadings, while simple and brief, were in the usual form of the pleadings and denials in action for the recovery of the possession of personal property, and the issue presented thereby was as to which of the parties to the action was entitled to the possession of such property at the time of the commencement of the action; and the trial court was therefore justified in considering any proof which bore upon this issue.

[3] Appellant's next contention is that the finding of the trial court to the effect that the plaintiff had delivered the possession of said property to Pat E. Patterson with instruction to sell the same was not supported by the evidence. The most that can be said of this contention is that the evidence upon that subject is conflicting. When the automobile was delivered to Patterson by the plaintiff or her agent he signed and delivered to the agent of the plaintiff, who delivered the same to her, a receipt which showed that he had "received of Kenny Collection Agency one Cadillac tour to be sold for $600 net." The evidence further showed that subsequently to the issuance of said receipt the plaintiff had, through her duly authorized agents, reduced the price to $450. The evidence further showed that at the time of the delivery of said car to Patterson he was engaged in the business of a dealer in and seller of used cars at a fixed place of business, and was in fact a factor within the definition of that term as set forth in section 2026 of the Civil Code.

[4, 5] While it is true that the plaintiff, through her testimony and that of her agent, undertook to limit the authority of Patterson to that of merely finding a purchaser for the car, the evidence on the whole, we think, sufficiently discloses that Patterson was so far invested with the possession and control over the car and with authority to sell the same for the designated price as to be entitled as such factor to deliver possession of the car to such purchaser as would pay the same, and to execute a bill of sale to such purchaser. These several acts Patterson did in his capacity as such factor and as the plaintiff's agent, but the evidence shows that, having done so, he absconded without hav-

ing paid over to the plaintiff the amount received by him from Christianson for the purchase price in full of said car. In so doing, however, he continued to be the agent of the plaintiff, and for his wrongful act in the embezzlement of the purchase price of the car the defendant Christianson was in no wise responsible. This case as to the foregoing aspects of it would seem to come squarely within the decision in the case of Carter v. Rowley, 59 Cal. App. 486, 211 P. 267, wherein in a well-reasoned opinion that court held that the purchaser of an automobile under circumstances much similar to those herein presented was entitled to retain or recover the possession of the personal property thus acquired.

[6] Plaintiff's next contention is that the defendant was not entitled to assert his ownership and right of possession of said automobile in this action for the reason that the evidence disclosed that there had never been issued to him the certificate of registration and ownership provided for in section 45, subd. (e) of the Motor Vehicle Act of 1925 (St. 1925, p. 402), which section provides for the issuance by the motor vehicle department of such certificate of ownership and registration upon every transfer of title or of an interest in a motor vehicle, and further provides that until such certificates are issued "delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose." The scope and meaning of this provision of the Motor Vehicle Act was before this court in the case of Parke v. Franciscus, 194 Cal. 284, 228 P. 435, wherein this court held that while a compliance with said section and subdivision was essential to complete the transfer of title to the motor vehicle sought to be transferred and delivered to a purchaser, the failure of the transferee of the ownership of such car to procure the registration certificate required by the terms of said act did not render his right to the possession thereof so incomplete as to make the assertion thereof unavailing to him in an action against him by the vendor of the automobile thus actually sold and delivered to a purchaser in good faith and for a full consideration. In so deciding this court referred with approval to the case of Boles v. Stiles, 188 Cal. 304, 204 P. 848, wherein this court held that where an owner of an automobile had by his own act and agreement placed another in the immediate and exclusive possession thereof, he was not in position thereafter, in an action for claim and delivery, to invoke the provisions of the Motor Vehicle Act above referred to. A similar ruling was made by the appellate court in the case of Chucovich v. S. F. Securities Corp., 60 Cal. App. 700, 214 P. 263, that court basing its ruling upon the decision in the case of Boles v. Stiles, supra. In the face of these authorities we are constrained to hold that the plaintiff was not entitled to rely upon the provisions of the Motor Vehicle Act in question to sustain her own title or to defeat the defendant's right of possession based upon the foregoing transaction.

[7, 8] The appellant makes the final contention that the defendant's claim that the plaintiff is not entitled to rely upon the aforesaid provisions of the Motor Vehicle Act to defeat the defendant's claim is a defense based upon estoppel, and that the defendant was not entitled to the benefit of such defense because of his failure to plead such estoppel. In making this contention plaintiff relies upon the familiar rule that the defense of an equitable estoppel is one which must be pleaded. This rule, however, has only application to cases wherein the plaintiff bases his sole reliance for his recovery in said action upon a claim of title which he is estopped to urge.

[9] Where, however, a plaintiff, as in this case, bases her alleged right to recovery in the first instance upon the original claim of ownership of the property in question and upon her contention that the person through whom the defendant acquired title to said property had no authority from her to dispose of the same, the defendant is not required in his pleadings to anticipate such other contentions as the plaintiff may seek to rely upon when her main reliance for her right of recovery has failed her, and which do not appear upon the face of her complaint. In such cases the defendant may await the assertion by the plaintiff in her proof of such additional foundation for her right of recovery and may then oppose the same with his evidence of an equitable estoppel.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

200 Cal. 434

MOTT v. CLINE. (Sac. 3727.)★

(Supreme Court of California. Feb. 17, 1927. Rehearing Denied March 17, 1927.)

1. Aliens 🔑6(1)—Assignee's right to specific performance under option to purchase agricultural land held not impaired by fact that assignor was Chinese subject incapable of acquiring real estate (Const. 1879, art. 2, § 1; St. 1913, p. 206; Alien Land Act 1920).

In action for specific performance by assignee of option for purchase of leased premises, assignee's rights were not impaired by fact that lease and option were originally given to subject of China, barred from holding agricultural land under Const. 1879, art. 2, § 1, making Chinese ineligible as electors and alien land laws (St. 1913, p. 206, Alien Land Act 1920 [St. 1921, p. *l*xxxiii]), where assignment was made before escheat proceedings were instituted, as purpose of alien land laws is not to confiscate property, but to prevent aliens incapable of becoming citizens from holding land.

2. Aliens 🔑13—Treaty with China, giving Chinese subjects privileges of most favored nation, did not prevent application of alien land laws (St. 1913, p. 206; Alien Land Act 1920; Const. 1879, art. 2, § 1).

Alien land laws (St. 1913, p. 206, and Alien Land Act 1920 [St. 1921, p. *l*xxxiii]) barring aliens, ineligible to citizenship under Const. 1879, art. 2, § 1, from acquiring real property, *held* not in violation of articles 2 and 3 of existing treaty between the United States and China (22 Stat. 826), providing Chinese subjects now in the United States shall be accorded privileges of most favored nation, as treaty followed California constitutional provision excluding Chinese as citizens, and was not intended to give Chinese subjects right to acquire agricultural land.

3. Treaties 🔑7—Treaties must be construed with respect to existing situation, difficulties sought to be corrected, and supplemental treaties.

Treaties must be construed with respect to situation existing at time of ratification, difficulties sought to be corrected as shown by treaty, and modifications agreed on in supplemental treaties.

4. Aliens 🔑13—China, by consenting to ineligibility of subjects to become citizens, conceded right of United States to fix their status as to acquisition of agricultural lands.

By consenting to ineligibility of its subjects to become citizens under treaty between China and United States proclaimed in 1881 (22 Stat. 826) and treaty of 1894 (28 Stat. 1210), prohibiting Chinese immigration for 10 years, China conceded right of United States to define or fix status of its subjects as to acquisition of agricultural lands, despite use of "most favored nation" clause with regard to privileges and immunities of Chinese subjects.

5. Aliens 🔑12(4)—Right of alien to lease and occupy buildings for trade does not include right to hold title to land for agricultural purposes.

Right of alien to carry on trade or lease, and occupy houses, warehouses, or shops, or to lease land for residential and commercial purposes, does not include right to own or lease, or have title to land for agricultural purposes.

6. Aliens 🔑10—Alien land laws, prohibiting persons ineligible to citizenship from acquiring land, held within states' police power (St. 1913, p. 206; Alien Land Act 1920; Const. 1879, art. 2, § 1).

Alien land laws (St. 1913, p. 206, Alien Land Act 1920 [St. 1921, p. *l*xxxiii]) *held* not in conflict with federal or state Constitutions, being lawful exercise of states' police power to prevent ownership of land of state by aliens who cannot become citizens under Const. 1879, art. 2, § 1.

7. Aliens 🔑10—Chinese subject, holding lease, could not enforce option therein to purchase real estate, though lease was executed prior to adoption of alien land laws (St. 1913, p. 206; Alien Land Act 1920, §§ 2, 7).

Ten-year lease, executed to Chinese subject with option to purchase land at any time during life of lease, though executed immediately prior to alien land laws (St. 1913, p. 206), could not give lessee right to compel specific performance under option, in view of Alien Land Act 1920, §§ 2, 7 (St. 1921, pp. *l*xxxiii, *l*xxxiv), providing any real property hereafter acquired in fee in violation of provisions of act by any alien ineligible to citizenship should escheat to state; statute being intended to prevent acquisition of fee in lands, regardless of preexisting contracts.

8. Aliens 🔑10—Whether alien land acts prevented acquisition of fee under pre-existing contracts depends upon legislative intent as related to police power (St. 1913, p. 206; Alien Land Act 1920).

Whether alien land laws (St. 1913, p. 206, Alien Land Act 1920 [St. 1921, p. *l*xxxiii]) prevented acquisition by aliens of fee in lands under pre-existing contracts or options, depends on legislative intent, and on whether objects sought to be attained are within police power.

9. Constitutional law 🔑81—Police power cannot be barred or suspended by contract or irrepealable law.

Police power, being in its nature continuous, cannot be barred or suspended by contract or irrepealable law, or bartered away by express contract.

10. Constitutional law 🔑117—Contracts are made subject to exercise of state's police power.

It is presumed that parties contract in contemplation of right of state to exercise its police power, which right cannot be nullified by making contracts inconsistent with enforcement of such power.

★Rehearing denied

11. Aliens 🔑6(1)—Owner of agricultural land and Chinese lessee taking option were charged with notice of existing and imminent laws regarding alien ownership of land (St. 1913, p. 206).

Owner and Chinese subject, leasing agricultural land and giving option thereon immediately prior to adoption of alien land law (St. 1913, p. 206), were charged with notice of state's police power and with notice of steps likely to be taken with regard to alien ownership of land.

12. Conspiracy 🔑28—Assignment by Chinese subject of option to purchase agricultural land to eligible person held not conspiracy to effect transfer of land in violation of alien land law (Alien Land Act 1920, § 10).

Chinese subject, who took lease to agricultural land for 10-year period, with option during life of lease did not violate Alien Land Act 1920, § 10 (St. 1921, p. *lxxxv*), making it crime to conspire to effect transfer of real property, resulting in acquisition of title by aliens not eligible to citizenship, by assignment of lease and option to assignee eligible to hold land.

13. Aliens 🔑6(2)—Transfer, made in violation of alien land law, is defeasible as to state only (Alien Land Act 1920).

Transfer made in violation of Alien Land Act 1920 (St. 1921, p. *lxxxiii*), prohibiting acquisition of land by aliens incapable of citizenship, is defeasible as to state only by proceeding by Attorney General or district attorney to have property escheated.

14. Aliens 🔑6(1)—Alien whose title to land is defeasible by state may nevertheless convey good title to eligible person before power of escheat is exercised (Alien Land Act 1920, § 7).

Where title to real property is defeasible by reason of owner's status as alien incapable of citizenship, owner may nevertheless convey good title to person eligible to hold property, providing power of state in escheat proceeding under Alien Land Act 1920, § 7 (St. 1921, p. *lxxxiv*), has not been invoked.

15. Vendor and purchaser 🔑214(2)—In suit for specific performance by assignee of option, option held assignable, where no relation of personal trust or confidence was involved (Civ. Code, § 1044).

In suit for specific performance by assignee, exercising option within time allowed, option, though accompanying 10-year lease of premises, *held* assignable, independent of lease, where severable, and where no features of personal trust or confidence were reposed in any of original parties, and only payment of money was required, in view of Civ. Code, § 1044, providing property of any kind may be transferred except as otherwise provided; option not being made nonassignable by any Code provision.

16. Specific performance 🔑97(1)—Assignee of option contained in lease could not require specific performance without tender of rent due under lease to time of offer, in addition to stipulated purchase price (Civ. Code, § 1935).

In suit for specific performance by assignee of person holding option ~~in~~ connection with lease of premises for 10-year period, tender of purchase price stated in option without proportionate amount of rent for 4-month period, bringing rent up to date to time of tender, *held* insufficient under Civ. Code, § 1935, providing that, when hiring is terminated before time originally agreed on, hirer must pay proportion for such use as he has actually made; failure to tender rent with offer to purchase being complete bar to demand of specific performance of option.

17. Specific performance 🔑119—Assignee of option, seeking specific performance, was required to prove owner waived insufficient amount of tender.

In action for specific performance, where tender by assignee of amount required under option contained in lease was insufficient, because no offer was made to pay rental up to date of tender, lessor's waiver of insufficiency of tender by failure to object was not shown, in absence of any evidence of such waiver, as burden is on party asserting waiver to introduce evidence of facts constituting it.

18. Specific performance 🔑101—Where insufficiency of tender was waived, assignee of option could nevertheless have specific performance on payment of total amount due.

Where insufficiency of tender under option contained in lease was waived by lessor, assignee of option who made tender could have decree of specific performance directing conveyance on payment of stipulated purchase price, together with proportionate amount of rent due of which he failed to make tender.

19. Specific performance 🔑131—Where insufficiency of tender was not waived, judgment for specific performance erroneously awarded assignee of option could not be modified to include total amount due, after time for exercising option had expired.

Where, in action for specific performance by assignee of option contained in lease, lessor did not waive insufficiency of tender, not including proportionate amount of rent due, and where period allowed for its exercise had expired, no relief could be given for modification of judgment to include amount of rent which should have been tendered, as such holding would extend right to compel specific performance of option beyond termination time agreed to.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action for specific performance by R. B. Mott against J. W. Cline. On hearing after judgment in the District Court of Appeal, Third District, reversing the judgment of the superior court in plaintiff's favor. Judgment of the superior court reversed.

Conley, Conley & Conley, of Fresno, Geary & Geary, of Santa Rosa, Lindsay & Conley, of Fresno, Harry I. Maxim, and John J. Coghlan, both of Madera, and A. B. Bianchi, Manson & Allan and Albert H. Elliot, all of San Francisco, amici curiæ, for appellant.

Walter H. Linforth, of San Francisco, John L. McVey, of Oakland, Edwin V. McKenzie, of San Francisco, and Nutter, Hancock & Rutherford and A. P. Haynes, all of Stockton, amici curiæ, for respondent.

SEAWELL, J. This action was brought by the assignee of a lessee who was also the holder of an option against the owner, and lessor of the let premises to compel specific performance of the option provision contained in the lease providing for the purchase by said lessee of the demised premises at any time during the term of the lease. Said assignee, who relies solely upon the assignment of the option to purchase, made a tender between rent days of the purchase price as agreed upon by the owner and lessee, and demanded the execution and delivery to him of a deed of the demised lands. The owner and lessor refused to comply with the demand to convey. The answer raised the question of the sufficiency of the tender. Judgment went for the plaintiff (assignee), hence this appeal.

The lands in suit are agricultural lands, and are situate in the county of Madera, this state. On January 13, 1913, appellant, owner and lessor of said lands, entered into a written contract of lease with Ah Chue, a person of Mongolian blood, and a subject of the empire of China, and alleged to be within the inhibitory provisions of Statutes 1913, p. 206, and other subsequent alien land acts, all of which were adopted subsequent to the execution of the lease contract containing the option to purchase, the assignability of which is challenged.

The term of said lease was for a period of 10 years, commencing February 1, 1914, almost one year after its execution, at an annual rental of $200 for the first 2 years, and $250 a year for the remainder of the term, payments to be made on the 20th day of December of each year, commencing with December 20, 1914. By the provisions of said lease all improvements placed on the demised premises by either party were to belong to the lessor, and, if the lessee should be in default at any time in the payment of rent or in the performance of any other covenant of the lease, the lessor reserved the right to terminate the lease and retake possession of the premises. The option provision is contained in the following paragraph of the lease:

> "And the said party of the first part, his heirs and assigns, does hereby covenant and agree that the said party of the second part, or his legal representatives, paying the rental herein provided for, and keeping and performing the several covenants herein provided for, shall at all times during the full term of this lease have, hold, and fully enjoy the said premises with its appurtenances without let or hinderance of or by the said party of the first part, his heirs or assigns, or any other person whomsoever. First party agrees to sell said premises at any time during the term hereof to said second party for the sum of $4,100."

The lessee, on February 1, 1914, went into possession, and cleared some 30 acres of land during his tenancy, and paid all installments of rent, except the installment payable on December 20, 1923, which was not due at the time the complaint was filed, to wit, June 18, 1923. On May 26, 1923, said Ah Chue executed the following instrument:

> "I, Ah Chue, * * * do hereby sell, assign, transfer, set over, grant, bargain, sell, convey and confirm unto R. B. Mott * * * all of my right and option to purchase said real property set forth in said lease wherein it is provided that the said J. W. Cline 'agrees to sell said premises at any time during the term' of said lease 'for the sum of $4,100.' It is intended hereby to subrogate the said R. B. Mott to every interest which I have in said option included in said lease and to grant and assign the said option to the said R. B. Mott."

No claim is made that the leasehold was assigned, and no attempt was made to put respondent in possession as a subtenant. The lessee, in fact, continued in possession of the premises under the lease. By a separate paper Mott and Ah Chue agreed as follows:

> "I will, as soon as delivery of a conveyance thereof is made by the said Cline, endeavor to sell said property at a profit and in the event of a sale will pay over to you [Ah Chue] one-half of my profit on such sale. It is understood that you are to consent to a cancellation of your lease of such property to any such purchaser, should such purchaser desire such cancellation. * * * All expenses to be paid by R. B. Mott."

On May 28, 1923, Mott served notice upon appellant, Cline, of the assignment of said option, and made a tender to him of the sum of $4,100, and demanded a conveyance of said premises. The grounds of Cline's refusal, if any were stated, do not appear in the record. The points that the rentals were not fair and reasonable, and that $4,100 was not the fair and reasonable market value of the lands at the time the lease and contract were executed, are not tenable. It was stipulated at the trial that $6,700 was then the fair market value of the premises.

[1] The lease contract was executed before the passage of any of the inhibitory alien land acts subsequently adopted by this state, and before there was any law interdicting the ownership of land or any interest therein by

any class of aliens. The alienage of Ah Chue was put in issue by the answer, and it is the contention of appellant that the option provision is in violation of the 1913 act, supra, and the initiative Alien Land Act of 1920 (Stats. 1921, p. *lxxxiii*), enacted pursuant to the police power of the state, and is therefore void. This being so, it is further argued, the option was neither assignable by Ah Chue nor enforceable against him. It is further contended that the lease contract is not severable or divisible on equitable grounds, and to so hold would tend to impair the rights of the lessor to the rentals reserved, as the title would be transferred out of the lessor. It is also made grounds of complaint that Ah Chue occupied the premises for a period of about 4 months immediately prior to the assignment of the option, for which period he paid no rent to the lessor, and none has since been paid or tendered for such occupancy by him or any one in his behalf. His occupancy seems to have continued undisturbed after the execution of the assignment. Aside from the assignability of the option, the sufficiency of the tender, and a few questions of pleading, the case is one hinging largely upon the application of the police power of the state and the construction to be given the statutes germane to the subject.

Laws affecting the status of aliens in California are not of recent origin. Long prior to the adoption of laws declaring certain races ineligible to own real property in this state, the Constitution provided that no native of China was eligible to citizenship. By article 2, § 1, of the Constitution of 1879, it was provided that every native male citizen of the United States who should have acquired the right of citizenship by virtue of the treaty of Querataro, and every male naturalized citizen thereof who should have become such 90 days prior to any election, of the age of 21 years, and who should have resided within the state, county, and precinct for the period of time therein prescribed, should be entitled to vote at all elections held therein, provided further that "no native of China, * * * shall ever exercise the privileges of an elector." The above provision prescribing ineligibility has never been removed from our Constitution. By the Statutes of 1913 it is provided that all aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit, and inherit real property, or any interest therein, in this state in the same manner and to the same extent as citizens of the United States, except as otherwise provided. It is further provided that all aliens not eligible to citizenship may acquire, possess, enjoy, and transfer real property, or any interest therein, in this state in the manner, and to the extent, and for the purposes, prescribed by any treaty then existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and, in addition thereto, lease lands in this state for agricultural purposes for a term not exceeding 3 years. If in any probate proceeding it should appear that any heir or devisee is barred by reason of the provisions of the act to take real property which said heir or devisee would have been entitled to take but for the provision of said act, the court, instead of ordering distribution of such real property to said heir or devisee, shall order a sale thereof, and the proceeds thereof shall be distributed to said heir or devisee in lieu of said real property. Any real property thereafter acquired in fee in violation of the provisions of the act shall escheat to the state of California upon a proceeding instituted by the Attorney General as by the act provided. The provisions of the act do not apply to any real property acquired after its passage in the enforcement of any lien or in the satisfaction of any lien existing upon said real property at the time of the adoption of the statute so long as such real property remains the property of the alien acquiring the same by the enforcement of his lien. Any leasehold or other interest in real property less than the fee acquired in violation of the provisions of the act shall escheat to the state. It was but a short time before the act of 1913 became a law that the lease contract was executed. In fact, it was executed during a time when there was much public discussion in the state as to the wisdom of the passage of alien land laws. The term of the lease did not commence until some months after the Act of 1913 became effective.

[2] The applicability of the alien land laws to subjects of China is challenged by respondent herein. We have not been cited to, nor have we found, any state or federal decision construing the alien land laws with respect to the treaty with China. It is contended that while the alien land laws of the state do not violate any treaty agreement between the United States and the empire of Japan, a different situation exists as to subjects of China by force of the language used in the treaty agreement with the power; it being different in phraseology from the treaty agreement with Japan. It is argued that, by the provisions of articles 2 and 3 of the existing treaty between the two nations, proclaimed October 5, 1881 (22 U. S. Stats. at L., p. 826), subjects of China cannot be brought within the inhibitory provisions of the alien land laws of the state without effecting a violation of our treaty agreement. This argument is based mainly upon the clauses of said articles 2 and 3, which according to Chinese subjects, as therein classified, the rights, privileges, immunities, and exemptions which are accorded to "the citizens and subjects of the most favored nation." Said articles in their order read:

"Article II.

"Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, * * * and Chinese laborers who are *now in the United States* shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation. (Italics supplied.)

"Article III.

"If Chinese laborers, or Chinese of any other class, *now either permanently or temporarily residing* in the territory of the United States, meet with ill treatment at the hands of any other persons, the government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, *and to which they are entitled by treaty.*" (Italics supplied.)

[3] A supplemental treaty concerning commercial intercourse and judicial procedure was ratified July 19, 1881 (22 Stat. 828), by the two nations, but it guarantees no rights to the subjects of China to own or occupy real property. The riotous conditions that existed in some of the states of the Pacific slope as a protest against Chinese immigration, which was pouring into this state and other coast states in menacing numbers are matters of state history, and were considerations inseparably connected with our treaty agreements with China, and were the motive of much subsequent legislation. Years prior to the ratification of said treaty the people of the state of California adopted a new Constitution (1879), in which it was provided that no native of China could ever thereafter become an elector of this state. The adoption of statutes withholding from the Chinese rights and privileges granted to the subjects of other nations followed. Conflicts involving violence to the person were not infrequent. As residents of this state they were in disfavor. Their testimony in the earlier years of our statehood was not receivable in courts of justice in certain trials and proceedings. It was claimed by their government that they were denied the equal protection of the laws guaranteed by the federal and state Constitutions. At the time the treaty of 1881 was adopted, they were not generally engaged in agricultural pursuits, and were not landholders, but mainly contract laborers, who had been brought into this country originally by the builders of the great transcontinental railroads to be used as laborers in the construction of said railroads. They settled in districts which became greatly overpopulated, and later engaged in the laundry business or mercantile pursuits. It was not until later that they engaged in the vegetable and garden truck business, or had any contact with the soil as producers for themselves, and there was no threatened menace by reason of their ownership of or dominion over the agricultural lands of the state until a much later period. The proclamation and preamble of the treaty very clearly show that it was meant as a purely immigration and labor treaty, and it must be construed with respect to the situation that existed at the time it was ratified and the difficulties sought to be corrected as shown by the treaty itself and by modifications that were agreed upon in supplemental treaties. The proclamation declares it to be a treaty for the modification of existing treaties between the two nations "by providing for the future regulation of Chinese immigration into the United States." The preamble, which is declaratory of the motive and object of the treaty, provides:

"Whereas the Government of the United States, because of the constantly increasing immigration of Chinese laborers to the territory of the United States, and the embarrassments consequent upon such immigration, now desires to negotiate a modification of the existing treaties," etc.

At this time Chinese subjects were expressly forever denied the privileges of citizenship, and, as they claimed, the equal protection of the laws. The rights, privileges, and immunities accorded them by treaty were such only as were specified by the treaty, to wit, personal security and protection in their property rights against spoliation. The treaty is no more than it purports to be, and, aside from extending certain privileges and immunities to students, travelers, and other persons who were temporarily within our territory, was intended primarily for the protection of alien Chinese laborers. No rights as to the acquirement, enjoyment, or occupancy of agricultural lands were granted by the treaty. That subject was not germane to the purposes of the treaty. The subsequent exclusion of Chinese immigration into this country was foreshadowed by the proclamation of the treaty, and eligibility as owners of the soil finds not the slightest guaranty in either the spirit or language of the treaty. Any other conclusion would be repugnant to the conditions that were terminated by the treaty agreement.

[4, 5] In 1894, "in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States," the governments of China and the United States, by a convention covenant (28 U. S. Stats. at L., p. 1210), agreed upon articles whereby it was provided that the coming, except under conditions not affecting the decision of the question before us, of Chinese to the United States should be absolutely prohibited for a period of 10 years, and said agreement should continue for another like period, unless either government should at

the expiration of the first 10-year period give formal notice to the other of its termination. Said articles further provided that Chinese then in the United States under the treaty of 1881 "shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens." No right to acquire real property is conferred thereby. By consenting to the ineligibility of its subjects to become citizens, China also conceded the right of the United States to define or fix the status of its subjects as to the acquisition of agricultural lands. The "most favored nation" clause is not used in a sense materially different from the language used in our treaty with Japan, entered into in 1911 (37 Stat. 1504), which treaty has been construed as not giving to the subjects of that empire any right to own or lease agricultural land. The right to carry on trade or to own or lease and occupy houses, manufactories, warehouses, and shops, or to lease land for residential and commercial purposes, or to do anything necessary for trade, cannot be said to include the right to own or lease, or to have any title to, or interest in, land for agricultural purposes. Terrace v. Thompson, 263 U. S. 197, 44 S. Ct. 15, 68 L. Ed. 255, and cases therein cited; Webb v. O'Brien, 263 U. S. 313, 44 S. Ct. 112, 68 L. Ed. 318; Porterfield v. Webb, 195 Cal. 71, 231 P. 554. It may well be said here, as was said in Webb v. O'Brien, supra, construing the treaty with Japan:

> "The treaty gives no permission to enjoy, use or have the benefit of land for agricultural purposes. The privileges granted by the act are carefully limited to those prescribed in the treaty. The act as a whole evidences legislative intention that ineligible aliens shall not be permitted to have or enjoy any privilege in respect of the use or the benefit of land for agricultural purposes. And this view is supported by the circumstances and negotiations leading up to the making of the treaty."

In addition, it may be said that the interpretation which we have given the treaty has for many years been acquiesced in by the nation affected thereby.

The alien land acts are not repugnant to any article of the federal or state Constitutions, and do not impinge upon the treaty agreements existing between this nation and China.

[6] We have set forth at some length the history of our treaty agreements and our commercial, industrial and political relations with China and her subjects, together with the constitutional and statutory regulations bearing upon those subjects, to show that there is no substantial ground upon which a claim may be based that it was the intention of either the state or federal governments to grant to native-born subjects of China the right of acquiring the title to agricultural lands. The spirit and scheme of our state and federal regulations are repugnant to such a claim.

[7, 8] We now come to a consideration of the question whether or not the alien land acts are retroactive so far as the option is concerned. This question depends largely upon the legislative intent, and upon whether or not the objects sought to be attained are within the police power of the state. There is no direct language upon this point, but there is general language which necessarily implies an intention to prevent an executory contract from ripening into a fee simple. Section 2 of the act of 1920 provides:

> "All aliens other than those mentioned in section one of this act may acquire, possess, enjoy and transfer real property, or any interest therein, in this state, in the manner and to the extent and for the purpose prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise."

Section 7 provides:

> "Any real property *hereafter acquired in fee in violation of the provisions of this act* by any alien mentioned in section two of this act, * * * shall escheat to, and become and remain the property of the State of California. * * *" (Italics supplied.)

The treaty confers no right to acquire a fee in agricultural lands. An assumption of rights not granted by the treaty is a violation of the act. It was the purpose of the act to cut off instanter the right to thereafter acquire the fee. It is not to be presumed from a consideration of the evil to be remedied that the state so tied its hands as to be utterly helpless and unable to protect itself against the passing of large and fertile acreages of land into the hands of ineligible aliens, who, in anticipation of adverse legislation, should contract with respect to the exercise of an option to purchase said lands. If this were so, the fee of the state's best lands could have been acquired by the persons proscribed between the day the act was introduced in the Legislature and the day on which it became effective. Surely sovereignty is not so impotent as to be unable to protect itself from a menacing situation.

[9, 10] "The police power, being in its nature a continuous one, must ever be reposed somewhere, and cannot be barred or suspended by contract or irrepealable law. It cannot be bartered away even by express contract." 5 Cal. Jur. 689; Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080. It is to be presumed that parties contract in contemplation of the inherent right of the state to exercise unhampered the police power that the sovereign always reserves to itself for the protection of peace, safety, health, and morals. Its effect cannot be nullified in advance

by making contracts inconsistent with its enforcement. Freund, Police Power, § 556; 5 Cal. Jur. 778; Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Philadelphia, Baltimore & Washington Ry. Co. v. Schubert, 224 U. S. 603, 32 S. Ct. 589, 56 L. Ed. 911; Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274; Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp., 168 Cal. 12, 141 P. 620, L. R. A. 1915C, 282, Ann. Cas. 1915D, 471; Kentucky Traction & Terminal Co. v. Murray, 176 Ky. 593, 195 S. W. 1119; Raymond Lumber Co. v. Raymond L. & W. Co., 92 Wash. 330, 159 P. 133, L. R. A. 1917C, 574; Massillon Savings & Loan Co. v. Imperial Finance Co., 114 Ohio St. 523, 151 N. E. 645; Shrader v. Steubenville, East Liverpool, etc., Co., 84 W. Va. 1, 99 S. E. 207.

[11, 12] Both Cline, the owner of the land, and Ah Chue, the optionee, entered into the contract, charged not only with notice of what the state had the right to do in the exercise of the police power, but also with notice of what it had done by constitutional and statutory laws affecting ineligible persons, and what in all probability it was most likely to do under a situation that was becoming acute as to alien ownership of land.

It has been firmly settled by the decisions of both federal and state courts (Webb v. O'Brien, supra; Terrace v. Thompson, supra; Porterfield v. Webb, supra, and many others to the same effect) that the adoption of the alien land acts was a lawful exercise of the police power. In fact, it is the exercise of that power in its highest and truest sense. The ownership of the soil by persons morally bound by obligations of citizenship is vital to the political existence of a state. It directly affects its welfare and safety. In Terrace v. Thompson, supra, the following observation is quoted approvingly:

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of noncitizens." Terrace v. Thompson (D. C.) 274 F. 841, 849. It is further declared by the high authority last cited that "the allegiance of the farmers to the state directly affects its strength."
>
> "At common law, aliens, though not permitted to take land by operation of law, may take by the act of the parties; but they have no capacity to hold against the state, and the land so taken may be escheated to the state." Webb v. O'Brien, supra; Doe v. Robertson, 11 Wheat. 332, 6 L. Ed. 488; Suwa v. Johnson, 54 Cal. App. 119, 203 P. 414.

It is appellant's view that the option provision has been rendered void by section 10 of the act of 1920, which makes it a crime punishable as a misdemeanor or felony to conspire to effect a transfer of real property or an interest therein in violation of the law. This is the only act that is made a public offense and penalized by imprisonment or fine or by both. In re Akado, 188 Cal. 739, 207 P. 245. The exaction imposed for all other violations of the act inhibiting transfers is that the conveyance is rendered void as to the state, and the real property escheats to the state upon action brought by the Attorney General or district attorney of the county in which the violation occurs. Cockrill v. People, 268 U. S. 258, 45 S. Ct. 490, 69 L. Ed. 944. Our statute follows the common law as to the escheat proceedings. It cannot be said that Ah Chue violated any provision of the conspiracy section.

The acts are designed to keep agricultural lands in the control of citizens or such persons as are eligible to citizenship under the state and federal laws. The option agreement was entered into at a time when there was, and for a number of years prior thereto had been, a very general public demand for the adoption of laws rendering persons ineligible to citizenship incapable of owning, leasing, or occupying agricultural lands within this state. The act of 1913 was introduced in the Legislature as a proposed law about the same day the lease containing the option was signed. It became a law within a few months thereafter, and before the 10-year term, as stipulated in the lease, commenced. Ah Chue occupied the lands 9 years and 4 months before making an assignment of the option. Within this period the initiative act of 1920 was adopted. Had the assignment of the option been made to an ineligible person, we would hold that the assignment violated the act of 1920, and consequently a court of equity would not compel specific performance of an act forbidden by law. Likewise we are of the opinion that the ineligible alien could not have compelled a conveyance to himself. Ales v. Epstein, 283 Mo. 434, 222 S. W. 1012; Case v. Kelly, 133 U. S. 21, 10 S. Ct. 216, 33 L. Ed. 513; Suwa v. Johnson, supra. The policy of the state forbade it. But here we have quite a different question presented. The ineligible person is not attempting to transfer any right or interest whatsoever to another who is likewise ineligible. The diverted stream is turned back into its legitimate channel. Respondent Mott, who is Ah Chue's assignee, is a person eligible to exercise all the rights and privileges of citizenship. As a matter of fact, the assignment is in furtherance of the purposes of the law. The fact that Ah Chue may receive a portion of the proceeds of the transaction is not at all material to the question. All of the alien land laws that have been passed provide that, if an ineligible alien is an heir or devisee under a will, the real property may not be distributed to him, but it must be sold and the proceeds distributed to such ineligible alien. The law does not mean to confiscate property, but to escheat it to the state in cases of violations of the acts in a proceeding brought for that purpose.

[13, 14] It was held in Suwa v. Johnson, supra, supported by a citation of authority from almost every jurisdiction of the nation, that under statutes forbidding ownership of land by aliens an alien grantee takes a defeasible estate free from attack by any one except the government in escheat proceedings. See, also, Estate of Yano, 188 Cal. 645, 650, 206 P. 995; In re Akado, 188 Cal. 739, 742, 207 P. 245; Fairfax v. Hunter, 7 Cranch, 603, 3 L. Ed. 453; Phillips v. Moore, 100 U. S. 208, 25 L. Ed. 603. It is a governmental affair, a transfer made in violation of the act being defeasible as to the state only. It is quite well settled that, in case title to real property is defeasible by reason of the alienage of the owner, and said owner, before the power of the state is invoked in an escheat proceeding, conveys the property to a person eligible to hold it, as Mott unquestionably is, the infirmity of title is removed. Manuel v. Wulff, 152 U. S. 505, 14 S. Ct. 651, 38 L. Ed. 532; State ex rel. Atkinson v. World Real Estate Commercial Co., 46 Wash. 104, 89 P. 471; Oregon Mortgage Co., Ltd., v. Carstens, 16 Wash. 165, 47 P. 421, 35 L. R. A. 841; 2 C. J. 1053.

A case quite in point is State ex rel. Atkinson, Attorney General, v. World Real Estate Commercial Co. et al., supra. There an ineligible alien conveyed real property to the World Real Estate Commercial Company in violation of the provisions of the Constitution of the state of Washington. The court, in passing upon an objection similar to the one made here, held that an alien holding lands in that state by purchase under a defeasible title, subject to attack on the part of the state, might by deed transfer a good title to a third person entitled to receive and hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. Numerous other cases are to the same effect.

[15] It is next contended that the option was nonassignable. Inasmuch as the contract contains no features of personal trust or confidence reposed in any of the parties, and requires nothing more than a mere routine of paying money, it is assignable. 25 Cal. Jur. 509; 5 C. J. 852; Prichard v. Kimball, 190 Cal. 757, 214 P. 863. The option provision is clearly severable from all other provisions of the lease, and no injury could possibly come to the owner and lessor by receiving the cash purchase, price, to wit, $4,100, from the optionee's assignee, rather than from the optionee. No features of trust or confidence, as pointed out in Prichard v. Kimball, supra, exist in the instant case. Under the laws of this state, "property of any kind may be transferred, except as otherwise provided by this article [article 2 of div. 2, pt. 4, tit. 4, c. 1, Civil Code]." Civ. Code. § 1044. The assignability of an option in the exercise of a general property right is not made an exception to the general rule by any Code provision.

[16] But we are of the opinion that respondent cannot prevail because of his failure to make a proper and seasonable tender. It is admitted that the only tender made by respondent was the amount stated in the option, to wit, $4,100. In other words, no proportionate amount of rent was tendered by either the lessee or his assignee for the use of the premises for a period of about 4 months, or one-third of the year 1923. "When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing, unless such use is merely nominal, and of no benefit to him." Civ. Code, § 1935. That the section of the Code above cited has direct application to the instant case, there can be no doubt. Diepenbrock v. Luiz, 159 Cal. 716, 115 P. 743, L. R. A. 1915C, 234, Ann. Cas. 1912C, 1084. Resolving all other controverted questions of law in favor of respondent, the failure to tender a proportionate amount of rent for the use made of the premises by the lessee for a period of about 4 months prior to the offer to purchase furnishes a complete bar and answer to his demand for specific performance of the option provision. Section 1935, Civil Code, is an innovation upon the common-law rule, which was to the effect that rent will not be apportioned in case of the termination of the lease before the rent is due. A number of the states of the Union have, however, adopted statutes similar to ours with reference to the apportionment of rent.

[17-19] Respondent further contends that appellant, Cline, by a failure to object to the insufficient amount of the tender, must be deemed to have waived any objection he might have made on that ground. Section 2076, Code Civ. Proc.; section 1501, Civ. Code. An examination of the record, however, does not show that respondent sought to introduce any evidence of such waiver. The record is silent as to what actually took place when the insufficient tender was made. The burden is on the party asserting a waiver to introduce evidence of the facts constituting it (25 Cal. Jur. 932; 40 Cyc. 269), and respondent did not meet this burden. If Cline, in fact, waived the insufficiency of the tender, respondent had the right to seek from a court of equity a decree of specific performance directing a conveyance to him upon payment of the stipulated purchase price and the proportionate amount of rent due. Bradford v. Fidelity Savings & Loan Society, 177 Cal. 247, 170 P. 404; Hixson v. Hovey, 18

Cal. App. 230, 122 P. 1097; Colton v. Oakland Bank of Savings, 137 Cal. 376, 70 P. 225; Shermaster v. California Building, etc., Co., 40 Cal. App. 661, 181 P. 409. If Cline did not waive the insufficiency of the tender, respondent lost all rights under the option, and cannot be given the relief sought by a modification of the judgment of the trial court or in any other manner. The offer by its very terms was to continue only during the life of the lease, and, since the insufficient tender of $4,100, in the absence of circumstances establishing a waiver, did not constitute an acceptance, the effect of holding that respondent now has the right to compel specific performance would be to extend the option beyond the time when it was to terminate by the express agreement of the parties.

Questions going to the sufficiency of the evidence and the findings and questions of pleading, more or less of a technical character, may easily be overcome by amendment and production of evidence.

The judgment is reversed.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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200 Cal. 318

CRAWFORD v. IMPERIAL IRR. DIST. et al. (L. A. 9149.)

(Supreme Court of California. Jan. 31, 1927.)

1. Contracts ⟹126—Employment of one to appear before congressional committees to present arguments supporting certain bill held not void as against public policy.

Employment of one to appear on behalf of irrigation district before various committees of Congress having under consideration the Swing-Johnson bill to present facts and arguments in support of such bill, though contract to influence legislation, *held* not void as against public policy, since such employment is valid, unless personal, secret, or sinister influence on legislators is used.

2. Evidence ⟹60—Parties to contract which may be performed legally will not be presumed to intend illegal performance.

There is universal presumption of law that, where contract can be performed legally, it will not be presumed that parties intended to perform it in illegal manner.

3. Waters and water courses ⟹224—Irrigation district is not "municipal corporation."

Irrigation district is not strictly a "municipal corporation."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Municipal Corporation.]

4. Waters and water courses ⟹228—Irrigation district derives powers from statutes.

Irrigation district derives powers from statute under which it is created and acts, and from such other statutes as may have been enacted, granting it additional powers or limiting those already granted.

5. Waters and water courses ⟹228—Irrigation district held authorized to employ one to present arguments supporting bill before congressional committees (Irrigation District Act 1915, § 1; Irrigation District Act 1897, §§ 15 [as amended by St. 1919, p. 660, § 1], 15b, 15c [as added by St. 1917, P. 758, §§ 8, 9], 61).

Imperial irrigation district *held* authorized to employ one to appear before various committees of Congress having under consideration Swing-Johnson bill to present arguments supporting it, in view of Irrigation District Act of 1915, § 1 (St. 1915, p. 1), and Irrigation District Act of 1897, §§ 15 (as amended by St. 1919, p. 660, § 1), 15b, 15c (as added by St. 1917, p. 758, §§ 8, 9), notwithstanding section 61, since Swing-Johnson bill or similar legislation was necessary to provide water for district, and prevent destruction of property therein.

6. Waters and water courses ⟹228—Power of board of directors of irrigation district implies power to do all things required for district's purposes.

Power of board of directors to carry on business of irrigation district implies power to do all things required for that purpose, and in the exercise thereof board has authority to perform all lawful acts necessary to accomplish purposes.

7. Trial ⟹388(4)—Findings of fact are unnecessary, where case is submitted on agreed statement of facts.

Where case is submitted on agreed statement of facts without any other evidence, findings of fact are unnecessary, and if made may be disregarded.

In Bank.

Appeal from Superior Court, Imperial County; C. W. Guerin, Judge.

Suit by D. R. Crawford against the Imperial Irrigation District and others. Judgment for plaintiff, and defendants appeal. Reversed with directions.

Chas. L. Childers, of El Centro, and A. C. Finney, of Brawley, amici curiæ.

A. L. Cowell, of Stockton, P. H. Griffin, of Modesto, H. J. Hankins, of San Francisco, Jess E. Stephens, City Atty., W. B. Mathews and Clarence S. Hill, all of Los Angeles, and T. P. Wittschen and Markell C. Baer, both of Oakland, for appellants.

C. L. Brown and Harry W. Horton, both of El Centro, for respondents.

CURTIS, J. The Imperial irrigation district, one of the defendants herein, is an irrigation district organized and existing under and by virtue of the California Irrigation District Act, approved March 31, 1897 (St. 1897, p. 254), and the acts amendatory thereof and supplementary thereto. The plaintiff is an elector and taxpayer of said district, and the defendants Mark Rose, Earl C. Pound, Ira Aten, C. W. Brockman, and W. O. Blair constitute the board of directors of said district, and the defendant F. H. McIver is the duly appointed, qualified, and acting treasurer of said district. On October 23, 1925, at a regular meeting of said board of directors the following resolution was adopted by said board:

> "Resolved that Imperial irrigation district employ B. F. Fly at a salary of $250.00 per month and one-half of his actual and necessary expenses to appear on behalf of this district before the various committees of Congress of the United States having under consideration the Swing-Johnson bill, to present facts and arguments in support of said bill; said employment to commence on the 1st day of December, 1925."

Thereafter the said B. F. Fly, referred to in said resolution, accepted said employment and agreed to perform the services required of him by said resolution in consideration of the payment to him of the salary and expenses provided for therein.

This action was instituted by plaintiff as an elector and taxpayer of said district to enjoin the defendant from auditing, allowing, or ordering paid any claim or demand for salary or expenses of the said B. F. Fly for services rendered pursuant to the terms of said resolution. The trial court held that said employment was illegal, and gave judgment in favor of plaintiff in accordance with the prayer of his complaint. From the judgment in favor of plaintiff, the defendants, other than defendant C. W. Brockman, have appealed. The contention of plaintiff, the respondent herein, is that the contract of employment of the said B. F. Fly by the Imperial irrigation district is illegal and void for two reasons: First, it is a contract to influence legislation, and it is against public policy and for that reason void; and, secondly, the defendant the Imperial irrigation district is without any authority to expend the funds of said district for the purposes designated in said resolution, even if the contract were not void as being against public policy.

[1] Considering the first point made by the respondent against the validity of the contract employing Mr. Fly, it is evident from the terms of the resolution that the purpose of employing him was to secure favorable action on the part of the Congress of the United States in behalf of the Swing-Johnson bill mentioned in said resolution and then pending before Congress. Appellants make no claim that this was not the object and purpose of the district in the employment of Mr. Fly. They do contend, however, that, notwithstanding that this was the object and purpose of said contract, yet, as by the terms of the resolution he is simply to appear before the committees of Congress having said bill under consideration and to present to said committees facts and arguments in support of said bill, such employment is perfectly proper, and is not against good morals or contrary to public policy. A contract somewhat similar to the one here involved was before the Supreme Court in the case of Foltz v. Cogswell, 86 Cal. 542, 25 P. 60. In that action the plaintiff sought to recover for services rendered by her in the preparation of a certain bill to be presented to the Legislature of the state of California "and in making arguments before the various committees of that body, in order that the justice and merits of defendant's demand for the passage of the bill might be fully understood." This court after quoting from the case of Miles v. Thorne, 38 Cal. 335 [99 Am. Dec. 384], used the following language:

> "In the latter case, the court draws a distinction between the use of personal, or any secret or sinister, influence upon legislators, by one who seeks the passage of an act which it holds to be contrary to public policy, and the open advocacy of the same before the Legislature or any committee thereof in open session."

This court held, in the case of Foltz v. Cogswell, supra, that plaintiff was entitled to recover for the services performed in drawing said bill and advocating its passage before the various committees of the state Legislature. In the case of Bergen v. Frisbie, 125 Cal. 168, 57 P. 784, the defendant, being the owner of timber land entries, employed the plaintiff as an attorney to influence the official action of the Secretary of the Interior favorably to the issuance of patents upon such entries, without any stipulation for the use of improper means or methods. This court held:

> "We have carefully scanned the face of this contract, and find nothing whatever there to justify a judicial declaration that it is against good morals. There was no secrecy, no deception, no fraud, no corruption. * * * The means and manner to be employed are the all-important factors in marking the validity or invalidity of the contract. We see no one of its provisions that stamp it void as against public policy and good morals. Neither do we find anything in the evidence indicating any act done by the plaintiffs that to any degree could be construed improper. The employment of persons to influence legislation, or to influence decisions of the land department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy, * * *. The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law."

The case of Schweppe v. Sandberg, 50 Cal. App. 507, 195 P. 454, involved the legality of a contract entered into by the defendant employing the plaintiff to present certain arguments before the state highway commission for the purpose of inducing the commission to so locate a proposed highway so as to pass through the defendant's lands. In holding that the contract was not illegal or against public policy or good morals the District Court of Appeal expressed itself as follows:

> "That the owner of property lying within a region through which it is proposed to construct a public highway, the precise route of which has not yet been determined upon by the public officials who are charged with the duty of selecting the same, may not honestly and in good faith present before such officials facts and arguments with relation to the merits of a particular route which, if selected, will run to or through his property, no one will for a moment question, and it follows necessarily that what such property owner may in good faith do in person in that regard he may do through another, and he may for that purpose select an attorney or agent to act as his representative in presenting the merits of the particular location of said highway which he desires to have selected, and, hence, of course, he may agree to pay his attorney, agent, or representative a stipulated regard for the performance of such services. There is nothing illegal or immoral or against public policy in such a transaction or service."

The only California case relied upon by respondent as laying down a different doctrine than enunciated in the foregoing authorities is the case of County of Colusa v. Welch, 122 Cal. 428, 55 P. 243. This case was one brought through the district attorney of Colusa county to restrain the county treasurer of said county from paying the sum of $1,000 upon a warrant issued by the county auditor in favor of one B. S. Sprague. The county of Colusa was interested in the defeat of a certain bill pending before the state Legislature, and so it was alleged in the complaint in said action:

> "That, if the sum of $1,000 'was agreed to be paid to said Sprague, it was to secure, by means of personal solicitation, and by means of private interview with members of the Legislature of California, and by means of lobbying, the defeat of said Senate bill.'"

A general demurrer to the complaint was sustained by the trial court. The Supreme Court reversed the judgment and held that the complaint stated a good cause of action. The decision of the court upon this phase of the case was predicated upon those allegations of the complaint wherein it was alleged that Sprague was employed to secure the defeat of the bill by means of lobbying as well as by other means. Lobbying has a definite meaning in this state, and it is made a crime both by the Constitution and statutes of this state. Const. art. 4, § 35; Pen. Code, § 89. The court in this case cites with approval the following statement from Cooley on Constitutional Limitations:

> "The law also seeks to cast its protection around legislative sessions, and to shield them against corrupt and improper influences, by making void all contracts which have for their object to influence legislation in any other manner than by such open and public presentation of facts, arguments, and appeals to reason as are recognized as proper and legitimate with all public bodies. While counsel may be properly employed to present the reasons in favor of any public measure to the body authorized to pass upon it, or to any of its committees empowered to collect facts and hear arguments, and parties interested may lawfully contract to pay for this service, yet to secretly approach the members of such a body with a view to influence their action at a time and in a manner that do not allow the presentation of opposite views, is improper and unfair to the opposing interest; and a contract to pay for this irregular and improper service would not be enforced by the law."

We are, therefore, unable to find anything in the case of County of Colusa v. Welch, supra, opposed to the rule laid down in the other California cases cited above. They hold, and it must be accepted as the law in this state, as summarized in 6 Cal. Juris, p. 126:

> "The employment of persons to influence legislation, or to influence decisions of the Land Department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy. A distinction is drawn between the use of personal, or any secret or sinister, influence upon legislators, by one who seeks the passage of an act, which is contrary to public policy, and the open advocacy of the same. It is generally agreed that the appearance of a representative of an interested party before a public body to urge the adoption of a particular measure or policy is neither illegal nor improper when the means employed are open and have for their purpose the presentation of the merits of the advocated matter."

[2] Turning now to the resolution of the irrigation district employing Mr. Fly, we find nothing therein which in any way contemplates the use by Mr. Fly of any improper or illegal means to secure the passage of the legislation desired by the district. The resolution plainly states that Mr. Fly is employed to appear on behalf of the district before the various committees of Congress of the United States having under consideration the Swing-Johnson bill and to present facts and arguments in support of said bill. His services are limited by the terms of the resolution to appearances before the various congressional committees having the bill under consideration and to the presentation before said committees of facts and arguments in support of said bill. "It is the universal presumption of law that, where a contract can be performed legally, it will not be presumed that the parties intended to perform it in an illegal manner." Fites v. Marsh, 171 Cal. 487, 153 P. 926. The very nature of the services to be performed under the resolution renders it practically impossible to perform them in any other way than in open advocacy of the bill, as the facts and

arguments in support of the bill are to be presented before various congressional committees. These hearings as a rule, as we understand the procedure before them, are generally held in open and public sessions of the committees, where not only the members of the committee and the parties interested in the pending matters, but the public itself, are free to attend. Services of this nature, as we have already seen, have been held in this state, without exception, to be not against public policy or good morals, but lawful and legal. The contention, therefore, that the contract of the district employing Mr. Fly to represent said district before the various congressional committees having in charge the Swing-Johnson bill was void as being against public policy and good morals cannot be sustained.

[3-5] The other question presented upon this appeal involves the power and authority of the Imperial irrigation district to enter into the contract employing Mr. Fly and to pay for his services from the funds of such district, even if such contract is not against public policy. The position taken by respondent is that, as the purpose of such contract is to employ Mr. Fly to influence legislation, the district has no power to use the funds of said district for such purpose. Respondent contends that an irrigation district is a municipal corporation and that the rule is well established that a municipal corporation has no authority to make an expenditure of public funds for the purpose of influencing legislation. While there is language to be found in some of the decisions of this state which might be taken as holding that an irrigation district is a municipal corporation (People v. Cardiff Irr. Dist., 51 Cal. App. 307, 312, 197 P. 384), we think that the great weight of authority is to the effect that an irrigation district is not strictly a municipal corporation (Huck v. Rathjen, 66 Cal. App. 84, 225 P. 33; Whiteman v. Irrigation District, 60 Cal. App. 234, 243, 212 P. 706; Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72). In the Turlock Case the court said, page 187 (198 P. 1062):

> "The nature of an irrigation district has been a matter of judicial investigation and interpretation, and it has been held that such a corporation is not a municipal corporation, but a 'public corporation for municipal purposes.'" (Citing authorities.) "As to swamp land, drainage, levee, and reclamation districts, similar to irrigation districts, it has been held that they were not municipal corporations." (Citing authorities.)

In Bettencourt v. Industrial Acc. Com., 175 Cal. 559, it was held on page 561 (166 P. 323, 324), that:

> "But reclamation districts organized as was this petitioner possess no political nor governmental powers, are not organized for political or governmental purposes, and are therefore not public corporations at all. Indeed, they are not in strictness corporations, public or private, but governmental mandatories or agents vested with limited powers to accomplish limited and specific work."

It is not necessary for our purposes to determine the strict legal status of an irrigation district, but it is evident from the decisions of this state, only a few of which have been referred to above, that an irrigation district is not strictly speaking a municipal corporation. This circumstance only becomes important when we come to examine certain authorities relied upon by the parties hereto which will be later referred to.

An irrigation district, like any other public or private corporation, derives its powers from the statute under which it is created and acts, and from such other statutes as may have been enacted by the Legislature granting it additional powers or limiting those already granted. These powers are as different from those exercised by a strictly municipal corporation as the purposes of an irrigation district differ from those of a city or county or other strictly municipal corporation. We must therefore consult the statutes of the state in the first instance, at least, to determine the extent of the powers which may be legally exercised by an irrigation district. The extent of these powers is found in the main in those sections of the statutes defining the powers of boards of directors of such districts. The principal provisions of the statutes affecting the powers of boards of directors are contained in the following sections of the statutes of our state:

Section 15 of the California Irrigation District Act of 1897 (as amended by St. 1919, p. 660, § 1), under which the Imperial irrigation district was organized and is now operating, provides:

> "The board of directors shall have the power and it shall be their duty to manage and conduct the business and affairs of the district; make and execute all necessary contracts; employ and appoint such agents, officers, and employees as may be required, and prescribe their duties. * * * Said board shall also have the right to acquire, by purchase, lease, contract, condemnation, or other legal means, all lands, and waters, and water rights, and other property necessary for the construction, use, supply, maintenance, repair and improvements of said canal, or canals, and works, whether in this or in other states or in a foreign nation, including canals, and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful waters, and all necessary appurtenances, and also where necessary or convenient to said ends to acquire and hold the stock of other corporations domestic or foreign owning waters, canals, waterworks, franchises, concessions or rights. Said board may enter into, and do any acts necessary or proper for the performance of, any agreements with the United States, or any state, county, district of any kind, public or private corporation, association, firm or individual, or any

> number of them, for the joint acquisition, construction, leasing, ownership, disposition, use, management, maintenance, repair or operation of any rights, works or other property of a kind which might lawfully be acquired or owned by the irrigation district, and may acquire the right to store water in any reservoirs or to carry water through any canal, ditch, or conduit not owned or controlled by the district. * * *"

Section 15b (as added by St. 1917, p. 758, § 8) of said act further provides that:

> "The board of directors of any irrigation district may also construct the necessary dams, reservoirs, and works for the collection of water for said district, and do any and every lawful act necessary to be done, that sufficient water may be furnished to each landowner in said district for irrigation and domestic purposes. * * *"

Section 15c (as added by St. 1917, p. 758, § 9) provides, among other things, that:

> "Said board shall have power generally to perform all such acts as shall be necessary to fully carry out the purposes of this act."

In addition to these sections of the Irrigation District Act, section 1 of the Act of 1915 (Stats. 1915, p. 1) provides:

> "The board of directors of irrigation districts having an area of more than five hundred thousand acres may expend such sums as may to them seem necessary for the protection of the canal system of such district or of lands within such districts from damage by flood and from the overflow of rivers and may contribute funds for that purpose to be expended by or jointly with the government of the United States of America, or other governments or persons benefited by the same protective work or works. The board of directors of any such irrigation district may also do all things necessary to insure such irrigation system and the lands within such district from any such damage by flood or overflow without first receiving a petition of landowners or freeholders for holding an election to authorize such expenditure."

This act has been held to be constitutional and applicable to the Imperial irrigation district. Wores v. Imperial Irrigation Dist., 193 Cal. 609, 227 P. 181.

To briefly epitomize the terms of these sections of the statutes, we find that the board of directors of an irrigation district is given power generally to manage the affairs of the district; to execute all necessary contracts; to employ and appoint all agents, officers, and employees, and define their duties; to acquire water rights, canals, maintain waterworks, whether in this or any other state or in a foreign nation; to enter into any agreement with the United States or any state or other corporation, public or private or individual, for the joint acquisition, construction, maintenance, or operation of any rights or works that might be lawfully owned by an irrigation district; to do any and all lawful acts necessary to be done that sufficient water may be furnished to the inhabitants of the district for irrigation and domestic purposes and to perform all acts that shall be necessary to fully carry out the purposes of the act under which said district was formed. In addition to these powers conferred generally upon irrigation districts, the board of directors of the Imperial irrigation district, under the Act of 1915, may expend such funds of the district as they may deem necessary for the protection of the canal system and the lands of the district from damage by flood or the overflow of rivers, and may contribute funds to be expended for that purpose by or jointly with the government of the United States of America or other governments or persons benefited by such protection work. From these provisions of the statutes we are impressed with two outstanding features of this legislation: First, that the prime object and purpose of such an organization is to provide water for the use of its inhabitants and landowners for irrigation and domestic purposes; and, secondly, the broad and comprehensive nature of the powers conferred upon the board of directors in order to enable them to accomplish this purpose. We also might emphasize another feature which stands out prominently in this legislation, and which, in our opinion, is important in the determination of the question now under consideration. This is the minute particularity and the definiteness with which the Legislature has given the board of directors power to contract with the United States government as well as with individuals and other public and private corporations for the purposes of acquiring water rights and constructing and operating waterworks and expressly authorizing the district to contribute funds of the district for the purpose of construction of works to be erected by the United States, or jointly by the United States and the district, for the purpose of protecting the canal system and lands of the district from river overflow.

In order to perform these duties and execute the powers thus given to the board of directors of the irrigation district, it is apparent that it may be necessary for the board to adopt some means of bringing to the attention of the United States government or other governments with which the district may wish to enter into contracts, the subject-matter of the proposed contracts. It also seems apparent to us that occasions may arise when it will be absolutely necessary in the best interests of the district that it be represented in person before the proper boards or instrumentalities of these governments in order that the claims of the district as to the matters before these boards may be understood by the officials charged with the consideration of such matters. In bringing about the execution of a contract with the United States government, such as securing rights of way over the public domain for a canal system or the right to take water from a stream under government control and jurisdiction, it may be necessary for the applicant to be represented, either in person or by a duly appointed agent before the Department of the Interior or some board or committee having charge of such matters, and perhaps before Congress itself, when the matters require congressional action, in order to properly present the interest of said district. We think there is no question if the Imperial irrigation district found it necessary to secure a right of way over the public domain for its canal system, and this right could only be had by the district making a proper showing before the Department of the Interior, that the board of directors would have the power to send a representative before such department for the purpose of properly presenting such matter before said department. And, if the project, which the board of directors finds is necessary in order to carry out some of its prescribed duties, requires congressional action before the same may be performed by the district, then we can see little or no difference in sending a representative to present the facts bearing upon the subject of the proposed legislation before the proper committees having the same under consideration than in sending such a representative before the Department of the Interior to present a matter there pending in which the district is interested. To withhold such authority in either case would be to cripple unnecessarily the power of the district to accomplish the purposes of its formation, and might seriously hamper the district in its efforts to secure the very contracts which the statute expressly authorizes it to make and execute with the United States government.

The Swing-Johnson bill authorizes the construction of a dam in the Colorado river at a point in or near Boulder Canyon, and also the construction of a canal from the Laguna Dam in said river to the lands of the Imperial irrigation district. The dam and canal are to be built according to the terms of said bill by the United States government, and the former is to be paid for by revenues to be derived from the leasing of power privileges incident thereto and the latter by the lands to be benefited thereby. This case was submitted in its entirety upon an agreed statement of facts. This statement recites at some length the problems of the Imperial irrigation district and its efforts to secure an adequate water supply for the use of its inhabitants for irrigation and domestic purposes, and protection of the district from the flood waters of the Colorado river. It is not necessary to enter into the details of this lengthy statement of facts. A portion of paragraph XIV of the agreed statement reads as follows:

> "It is necessary that said Swing-Johnson bill, or similar legislation by the Congress of the United States, be enacted in order that water may be furnished to the landowners within the boundaries of Imperial irrigation district for irrigation and domestic use, and that it is necessary that said Swing-Johnson bill or similar legislation be passed by the Congress of the United States to prevent the destruction of the properties of the said district and the inhabitants thereof from floods of the Colorado river; * * * that said Swing-Johnson bill is designed primarily for the relief and benefit and protection of the Imperial irrigation district."

From another portion of the agreed statement of facts it appears that the only source from which said district can secure an adequate or, for that matter, any supply of water is the Colorado river, and, furthermore, due to the fact that said district is situated from 100 to 300 feet below the river bed of said river, it is seriously menaced by having its lands overflowed and destroyed by the flood waters of said river. In fact, it is expressly stipulated as to the flood menace that:

> "Within a period of from 10 to 20 years the basin where the river now flows will be entirely filled with silt and sediment, and that in that event there will be no place for the river to flow except into the Imperial Valley and onto the lands within the Imperial irrigation district, and that the river will so flow into said district and completely inundate and destroy the same and the property values therein and drive the inhabitants therefrom if adequate means are not promptly provided to thoroughly regulate the river, desilt the water, and control the floods by means of one or more great storage reservoirs in the upper reaches of the river."

The district is not financially able to construct said dam and canal, and, if it were able, it has no authority from the United States or the states in which said dam would necessarily have to be located to build said dam. From these facts it appears that the only means whereby said district can hope to obtain a supply of water for irrigation and domestic purposes and to secure protection from destruction of the lands therein by the flood waters of the Colorado river is through a contract with the United States government. It is the object and purpose of the Swing-Johnson bill to enable the government to enter into such a contract with the district. The purpose of employing Mr. Fly and sending him to Washington is to enable the district, through him, to present the facts bearing upon the subject-matter of the proposed legislation before the committees in Congress having this bill under consideration. We think it is plainly within the powers of the board of directors of said district to furnish to Congress all the information in its possession which might tend in any manner to enlighten the members of that body upon the pending bill, and, if in the judgment of the board of directors this can best be done by having a representative of the district appear personally before the committees of Congress, then in our opinion said board of directors is authorized to employ and send to Congress such a representative.

We do not think this conclusion is contrary to any of the authorities cited by the respondent and the amici curiæ in this action. The cases mainly relied upon by them as announcing a different doctrine are County of Colusa v. Welch, 122 Cal. 428, 55 P. 243; Valentine v. Robertson (C. C. A.) 300 F. 521, and State ex rel. Rice v. Bell, 124 Wash. 647, 215 P. 326. In the first two of these three cases the right of a strictly municipal corporation to employ a representative to appear before a legislative body to influence legislation in which the municipality had only an indirect interest was involved. In each case it was decided that no such authority was given to the governing body of such municipality and that public funds could not be expended for such purpose. In the case of State ex rel. Rice v. Bell, supra, the Supreme Court of the state of Washington decided that an irrigation district known as the Quincy Valley irrigation district, organized under the laws of that state, had no authority to pay the expenses of its engineer in attending the Western States Irrigation Congress, held at San Francisco, for the purpose of interesting said Irrigation Congress in a bill then pending before the Congress of the United States known as the Jones bill, the passage of which it was thought would be of great benefit to said irrigation district. The court held that the district had no authority to expend public funds to pay the expenses of said engineer in attending said Congress. The Jones bill, so called, was not a measure affecting directly the Quincy Valley irrigation district, but was a bill applying generally to any irrigation district authorized to issue bonds, and providing a plan whereby the interest on bonds issued under certain conditions might be guaranteed by the United States government. It is obvious that the conditions under which the engineer of this irrigation district was employed differ materially from those surrounding the employment of Mr. Fly by the Imperial irrigation district. It is to be further noted that all the authorities relied upon by the court in that decision were cases in which the right of a strictly municipal corporation to make expenditures of public funds was involved. In other words, the Supreme Court of Washington applied the rule applicable to strictly municipal corporations to irrigation districts and accordingly held that the latter were without power to make expenditures of public money for the purposes shown by the facts of said case. This, as we have already seen, we have declined to do, for the reason, as we view the subject, irrigation districts, at least in this state, in certain respects, and particularly in regard to their power to provide the necessary water for the use of lands within the district and to protect them from flood waters, are clothed with most extensive powers, sufficient, we believe, at least to authorize a contract of the charter herein under consideration. For this reason we are unable to accept as an authority in the present action the case from the Supreme Court of the state of Washington.

Neither do we find anything in section 61 of the California Irrigation District Act of 1897 which would lead to a conclusion contrary to that which we have expressed above. This section provides:

> "The board of directors or other officers of the district, shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act; and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void. * * *"

[6] We think that we have already shown that the employment of Mr. Fly was within the express provisions of the Irrigation Act. It is true that there are no express words to be found in the statute authorizing the board to employ a person to attend upon the sessions of Congress in the interest of legislation affecting the district. In like manner there is no express provisions of the statute authorizing the board of directors to rent a building in which to carry on the business of the district, but the board is by the terms of the statute authorized to "manage and conduct the business and affairs of the district." The power to carry on the business of the district implies the power to do all things required for that purpose, and this would include the renting of a building in which to transact the business of the district, and a debt or liability incurred for the reasonable rental of a building for such purposes would not be in excess of the express provisions of the act. For like reason it has been held that the board of supervisors, under their general powers to supervise the official conduct of all county officers, may employ an expert to examine the books of said officers (Harris v. Gibbins, 114 Cal. 418, 46 P. 292), and the state board of examiners, under the law as it then existed, defining its powers, which did not include any express authority to employ an expert, might under its general powers appoint such an employee to assist said board in the performance of its duties (Lewis v. Colgan, 115 Cal. 529, 47 P. 357).

> "A public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted. * * *" 21 Cal. Jur. 874.

So the power to acquire lands and water rights, construct canals and reservoirs, build levees, and otherwise protect property from flood water, and to enter into contracts with private individuals and public corporations and with the several states and the national government, is given to the board of directors of an irrigation district by the express provisions of the act. In the exercise of this power the board of directors have authority to perform all lawful acts necessary to be done in order to accomplish any or all of these purposes. All of these acts, therefore, would be within the express provisions of the act, and any liability incurred by the district in the performance of any of said acts would be a legal claim against the district and entitled to be paid from the funds of said district. Such a liability could not in any way be held to be void as incurred in excess of the express provisions of the act. There is nothing, therefore, to be found in the provisions of said section 61 which affects the legality of the Fly contract.

[7] The judgment is reversed. As the case was submitted upon an agreed statement of facts without any other evidence whatever, findings of fact were unnecessary. 24 Cal. Jur. 953. The only question, therefore, before the court, was as to what was the law applicable to those facts. Gregory v. Gregory, 102 Cal. 50, 36 P. 364; McMenomy v. White, 115 Cal. 339, 47 P. 109. Any findings of facts made by the court under these circumstances may be disregarded. The trial court is therefore directed to enter a judgment in favor of the defendants, denying plaintiff the relief sought by the complaint herein.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

SHENK, J., being disqualified, did not participate in the decision.

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200 Cal. 425

HARTWIG et ux. v. CENTRAL-GAITHER UNION SCHOOL DIST. et al.

(Sac. 3768.)

(Supreme Court of California. Feb. 15, 1927.)

1. Boundaries 🔑3(9)—Rule that description by acreage is secondary to description by boundaries held inapplicable to conveyance of quarter section, less lot deeded to school district (Civ. Code, § 1069).

Rule that description of property conveyed by acreage is secondary to description by boundaries *held* inapplicable to deed conveying quarter section, "containing 160 acres, less one acre and 106 square rods deeded * * * to Gaither school district," especially in view of Civ. Code, § 1069, requiring interpretation of reservation in favor of grantor; grant not being of entire quarter section, but of quarter section less portion more particularly described by reference to previous conveyance.

2. Deeds 🔑93—Intent of parties to unambiguous deed must be gathered from instrument and language thereof.

Intent of parties to unambiguous deed must be gathered from the instrument itself and language used therein.

3. Deeds 🔑140—Neither successors of grantee of quarter section, less lot conveyed to school district, nor district, which had ceased to use it for prescribed purposes, had any interest therein.

Neither successors to title of grantee in deed of quarter section, less lot theretofore conveyed to school district for educational purposes only, nor such district, which had ceased to use lot for school purposes, had any right, title, or interest in such lot.

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by C. H. Hartwig and wife against the Central-Gaither Union School District and the trustees thereof. From the judgment rendered, plaintiffs appeal. Affirmed.

A. H. Hewitt and Lloyd E. Hewitt, both of Yuba City, for appellants.

Arthur Coats, of Yuba City, for respondents.

LANGDON, J. This is an appeal by plaintiffs from a judgment in an action to quiet title to certain real property in Sutter county, California. The judgment decreed that neither the plaintiffs nor the defendants had any right, title, or interest in the land in controversy.

On August 4, 1873, the land involved here, as a part of a larger tract, was the property of James W. Gaither, and on that date he and his wife, by good and sufficient deed, granted to the trustees of the Gaither school district a lot consisting of one acre and 106 square rods, situated in the northwest quarter of section 32, township 14 north of range 3 east, Mount Diablo meridian, and running south 19 rods; thence east 14 rods; thence north 19 rods and thence west 14 rods to the place of beginning. This deed contained the condition that said premises should be used for educational purposes only, and that when they ceased to be so used they should revert to the grantors thereof, their heirs and assigns.

According to the stipulation of the parties as to facts and the findings of the trial court, about a year after the execution of the deed above mentioned, Gaither and his wife granted and conveyed to Bethel Way "the northwest quarter of section 32, township 14 north, range 3 east, Mount Diablo meridian in Sutter county California, containing 160 acres, less one acre and 106 square rods deeded by said James W. Gaither and M. E. Gaither, his wife, in the year 1873 to Gaither school district, said lot being the northwest corner of the above parcel of land."

There were no further conveyances from the Gaithers and plaintiffs, by mesne conveyances, have succeeded to all right, title, and interest of Bethel Way under the aforementioned deed to him by the Gaithers in 1873. In the meantime, as found by the trial court, the land granted to the school district had ceased to be used for school purposes for more than three years prior to the bringing of this action. The "school land" had reverted, therefore (Papst v. Hamilton, 133 Cal. 631, 66 P. 10) and the question presented by the record is whether that reversionary interest remained in the heirs of Gaither, who were not parties to this action, or whether it passed by deed made in 1873 from the Gaithers to Bethel Way and from Bethel Way, through successive transfers, to the present plaintiffs. The problem is determined by the language which we have quoted from said deed given by the Gaithers to Way.

[1, 2] Appellants contend that this instrument grants the entire quarter section and that the excepting clause is, in effect, meaningless, because it is at variance with the grant of the quarter section. This argument proceeds upon the theory that the exception is an attempt to describe the property by acreage and that such description is secondary to a description by boundaries. We think this rule of construction has no application to the facts of this case. The grant was not of the entire quarter section, but of the quarter section, less one acre, more or less, which was more particularly described by reference to a previous conveyance. There is no ambiguity about the deed from the Gaithers to Way, and the intent of the parties must be gathered from the instrument itself and the language used therein. It is pertinent to inquire here, as was done in the opinion upon a closely similar state of facts (Seligman v. Carr, 8 Cal. App. 572, 97 P. 324):

> "Why was the excepting clause inserted if not to reserve some interest in the grantors or to take some interest out of the operation of the deed?"

In the case last mentioned, it was said, in considering a closely analogous state of facts:

> "In whom is vested the reversionary interest in the 2 acres conveyed to the school district, which is designated as the school land? The court found that a two-thirds interest belongs to plaintiffs and that one-third is vested in defendant Webb. The court decided that in view of the exception or reservation in the deed of William and John to Samuel Frey, of January 30, 1884, they conveyed to Samuel only an undivided half of their interest in that part of the 20-acre tract that was not conveyed to the school district; that the school land was excepted from the operation of the deed and hence when Samuel Frey, in November, 1884, conveyed to Carr, his deed conveyed no greater reversionary interest in the school land than he reserved when he deeded to the school district, which was one-third, and this the court awarded to defendant Webb."

Our conclusion in the instant case, as well as the conclusion of the court in Seligman v. Carr, supra, is fortified by section 1069, Civil Code, which provides that a reservation in a grant is to be interpreted in favor of the grantor.

[3] It appears from the undisputed facts that neither the plaintiffs nor the defendants have any right, title, or interest in the land to which title was sought to be quieted, and the judgment and decree appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

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200 Cal. 796

HARTWIG et ux. v. PROPER. (Sac. 3825.)

(Supreme Court of California. Feb. 15, 1927.)

1. Boundaries 🔑3(9)—Rule that description by acreage is secondary to description by boundaries held inapplicable to conveyance of quarter section, less lot deeded to school district (Civ. Code, § 1069).

Rule that description of property conveyed by acreage is secondary to description by boundaries *held* inapplicable to deed conveying quarter section "containing 160 acres, less one acre and 106 square rods deeded * * * to Gaither school district," especially in view of Civ. Code, § 1069, requiring interpretation of reservation in favor of grantor; grant not being of entire quarter section, but of quarter section less portion more particularly described by reference to previous conveyance.

2. Deeds 🔑93—Intent of parties to unambiguous deed must be gathered from instrument and language thereof.

Intent of parties to unambiguous deed must be gathered from the instrument itself and language used therein.

3. Deeds 🔑140—Heirs of grantors of quarter section, less lot conveyed to school district, which had ceased to use it for prescribed purposes, held owners of lot in fee.

Heirs of grantors in deed of quarter section, less lot theretofore conveyed for educational purposes to school district, which had ceased to use it for such purposes, *held* owners thereof in fee, subject to grantors' administrator's right of possession for administration.

In Bank.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by C. H. Hartwig and wife against E. E. Proper, as administrator of the estates of James W. Gaither and M. E. Gaither, deceased. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. H. Hewitt, and Lloyd E. Hewitt, both of Yuba City, for appellants.

Arthur Coats, of Yuba City, for respondent.

LANGDON, J. This is an appeal by plaintiffs from a judgment in an action to quiet title to certain real property in Sutter county, California, which judgment decreed that the plaintiffs have no right, title, or interest in said land and that the heirs of James W. Gaither and of M. E. Gaither are the owners of the same in fee, subject to the right of possession, for the purposes of administration, of the defendant, E. E. Proper, as administrator of the estate of James W. Gaither, deceased, and of M. E. Gaither, deceased, and that said administrator is now entitled to the possession of said property.

The facts are undisputed, and the appeal presents the single question of the construction of a deed.

On August 4, 1873, the land involved here, as a part of a larger tract, was the property of James W. Gaither, and on that date he and his wife, by good and sufficient deed, granted to the trustees of the Gaither school district a lot consisting of one acre and 106 square rods, situated in the northwest quarter of section 32, township 14 north of range 3 east, Mount Diablo meridian, and running south 19 rods; thence east 14 rods; thence north 19 rods, and thence west 14 rods to the place of beginning. This deed contained the condition that said premises should be used for educational purposes only, and that when they ceased to be so used they should revert to the grantors thereof, their heirs and assigns.

[1-3] According to the stipulation of the parties as to facts and the findings of the trial court, about a year after the execution of the deed above mentioned, Gaither and his wife granted and conveyed to Bethel Way "the northwest quarter of section 32, township 14 north, range 3 east, Mount Diablo meridian in Sutter county, California, containing 160 acres, less one acre and 106 square rods deeded by said James W. Gaither and M. E. Gaither, his wife, in 1873 to Gaither school district, said lot being the northwest corner of the above parcel of land."

There were no further conveyances from the Gaithers, and the plaintiffs, by mesne conveyances, have succeeded to all right, title, and interest of Bethel Way under the aforementioned deed to him made by Gaithers in 1873. In the meantime, as found by the trial court, the land granted to the school district had ceased to be used for school purposes for more than three years prior to the bringing of this action. The "school land" had reverted, therefore (Papst v. Hamilton, 133 Cal. 631, 66 P. 10), and the question presented by the record is whether that reversionary interest remained in the heirs of Gaither or whether it passed by deed made in 1873 from Gaithers to Bethel Way and from Bethel Way, through successive transfers, to the present plaintiffs. The problem is determined by the language which we have quoted from said deed given by Gaithers to Way.

This identical question was presented by the record in the companion case to this one (Hartwig et al. v. Central-Gaither Union School District et al., Sac. 3768, of the records of this court, 253 P. 733), which was brought by the present plaintiffs to quiet title to this same land against the school district, and in which action this court has this day determined the effect of the deed from the Gaithers to Bethel Way. Both cases were submitted to this court, by stipulation, upon the same points and authorities, and the decision of the one, necessarily, concludes the other.

Upon the authority of Hartwig et al. v. Central-Gaither Union School District et al., supra, and for the reasons therein stated, the judgment appealed from in this action is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.

81 Cal. App. 226

PEOPLE v. BROWN et al. (Cr. 1294; 3013.)★

(District Court of Appeal, Second District, Division 2, California. Feb. 7, 1927. Hearing Denied by Supreme Court April 8, 1927.)

1. Criminal law 🔑419, 420(10)—Admitting hearsay evidence of deceased's statements, showing discord with defendants in furtherance of alleged conspiracy against him, held reversible error.

In murder trial, admission of hearsay testimony as to deceased's statements, showing gross unpleasantness and discord between him and defendants in furtherance of alleged conspiracy to harass and discourage him until he abandoned ranch properties and his life insurance to one defendant, *held* reversible error.

2. Witnesses 🔑380(5)—Competent purpose must be shown to admit evidence of inconsistent statements by witness sought to be impeached by party calling him (Code Civ. Proc. §§ 2049, 2052).

While party may impeach his own witness, under Code Civ. Proc. §§ 2049, 2052, by proving statements made by him at other times inconsistent with his present testimony, a com-

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★Hearing denied by Supreme Court.

petent purpose must first appear to avoid exclusion of impeaching testimony as hearsay, or on ground that one calling witness vouches for his veracity, and it is not permissible to call a witness merely to impeach him.

3. Witnesses 🔑380(5)—Witness may be impeached by party producing him only when evidence injured cause of such party (Code Civ. Proc. §§ 2049, 2052).

It is only when evidence produced has resulted in injury to cause of party producing witness that he may be impeached by such party, under Code Civ. Proc. §§ 2049, 2052, by showing that he made statements at other times inconsistent with his present testimony.

4. Criminal law 🔑692—Defendants held not to have waived objection to impeachment of people's witness by demand that district attorney be sworn and testify as to conversation with such witness (Code Civ. Proc. §§ 2049, 2052).

Defendants *held* not to have waived rule that witness may be impeached by party producing him, under Code Civ. Proc. §§ 2049, 2052, only when his testimony injured cause of such party, by demanding that district attorney be sworn and testify as to alleged conversation with people's witness in his office; such request being merely legitimate precaution against unsworn statements as to incompetent matters.

5. Criminal law 🔑475—Testimony as to direction from which blood emanated, and relative positions of certain markings, by experts investigating nearly two months after alleged homicide, held inadmissible.

In murder trial, chemist's and crime investigator's testimony as to direction from which blood on premises and deceased's wearing apparel emanated, and relative positions of certain markings, *held* inadmissible, where effort was made to remove all blood spots immediately after injury, and they did not investigate until nearly two months afterward.

6. Criminal law 🔑471—Expert cannot express opinion as to conclusions from matters of common observation and experience.

One skilled in art, trade, or science, and having knowledge of matters not within grasp of men of average intelligence, education, and experience, may express opinion on state of facts within his specialty and involved in inquiry, but not as to conclusions from matters of common observation and experience.

7. Homicide 🔑166(11)—Decedent's will held inadmissible to show motive for homicide, in absence of showing that defendants knew of it.

In murder trial, decedent's will, executed over 10 years before death, *held* inadmissible to show motive, in absence of evidence that defendants had any knowledge of its existence.

8. Homicide 🔑166(11)—Evidence of defendant's mistreatment of deceased's sister and acts indicating criminal design to secure their property held admissible in murder trial.

In murder trial, testimony as to defendant's gross mistreatment of deceased's sister, attempt to injure her by inserting phonograph needles in quinine capsules prescribed for her, and other acts tending to show premeditated design to carry out felonious scheme to secure deceased's, as well as his sister's, property, *held* admissible.

9. Criminal law 🔑723(1)—Special prosecutor's argument that reflections were cast on him as representative of grand jury held misconduct.

In murder trial, special prosecutor's statements in argument that any reflections cast on him by defendants were cast on him as representative of grand jury, not as individual, *held* misconduct; grand jury not being concerned with employment of prosecuting attorneys, nor obtaining of convictions.

10. Criminal law 🔑719(1)—Special prosecutor's argument that former superior court judge had refused to defend defendants held improper.

In murder trial, special prosecutor's argument that former judge of superior court of county had refused to defend defendants *held* improper, as not supported by evidence, and asserting in effect that person referred to believed defendants guilty.

11. Criminal law 🔑720½—Argument that coroner's jury did not give absolutely clean bill of health, and that "we know that these particular people * * * are guilty," held improper.

In murder trial, argument of people's counsel that there must have been something in testimony that did not convey innocence to coroner's jury because they did not absolutely give defendants a clean bill of health, and that "we know that these particular people * * * are guilty of murder," *held* improper as not supported by evidence, commenting on verdict of coroner's jury, and predicating statement of ultimate fact on counsel's private opinion.

12. Criminal law 🔑721(5)—Argument that only contradiction of charge was argument of counsel paid by defendants "to do * * * what they were scared to do with evidence" held improper comment on their failure to testify (Pen. Code, § 1323).

In murder trial, argument of people's counsel that defendants had remained silent at certain times, had loaned undying strength to charge by weakness of their efforts to deny certain accusations, and contradicted it only by argument of counsel paid by them "to do with an argument what they were scared to do with evidence," *held* improper comment on their failure to testify, in violation of Pen. Code, § 1323.

13. Criminal law 🔑723(1)—Counsel's argument that jurors should prepare to take law into their own hands, but for his presence, held prejudicial misconduct.

In murder trial, it was prejudicial misconduct for counsel to suggest that jurors take law into their own hands by statement that they had better prepare to do so but for his presence.

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14. Criminal law 🔑659, 723(1)—Special prosecutor's inflammatory argument, followed by applause and cheers, held prejudicial misconduct.

Special prosecutor's argument, consisting of extended inflammatory attack upon defendants and their counsel, and followed by applause and cheers from audience, *held* prejudicial misconduct.

15. Criminal law 🔑659, 730(1)—Denial of motion to clear courtroom because of applause and cheers, and refusal to caution jury and admonish counsel after improper argument, held prejudicial error.

Trial court's denial of motion to clear courtroom because of applause and cheers at conclusion of special prosecutor's argument, and statement, when assignments of prejudicial statements therein as misconduct were attempted, that "the court will deem that you have excepted to * * * and assigned every statement as misconduct," and "requested the court to instruct the jury, and that the court has refused to do so," *held* prejudicial error; court's duty being to caution jury and admonish counsel when objection was first interposed, and to prevent repetition of such infractions of rules.

16. Indictment and information 🔑10—Indictment by grand jury visiting place of homicide, where defendant and other witnesses demonstrated and explained position of body, etc., held invalid (Pen. Code, §§ 906, 919, 925).

Grand jury's visit, without court order, to place of alleged homicide, where defendant and other witnesses demonstrated and explained position of body, location of blood spots, etc., in violation of Pen. Code, §§ 906, 919, 925, *held* to invalidate indictment as against contention that they did not convene as grand jury nor swear witnesses, but visited premises merely for inspection, and were not in session when evidence was offered.

17. Grand jury 🔑39—Unauthorized person may attend grand jury session only as witness during taking of his testimony (Pen. Code, § 925).

Only capacity in which person, not authorized by Pen. Code, § 925, may be called before or attend on grand jury session, is that of witness during actual taking of his own testimony.

18. Constitutional law 🔑70(3)—Court must comply with mandatory statutory requirements as to grand jurors and grounds for setting aside indictment, regardless of wisdom (Pen. Code, §§ 906, 919, 925).

It is court's duty to comply with mandatory requirements of Pen. Code, §§ 906, 919, 925, as to grand jurors, and statutory provisions as to grounds on which indictment shall be set aside, without regard to wisdom thereof.

19. Grand jury 🔑33—Grand jury cannot voluntarily inspect premises and examine witnesses without court order.

Grand jury cannot voluntarily make inspection of premises and examine witnesses without court order.

On Denial of Hearing by Supreme Court.

20. Witnesses 🔑380(5)—Testimony offered by district attorney that people's witness said he saw deceased staggering out of defendant's house, to impeach his testimony that he only saw three automobiles in yard, held properly admitted.

In murder prosecution, testimony that people's witness said he saw deceased staggering out of back door of defendant's residence, "like a chicken with his head cut off," *held* properly admitted, when offered by district attorney in impeachment of his testimony that he saw nothing except three automobiles in yard when he passed.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Jennie Laura Brown, John H. Tipton, and Fred Mills were convicted of second degree murder, and they appeal. Reversed, with directions.

Crosby, Naus & Crosby, of Oakland, and George L. Reimbold, of Hanford, for appellants Brown and Tipton.

J. C. C. Russell, of Hanford, for appellant Mills.

U. S. Webb, Atty. Gen., John W. Maltman and John L. Flynn, Dep. Attys. Gen., and William R. McKay, Dist. Atty., of Hanford, for the People.

CRAIG, J. The appellants and one Robert McCammish were jointly charged by indictment with having on the 14th day of December, 1924, in the county of Kings, willfully, unlawfully, feloniously, and with malice aforethought, killed and murdered one Lee Camp. Appellants were convicted of murder in the second degree, and McCammish was acquitted. Motions for new trial were denied, and the respective appeals from the judgments and rulings upon such motions are presented together. All of the parties adopt as substantially correct the statement of facts set forth in the briefs of appellants Brown and Tipton.

From such statement, and from a careful perusal of the voluminous record in this case, it appears that the whole controversy revolved around the question as to whether or not Jennie Laura Brown instigated and conspired with her codefendants to perpetrate the alleged murder of Lee Camp. It is admitted that the latter received an injury, either through accident, or a felonious assault, from which he died within a few hours thereafter. It was the theory of the prosecution that Camp was struck on the head with a cogwheel which lay near a windmill tower on the premises of Mrs. Brown, whereas, the defendants insisted that he fell from the tower, striking his head on the wheel. The evidence in this respect is wholly circumstantial. None of the defendants testified at the trial, and no one other than the three ap-

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

pellants appears to have been upon the ground at the time of the occurrence in question. W. Stanton Brown, the husband of appellant Jennie Laura Brown, testified that he was ill and in bed, and that his wife was in the room with him, until some one called her from downstairs to "come quick"; that he heard a voice on the telephone, summoning a doctor to "come to the Brown ranch immediately, an accident"; and that within a few minutes he "heard two people crying" on the floor below.

Tipton testified before the coroner's jury that he and Camp were preparing to remove a large windmill fan from the tower; that the witness had gone to a shed, and was gathering up some ropes; that he returned to the tower within about 20 minutes, whereupon he discovered Camp lying "kind of on his side" on a brick pavement at the base of the tower, and saw that Camp had been injured. This witness further swore, however, that he did not know that the man had been on the tankhouse; that he "didn't see him at all, or didn't see him fall or never heard him"; that Mills soon drove up in his automobile, and was told to telephone for a doctor, soon after which a Chinese employee named Lee Gum appeared on the scene. McCammish appears to have been visiting a neighbor at the time. Shortly thereafter a doctor arrived, followed by an ambulance, and Camp was removed to a hospital, where he died that afternoon.

Autopsies which were performed on the following day and six weeks later showed that the crown of the head was intact, but that the upper part of the occipital bone and the lower part of the two parietal bones "were a mass of small pieces," and that portions of the skull had penetrated the brain. About twenty "peculiar shaped marks," apparently such as would result from contact with the cogs on the wheel mentioned, and of a bluish color, appeared on the posterior area of the scalp. There was a small blue scar on the right temple, and a bruise on the left hip, but no other blemish was found on the body.

It appears that the deceased was 11 years of age when, in 1901, he and his sister, Pearl Camp, were taken by the Browns to rear and educate, and that he had continued to reside with them until the date of his death. He received an interest in certain real property near the Brown ranch, title to which he conveyed to Mrs. Brown, and carried life insurance of approximately $80,000, of which the latter was named as beneficiary, and she had agreed to at least assist in paying the premiums thereon, which amounted to $2,700 to $3,000 per annum. McCammish was a relative of Mrs. Brown, and had lived on the same ranch for a period of 17 years; Tipton was her uncle, and, at Camp's suggestion, had been employed to assist in managing the ranch properties during the 4 months next preceding the latter's demise. Mills had known Stanton Brown for many years, had nursed him in his illness, and continued to visit him.

[1] It was contended on behalf of the people at the time of the trial that the defendant Jennie Laura Brown had conceived and progressively forwarded a scheme and design to poison the minds of Tipton, McCammish, and Mills against Camp, and conspired with them to harass and discourage him until he should abandon the ranch properties and his life insurance to her. In attempting to prove the existence of gross unpleasantness and discord among said parties in furtherance of such conspiracy and design, several witnesses were called by the district attorney, who were permitted to testify to many hearsay statements of the deceased and others. Strenuous objections to each question propounded to such witnesses were interposed, upon the grounds that it called for irrelevant, incompetent, immaterial, and hearsay testimony which did not tend to prove any issue in the case. The defendants moved to strike out each such answer, upon the same grounds. All of the objections so made were overruled by the trial court, and the motions to strike were denied. These rulings are here assigned as prejudicial error. The testimony of this character covers an extensive field in the record, and we need only to detail a few excerpts therefrom.

The people's witness Theresa Lindauer, testified that 7 months before he was injured Lee Camp visited her, and that he asked, "If I knew anything about how he could cash in on his insurance in order to get the money ahead, as he didn't have very much on hand, and I told him to go take a note; I did not know anything about it; and then he told me that he would not be able to leave the place just then on account of the condition in which his land and his money was tied up, and, if he left now, he would not have anything"; that in July, 5 months before Camp died, "he told me about the trouble he was having at home"; "he came out and told me that his relations at home were quite unbearable, and that his clothes at this time had been taken away from him, and had been hidden so that he would not be able to go out at any time"; "and then he told me also that he didn't think he would be able to stand it very much longer, as the day before he had gotten a tongue lashing, the worst he had ever gotten in his life before."

The witness Alfred Brown testified, "Lee told Frank Marciel he didn't want to go home any more, because he was having lots of trouble." Lambert swore that "he stated that he had been the goat on the ranch for 3 years, and that he had tried to get a settlement with them the year before, but that they wanted to sell out to him or either sell the property and divide the money"; and People's witness Roberts testified: "He said there had been another row up at the breakfast table over the drawing up of the 3-year lease, between himself and Uncle Johnnie (Tipton); and Mr. Camp stated that, if Uncle Johnnie didn't keep out of his business he was going to knock his damned head off. He didn't know what he was around there for, anyhow."

The foregoing and much other such testimony constituted the only evidence of the fact to which they related, and we are unable to find elsewhere in the record any evidence from which the jury would have been justified in concluding that there existed a common understanding among the defendants which was intended to accomplish purposes detrimental to Lee Camp. That such was the object of offering it is not questioned, and the district attorney elaborated upon the strifes mentioned in his closing argument to the jury. He there said, in part:

> "Now, then, unless they are going to tell you that they think the testimony of Lee Camp is to be disbelieved, for the purpose for which it was introduced, namely, as to the conditions on that farm, unless they are going to put him in the same category that they have put every other citizen who has had anything to do with this case, that they are perjurers, you have got to accept that as the truth and the fact, and therefore, on this particular morning, at this particular time, if you please, isn't it very significant that that was the time when the final crisis was coming between Mrs. Brown and Lee Camp? That was the final moment when the mission of Tipton upon that farm was going to be called into play, as to whether her interests, Mrs. Brown's, was to be subserved, or whether Lee Camp was to get out."

Judgments have repeatedly been reversed in this and about every other jurisdiction in this country wherein hearsay testimony of the character above noted has been introduced. In People v. Irwin, 77 Cal. 494, 20 P. 56, our Supreme Court, quoting with approval from People v. Carlton, 57 Cal. 84, 40 Am. Rep. 112, said:

> "'This testimony was not a part of the res gestæ, and was not admissible under the authorities to which reference has been made, nor upon any theory or principle of the law with which we are acquainted. From it injury might readily have resulted to the defendant, for it might have been, and probably was, argued therefrom that deceased intended to resort to the courts rather than to force for redress, and therefore did not commence the rencounter in which he lost his life.' * * * Such declarations depend for their force upon the veracity of the deceased, or the party who has been assaulted, are highly prejudicial (State v. Pomeroy, 25 Kan. 350), and are regarded as being so grievously injurious that in one case it was held the judgment should be reversed, although no objection was made to the evidence when offered. People v. Williams, 3 Abb. App. [Dec. (N. Y.)] 600. There is no analogy between such statements and dying declarations; for the latter, being made in view of immediate death, have all the sanction and solemnity of testimony given under oath before the court and jury. * * *
>
> "But it is claimed by counsel for respondent that these declarations were admissible in evidence to prove conspiracy, and the court seems to have allowed them for that and no other purpose; that is to say, the main fact which they are supposed to explain is the alleged conspiracy, and not the killing. In other words, it is admitted by counsel for respondent, as we understand the matter, that if there was no question of conspiracy in the case, a declaration by deceased that Irwin was making preparations to kill him, and would kill him unless he left the country, would be inadmissible. This must be admitted. Such a declaration is on a par with the one referred to in People v. Carlton, supra, and, as said there, 'not admissible upon any theory or principle of the law with which we are acquainted.'"

In People v. Gress, 107 Cal. 461, 40 P. 752, a witness was permitted to testify that the deceased had told the witness of domestic difficulties which he was experiencing on account of the attentions of the defendant to decedent's wife; that the deceased had said:

> "'I am in trouble. * * * I want to save my boy, and that's my hurry for coming here.'"

In reversing a judgment of conviction in that case it was said:

> "This evidence was clearly hearsay, and was wholly inadmissible upon any possible theory of the case, or upon any principle or rule of evidence known to the law. It is no less hearsay because the declarations were those of the deceased, since proof of such declarations are only admissible when made in extremis—dying declarations, having reference to the circumstances of the death, or when they constitute a part of the res gestæ. People v. Carkhuff, 24 Cal. 642. In this case they were neither."

To the same effect are People v. Landis, 139 Cal. 426, 73 P. 153, and People v. Driggs, 12 Cal. App. 240, 108 P. 62, 64. From the foregoing the inevitable conclusion is that the admission of the declarations in question constituted reversible error.

The respondent cites many authorities from other jurisdictions, but, were they even persuasive, we should be compelled to recognize and follow the rule uniformly denounced in all analogous decisions in this state.

People v. Wright, 167 Cal. 1, 138 P. 349, cited by respondent, upheld the admission of extrajudicial statements of a woman as to her condition of pregnancy in a prosecution for murder by abortion. Such evidence was not there offered to show motive on the part of the defendant, but to establish a condition necessary to proof of the commission of the offense. Rogers v. Manhattan Insurance Co., 138 Cal. 285, 71 P. 348, held that proof of suicide would obviate the necessity for waiting 7 years to establish liability upon a policy of insurance in cases otherwise falling within the requirements of subdivision 26, section 1963, of the Code of Civil Procedure. Neither of these cases is in point.

A witness called by the people was asked to "tell us what you saw at that time when you came by" the Brown residence, to which he replied that he saw nothing except three automobiles standing in the yard. The district attorney then propounded the following question:

> "Isn't it a fact, Mr. Garcia, that about 3 or 4 days after Mr. Camp died that you were over in Bettencourt's barber shop, here on Doughty street, in the city of Hanford, and you told Mr. Bettencourt and his father there that on the morning of December 14, 1924, when you came by Mr. Brown's ranch early in the morning, that you saw Lee Camp staggering out of the back door like a chicken with his head cut off?"

Strenuous objections were at once interposed by the defendants, upon the grounds that such questions and line of examination were but an attempt to impeach the people's own witness; that no proper foundation had been laid; that the prosecution had not shown that they were taken by surprise; that the witness had given no testimony contrary to any statement embodied in the question; that it called for hearsay testimony; and that it was incompetent and immaterial. Thereupon the district attorney was sworn, and testified that Garcia had promised to come into court and "tell the truth" as to a statement which he had made to the barber. The witness was then recalled, and, over the same objections, swore that he had previously been examined by the district attorney for a period of 3 hours, during which the latter "talked to him kind of rough"; that he had informed the district attorney at that time that all he saw was three machines in the yard; that a person passing the Brown ranch could see "just the front door"; "you can't see the back door." Bettencourt and two other witnesses were then called by the people, and each, over the objections by defendants upon all the grounds heretofore recited, testified that Garcia had made the statements embraced in the question quoted above. Bettencourt added to his answers the following:

> "I says, 'like a drunk man?' He says, 'No, worse than that. Like a chicken with the head cut off.'"

Appellants insist that the testimony of these witnesses was hearsay; that it did not tend to contradict any testimony given by Garcia from the stand; and that it was inadmissible for any purpose. The respondent relies upon sections 2049 and 2052 of the Code of Civil Procedure, and cases construing them.

[2] Said sections merely provide that, under proper conditions, a party may impeach his own witness by showing that he has made, at other times, statements inconsistent with his present testimony. While, standing alone, it was perhaps not seriously prejudicial to the rights of the defendants, we think it was error to have received this testimony. The rule which permits one to impeach his own witness in the manner specified by the Code sections just mentioned is subject to certain qualifications. It must be remembered that ordinarily one who calls a witness to the stand vouches for his veracity. Again, proof that the witness has made statements out of court is generally refused admission, because it is hearsay. In order to avoid exclusion upon these, and no doubt other, considerations, it must first appear that some competent purpose is to be subserved. To put a witness on the stand merely to impeach him is not permissible. People v. Crespi, 115 Cal. 50, 46 P. 863. The only object which will justify impeaching a witness by showing that he has made other statements different from those given upon the trial is to detract from his credibility, in order that other testimony given by him may carry less weight with the jury (People v. Godwin, 123 Cal. 374, 55 P. 1059), for the impeaching statements cannot be considered for the purpose of establishing the truth of the declarations themselves. Thiele v. Newman, 116 Cal. 571, 48 P. 713; People v. Mitchell, 94 Cal. 550, 29 P. 1106. In the instant case, it is true that, if Garcia made the statements attributed to him at the barber shop, it might be assumed that they were inconsistent with his testimony to the effect that he saw nothing except the machines as he was passing the house from which Camp was supposed to have emerged. But this was the only testimony which Garcia gave. To permit his impeachment could accomplish no purpose, except to show that he was not worthy of belief. Proof that he made the declarations attributed to him at the barber shop could not be considered by the jury in determining whether or not such statements were true, and therefore the impeachment should not have been permitted.

[3] Garcia, as a witness, testified that he "saw nothing except three machines." Now, if he be impeached, the net result is to prove that this statement is not to be believed, and that he did not see the machines. The people's case was no better off to have the jury conclude that Garcia did not see three machines than to have his statement that he did see them accepted as true. It is only when the evidence produced has resulted in in-

jury to the cause of the party producing the witness that sections 2049 and 2052 may be made the bases of impeachment of the witness giving it. People v. Jacobs, 49 Cal. 384; People v. Conkling, 111 Cal. 616, 44 P. 314; People v. Mitchell, supra; People v. Godwin, supra.

[4] It is argued by the respondent that this rule was waived by the defendants. It appears that, during argument as to the admissibility of such evidence, the district attorney remarked that Garcia had been in his office, and proceeded to detail the circumstances. One of the counsel for defendants demanded that the district attorney be sworn and take the stand, which he did, but objections were immediately interposed to his stating any of his alleged conversation with Garcia, and repeated comprehensive objections were continuously interjected to each question propounded to the district attorney while testifying. We think the request of the defendants amounted to nothing more than a legitimate precaution against the district attorney making unsworn statements as to matters which were objectionable as being incompetent. If constrained to state what occurred, and apparently indicating that he would do so, it was but proper that he be sworn and testify as any other witness, and subject to the same rules of evidence and objections by his adversaries.

[5] Two experts, a chemist and a crime investigator, were called as witnesses for the defendants, and each testified to the results of his inspection. The chemist swore that certain spots on the premises and on the wearing apparel of the deceased consisted of human blood. When asked during his direct examination as to the direction from which the blood appeared to have emanated, objections on behalf of the people upon the ground that the questions did not call for expert testimony, and that, if given, it would invade the province of the jury, were sustained. The other witness testified to measurements and relative locations and conditions. He then volunteered the statement that certain markings which he discovered "all lay on a single parabolic line with respect to their position above one another," according to his computations and experiments, which statement was stricken out on motion of the district attorney.

It is contended that these rulings were prejudicially erroneous, and in violation of the constitutional rights of the defendants to be heard. We think such contention is untenable. It appears that almost immediately after the injury received by Camp the Chinese laborer heretofore mentioned carefully scrubbed the wheel, bricks, and concrete walk, in an endeavor to remove all blood spots, and to "clean up everything." The two experts did not investigate until nearly 2 months thereafter, when conditions obviously were not, in many respects, the same as those existing at the time of the commission of the alleged offense. At all events, it cannot be said as a matter of law that the knowledge of a chemist as to the probable position of a person from whose wounds blood may have flowed is more certain or reliable than that of the jury having before it all of the facts and circumstances. Nor should the jury be required to accept as an expert opinion the conclusion of an investigator upon matters which may not have borne the same appearance or relationship in February as that existing in December, and as to which his problematical guess could be no more authentic than their own.

[6] It is well settled that an expert will not be permitted to express his opinion as to conclusions from matters of common observation and experience. A person skilled in art, trade, or science, and having knowledge in relation to matters which are not within the grasp of men of average intelligence, education, and experience, may express an opinion only on a state of facts within his specialty and involved in the inquiry. People v. Heacock, 10 Cal. App. 450, 102 P. 543; People v. Willis, 70 Cal. App. 465, 474, 233 P. 812.

[7] It is next insisted by appellants that the admission of Lee Camp's will in evidence constituted error. The respondent concedes that it was offered and received over the objection of the defendants as evidence tending to support the element of motive for the commission of the alleged murder. It appears, however, that the will had been executed more than 10 years prior to December 14, 1924, and, so far as we are able to discern from the record, neither of the defendants had any knowledge of its existence. Assuming, therefore, from the defendants' viewpoint, that no will existed, it is impossible upon any theory that any act of theirs could have been influenced thereby. Appellants' objections to the introduction of this document should have been sustained.

[8] Appellants complain that the trial court erred in admitting in evidence the testimony of Pearl Camp, sister of the deceased, as to facts asserted to constitute another crime. The witness swore that during her girlhood Mrs. Brown had grossly mistreated her, compelled her to do manual labor on the ranch, and had attempted to injure her by inserting phonograph needles in capsules of quinine which had been prescribed for her. It was the theory of the prosecution that the defendant Brown had for a period of years conducted a campaign of merciless persecution against the Camp children, for the purpose of causing estrangement between them, and it in fact appears that they had not spoken to each other for some time previously to the injury and death of Lee Camp. It was claimed that Mrs. Brown planned, by

alienating the affections of Pearl Camp for her brother, to curtail or terminate his outside source of advice and counsel, and thus to control his actions. The incident of the phonograph needles is but one of numerous acts related by the witness, and offered as tending to establish criminal design of a premeditated character in carrying out the felonious scheme to secure Camp's property, as well as that of his sister. We think, therefore, that the testimony in controversy was properly admitted.

[9] A special prosecutor for the people during his closing argument made numerous statements which the defendants assigned as misconduct, and requested that the jury be admonished to disregard, which the trial court declined to do. We quote excerpts therefrom, as follows:

Stating that the defendants had reflected upon counsel for the people during the trial as being unfair, the special prosecutor continued:

> " * * * But whenever they cast any reflection upon me or my presence here, they are not casting it nor any part of it upon me as an individual, but they are casting it upon me as a representative of the state of California, as a representative of the citizens of Kings county, as a representative of the grand jury of this county, if you please."

A grand jury is not concerned with the employment of prosecuting attorneys, nor with the obtaining of convictions, and there is no reason that this grand jury should have interested itself in the case beyond its investigation in disregard of any possible defenses which the defendants might have had. Their opinions, derived from a consideration of but one side of the issues, amounted to no more than a conclusion that the case should be fairly tried by twelve peers of the defendants, upon all of the evidence, and it is neither in consonance with legal principles nor true in fact that the district attorney appears as spokesman for the original body before a trial jury.

[10] It was argued, further:

> "There is a man who was former judge of the superior court of this county that was asked to defend them for a nice big fat sum, and that man wouldn't do it because he couldn't look the citizens of this county in the eye and do it like a man—Judge Short of this county, and these are the defendants. * * * Judge Short's first term of office began in November, 1898, and he served continuously thereafter until the first Monday of January, 1907. He then retired for one term, and again was elected. * * * He served as judge, in all, twenty years, one month and a half."

At the outset it is observed that there is no evidence of this nature in the record. Whether by such statements counsel calculated that the jury should conclude from a political and popular view of the situation that an acquittal would not be tolerated, or that one of their eminent leaders had decided that the defendants were guilty, he did not say. It remains that such argument was unjustifiable upon any ground. The jurors must of necessity have respected and valued the opinion of a learned and distinguished jurist, and doubtless so no less because he was not then on the bench. Considering the entire record, the assertion, in effect, that he believed the defendants to be guilty of the heinous crime charged against them may well have constituted a determining factor in convincing these jurors of their guilt. Since Judge Short was not of counsel for the prosecution, it was impossible for the defendants by examination of the jurors to determine as to whether or not he may have then represented some or all of them, or whether his views would tend to influence them one way or the other. The argument was therefore in this respect improper, and we cannot say that it was not prejudicial.

[11] Again, counsel said:

> "There must have been something in that testimony that did not convey innocence to that coroner's jury, for the reason that they didn't absolutely give them a clean bill of health. * * * We know that these particular people on that ranch at that time are guilty of murder. We know that they struck this man."

There is no evidence in the record upon which such statements could legitimately be founded. For aught that appears that coroner's jury may have believed that Lee Camp's death was the result of an accident. In any event, they were not required to find the defendants not guilty as a condition precedent to any action of a future petit jury. Counsel produced no eyewitness to the occurrence, and was not authorized to comment upon the verdict of the coroner's jury, nor to predicate a statement of the ultimate fact upon his private opinion. People v. Edgar, 34 Cal. App. 459, 467, 167 P. 891.

[12] Counsel's argument bristled with prejudicial insinuations, or worse, concerning the failure of the defendants to testify. He said, in part:

> "At certain times and places the defendants have made certain statements which had been introduced here. At other times they have remained silent. Now then, they have brought in before you Stant Brown, knowing that he was known personally to a number of you, * * * and he, the poor invalid that has been lying up there, and the least apt to know about the facts of the case, * * * he did not know half as much about the case as other people did. * * * If your wife was accused, wouldn't you feel that you were not the proper party, that you weren't the best evidence; and so I say to you, gentlemen, that by the weakness of their efforts to deny certain accusations they have loaned an undying strength to our charge. * * * The only possible contradiction that you have to it is an argument of counsel paid by these defendants, to do

with an argument what they were scared to do with evidence. And I want to say to you that any time I call you a liar and I tell you wherein you are a liar, instead of you denying it, you get somebody else to argue for you, the logical deduction is that there is something wrong."

And, referring to Mrs. Brown's answer to one question before the coroner's jury:

> "That is the only sentence, if you please, that she ever gave; the only instance she ever gave was the testimony to the coroner."

And, finally:

> "You have the witnesses to this crime, and you know the way your criminal affairs have been handled in the past, and it is time that somebody was brought in that they do dislike, that does things they dislike, because if they didn't you had better go home tonight and build a wall around your house, and prepare to take the law in your own hands, and give yourselves and your family your own protection."

That the defendants may have elected to stand mute was not a subject for argument to the jury, nor one which they could under any consideration be permitted to consider. As to whether the jurors might or might not under given circumstances deem themselves proper witnesses was a question wholly foreign to a determination of the issues before them. We are unable to conceive of any view which the jury could have taken of the argument last quoted other than that it was intended to suggest that, had the defendants dared to do so, they would have testified. Such is often not the reason for one declining to take the stand when charged with a public offense, and every person's inviolable right to remain silent, for any reason whatever, or for no reason, without subjecting himself to comment of counsel or consideration of that fact by the jury, ever has been and is to-day, safeguarded by the courts of last resort in all jurisdictions. Pen. Code, § 1323; People v. Morris, 3 Cal. App. 1, 6, 84 P. 463; People v. Tyler, 36 Cal. 522, 528; People v. Keko, 27 Cal. App. 351, 352, 149 P. 1003; People v. Lemperle, 94 Cal. 45, 48, 29 P. 709; People v. Edgar, supra.

[13] It was also prejudicial misconduct for counsel to suggest that the jurors take the law into their own hands. Hemphill v. Texas, 72 Tex. Cr. R. 638, 165 S. W. 462, 51 L. R. A. (N. S.) 914; State v. Hess, 240 Mo. 147, 144 S. W. 489; Ferguson v. State, 49 Ind. 33; Parker v. State, 43 Tex. Cr. R. 526, 67 S. W. 121; Turner v. State, 4 Lea (Tenn.) 206.

[14] The argument of this special prosecutor consisted of an extended inflammatory attack upon the defendants and their counsel, and it appears that his discourse was followed by "applause and cheers from the audience." The record is permeated by significant exhibitions of appeal, invective, and demands for conviction which could have and doubtless did arouse the passion and prejudice of the jury no less than that of the others listening. It is impossible to say that it appears of record, or could have been characterized by the jury, as a plea for a fair and impartial verdict. We are unable to ignore the fact that, if the ingeniously sweeping statements and accusations of counsel without proof, his charge that the defendants dared not produce better evidence, and that but for his presence the jury might as well resort to unlawful individual action—if these combined lacked damaging influence and coercion, the deficiency was supplied by "applause and cheers," reinforced by the weight of the rulings of the trial court thereon.

[15] Exceptions were taken to certain of such remarks, whereupon it was stipulated, and the court ordered, that, to avoid repeated interruption, any desired assignments for misconduct should not be deemed to have been waived, and might be stated at the close of the argument. When counsel for the people had concluded, the defendants accordingly excepted to the "applause and cheers," and moved that the courtroom be cleared, which motion was denied. Assignments of the alleged prejudicial statements of counsel as misconduct were then attempted to be made, when the trial court interrupted, saying:

> "Mr. Covert, that will be deemed. The court will deem that you have excepted to every statement, and that you have assigned every statement as misconduct on the part of the district attorney, and that the court—and that you have requested the court to instruct the jury—and that the court has refused to do so."

The colloquy closed as follows:

> "Mr. Covert: That is entirely satisfactory.
> "The Court: All right, and that is all for the defendants."

While it could not be said that counsel's entire argument was improper, and constituted misconduct, the defendants were not allowed to designate and except to the portions which were obviously prejudicial, and the entire harangue remained with the jury, unqualified, and stamped with the approval of the trial court.

We do not think any admonition by the court below could have disabused the minds of the jury of the damaging thrusts of the prosecutor which so patently savored of animosity and personal venom. But it lay within the power and the duty of the court to caution the jury, and to admonish counsel, when objection was first interposed, and to prevent a repetition of such infractions of the most elementary rules of judicial procedure and decorum. The action of counsel for the prosecution was beyond doubt damaging misconduct, and the rulings of the trial court constituted prejudicial error.

[16] On February 19, 1924, the grand jury which returned the indictment in this case were in session at the courthouse, and appellant Tipton, who had been sworn, testified before them. At the close of the day the foreman announced an adjournment until the following morning, and instructed Tipton to return at 10 o'clock a. m. On the morning of the 20th the inquisitorial body met at the courthouse, but did not enter their juryroom. It appears that they entered automobiles and proceeded to the premises of appellants, and that Tipton and other witnesses were present, and took part in demonstrating and explaining to the grand jurors the position in which Camp had been found, the locations of blood spots, ropes, and other paraphernalia.

Prior to the trial motions were made to set aside the indictment upon the ground that "a third person was present during the session of the grand jury, when the charge embraced in the indictment was under consideration, other than the persons provided by section 925 of the Penal Code."

The respondent denied that the grand jury "convened" at said premises, or that they held a "session" at that time. It is here insisted that the grand jury drove to the ranch in their respective automobiles; that they divided into groups, inspected the premises, and individually gathered a "general aspect" of surrounding conditions for the purpose of acquiring a "mental picture" of the situation. The foreman of the grand jury and appellant Tipton testified, and affidavits of others, including five of the grand jurors, were introduced upon the motion to set aside the indictment.

From such evidence it appears that the grand jurors all assembled at the tankhouse in question, and that one Fields, a detective for an insurance company, was placed on the ground in approximately the position in which Camp lay when found; that appellants Tipton and Mills took part in the demonstration; and that witnesses Cronin and Hallinan and two Chinamen were present. Tipton swore that he was questioned by certain grand jurors and others; that he was directed to obtain the rope, and the block and tackle, and to "come around there at that particular tankhouse where this demonstration was going on. * * * Mr. Fields was the man doing the demonstrating. * * * He was lying on the ground, and I was to place his body in the position, as near as I could remember, as that which Mr. Camp's body was found at the time I found him, * * * and I placed, as near as I could, his carcass, as near as I could remember as to where it should be. * * * Fields argued with me about objects supposed to have been present when Camp was killed; asked me who moved the rope from the tankhouse; I asked him if he was a member of the grand jury, and he said 'No.' I told him, 'It looks to me as if you have got far enough.' He then hauled off as though he was going to take a punch at me." The foregoing testimony was corroborated by Hallinan, Mills and Cronin. The latter averred that Fields actively participated in the examination of witnesses, demonstrated his theory as to how the murder was committed, argued with members of the jury, and disposed his body and other objects upon the ground, and that Tipton was examined for a period of about 15 minutes. Mills swore that he also was examined to considerable length, and that he was required by grand jurors to assist in the demonstration; that some jurymen asked about the blood spots, and "then I showed them as near as I could the blood spots, where they were, and showed them under the bench that is there, where the blood spots were on the house about five or six feet away, and are still there." This witness also testified that he had previously been sworn by the grand jury.

The evidence adduced upon the hearing of the motion to set aside the indictment is voluminous, but we deem it unnecessary for the purpose of considering the point here presented to quote it extensively. None of the grand jurors deny the fact that witnesses were questioned, or that the jurors were all present. The demonstrations are admitted to have been made as we have recited. Some of the statements of appellants' witnesses are evaded by the foreman and other grand jurors, but none denied. It was testified by them that they were not acquainted with Hallinan or Cronin, and, therefore, that they could not say whether they saw them or not. The crux of the situation, however, arises by strenuous insistence of the grand jurors, statements of the trial court, and argument in the briefs upon appeal, that the jurors did not convene as a grand jury, nor swear any witnesses at the ranch; that they visited the premises merely for the purpose of inspection, and were not "in session" when the evidence mentioned was offered.

The Penal Code requires that a grand jury must retire to a private room to inquire into alleged offenses (Pen. Code, § 906); that they can receive no other evidence than such as is given by witnesses produced and sworn before them, or furnished by legal documentary evidence, or by deposition (Pen. Code, § 919); and that no person other than counsel for the people, a stenographic reporter, witness, and interpreter shall be present during the session of the grand jury, "and no person must be permitted to be present during the expression of their opinions, or giving their votes upon any matter before them. Pen. Code, § 925.

Our attention is called to no authority in this or any other jurisdiction which by even remote analogy can be said to have sanctioned proceedings of a grand jury such as are outlined in the record before us. In State v. Johnson, 116 La. 856, 41 So. 117, it was held that to merely visit the scene of a homicide in charge of a deputy sheriff and the district attorney, without an order of court therefor, was not improper. But such ruling was expressly founded upon statutes requiring grand jurors to act upon facts within their own knowledge, and "from which it also follows that they do not require the permission of the court to investigate crime, but are bound to take the initiative and determine for themselves the character of the evidence, or the sufficiency of the facts, necessary to their findings." In Wyatt v. People, 17 Colo. 252, 28 P. 961, the Supreme Court of Colorado held that, while cases might arise wherein such inspection would greatly assist them, "such proceedings being unusual and extraordinary must, unless otherwise provided by statute, first have the sanction of the court. And as a matter of course there must be a careful compliance with the limitations and regulations prescribed in the order." It must at once be conceded that the grand jury of whose proceedings complaint is made in the instant case acted, not only without an order of court, but in contravention of the provisions of the Penal Code. The statutes of this state do not vest in grand juries the broad powers of investigation and discretion indicated by the Louisiana case above cited. The Penal Code is mandatory in its safeguards of such secret inquisitorial bodies. And, further, it cannot be said that the grand jury here involved visited the premises in question in charge of a deputy sheriff and district attorney, or merely for the purpose of inspection. The mere fact that apparently as an afterthought they now seek to escape criticism by asserting that they were not "in session" at the Brown ranch, and that they swore no witnesses, cannot alter the record, nor is the legal effect of their conduct within their province to decide. They adjourned on the 19th of February, to meet at 10 o'clock a. m. on the 20th. They did not enter their juryroom, as formerly intended and agreed, but all proceeded to the premises of their own volition, where they received much evidence. At least seven other persons were present during the proceedings, two of whom were witnesses who had theretofore been sworn, and had testified before the grand jury. To permit such bodies, surrounded as they are by the statutory restrictions which we have indicated, to arbitrarily rule themselves "in session" and not "in session," and to receive evidence in the same case in both capacities, would be to hold that the provisions of the statute are directory only, and that by some power peculiar to themselves they might at will deprive courts of the power to afford the public any of the benefits provided by the Legislature.

[17, 18] As was said in People v. Bright, 157 Cal. 663, 667, 109 P. 33, 35, the only capacity in which an unauthorized person may be called before or attend upon the grand jury session is that "of witness during the actual taking of his own testimony." And the Supreme Court concluded by announcing the rule as follows:

> "We may question the wisdom of some of our statutory provisions relative to grand jurors and the grounds upon which an indictment shall be set aside, but it is our duty to comply with their mandatory requirements. * * *"

The consensus of all authority with which we are familiar is in complete harmony with this rule. In State v. Wetzel, 75 W. Va. 7, 83 S. E. 68, Ann. Cas. 1918A, 1074, it appeared that a grand jury adjourned to other premises, where four persons not witnesses discussed certain facts whereupon they returned to their juryroom. It was there said:

> "The law holds inviolate the secrecy of proceedings before the grand jury. * * * Quoting from the opinion of Judge Bynum, in Lewis v. Board of Commissioners, 74 N. C. 199: 'None but witnesses have any business before them. * * * The examination of witnesses is conducted by them, without the advice or interference of others. Their findings must be their own, uninfluenced by the promptings or suggestions of others, or the opportunity thereof.'"

Many other authorities are quoted with approval in State v. Wetzel, supra, wherein all informal appearances before grand juries, and unauthorized participation in their inquiries, are condemned. In State v. Fasset, 16 Conn. 457, it was said:

> "It is the peculiar policy of the law, in the furtherance of justice, that this preliminary inquiry should be conducted in secret."

[19] The trial court, in its ruling sustaining the indictment herein, stated, in part:

> "They certainly did get information there, there is no question about that. But that is equally true of trial juries. If you want to take the analogy of trial juries going out to view premises. They certainly get information there. That is their object in going out there."

This point was discussed in Wyatt v. People, supra, in the following language:

> "Some analogy may be said to exist in this regard between the action of grand and petit jurors, though the larger powers and greater independence of the former render this analogy imperfect. Inspection by the latter during the progress of trials, under proper circumstances and limitations, is now frequently permitted in civil cases, and the authority therefor is often declared by statute. But we are strongly of the opinion that the grand jury has no more right to visit premises for the pur-

pose of official inspection upon its own motion than the petit jury."

It would not for an instant be contended that even a petit jury could voluntarily and without an order of court make an inspection of premises and examine witnesses in a case before it, and under the authority last cited there is much less justification for such action by a grand jury. We think, therefore, that the order denying the motion to set aside the indictment should have been granted.

Many other points are presented, but they involve questions which either because of what has been said become unimportant, or may not be expected to again arise in the event of another trial.

The judgments and orders appealed from are reversed, with directions to the trial court to set aside the indictment.

We concur: WORKS, P. J.; THOMPSON, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. [20] The petition for hearing is denied. In denying the same, however, we withhold our approval from that portion of the decision of the district court of appeal wherein it was held that the trial court was in error in admitting certain evidence offered by the prosecution to impeach the witness Garcia. In our opinion such evidence was properly admitted, and the appellate court was in error in holding to the contrary. In all other respects, however, we are in accord with the decision of the district court of appeal.

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81 Cal. App. 267

PRICE v. MANUEL. (Civ. 3194.)★

(District Court of Appeal, Third District, California. Feb. 8, 1927. Rehearing Denied March 10, 1927. Hearing Denied by Supreme Court April 8, 1927.)

Payment 🔑80—Money paid held not recoverable, where certainly owed, though payor claimed credit on note and payee claimed money was consideration for contract.

Where money was actually owed and paid, it was not recoverable, although the parties differed as to its application; one claiming it was to be credited on a promissory note, and the other that it was consideration for entering into a contract.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action by John L. Price against Walter Manuel. Judgment for defendant, and plaintiff appeals. Affirmed.

Henry C. McPike, of Oakland, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

FINCH, P. J. The complaint alleges that the "defendant is indebted to the plaintiff in the sum of $2,550 * * * for so much money had and received by said defendant to and for plaintiff's use," and that the plaintiff had demanded payment thereof, but that the defendant refused to make such payment. The answer denies the allegations of the complaint. The trial court instructed the jury to return a verdict in favor of the defendant, and, upon the verdict so returned, judgment was entered in favor of defendant for his costs of suit. Plaintiff has appealed from the judgment.

In September, 1921, the parties entered into an agreement, by the terms of which the defendant, as party of the first part, agreed to sell an apartment house to the plaintiff for $180,000, payment of $50,000 to be made January 2, 1922, and $130,000 a year later, interest at the rate of 6 per cent. per annum to be paid on the $130,000 from October 1, 1921. The agreement contained the following paragraph:

> "It is further agreed that, upon and in the event of the consummation of said sale, to wit, on the 2d day of January, 1922, the party of the second part shall be regarded as if he had been the tenant of said Como Apartments from the 1st day of October, 1921, to the 1st day of January, 1922, for the following purposes, to wit: The party of the first part shall pay the net income he has received from said property from October 1, 1921, to January 1, 1922, to said party of the second part; and said party of the second part shall pay to said party of the first part the sum of $4,500, of which sum the sum of $1,950 shall be regarded as rent paid for said premises from October 1, 1921, to January 1, 1922, but nevertheless shall then be applied in payment of interest on said note for $130,000 accruing from October 1, 1921, to January 1, 1922, and the remainder of said sum, to wit, $2,550, shall be the consideration paid by the party of the second part to the party of the first part for entering into this agreement."

Plaintiff sought to recover on the theory that the provision in the agreement that "$2,550 shall be the consideration paid by the party of the second part to the party of the first part for entering into this agreement" was inserted therein by fraud or mistake, and that the real agreement between the parties was that such sum was to be applied as payment upon the principal. Plaintiff testified that he did not know that the agreement contained that provision at the time of its execution. He further testified as follows:

> "I understood when I entered into the agreement with Mr. Manuel that he was to receive $4,500 out of the income for the last three

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★Hearing denied by Supreme Court.

months of the year 1921. He was to receive $4,500 for three months, $650 to be interest on the $130,000 a month, and $850 to be credited on my note as principal. * * * I was to have all the net proceeds of the Como over the $4,500. * * * My agreement was that the $2,550 should be credited on the note."

Plaintiff received the income from the property for the last three months of 1921 amounting to nearly $6,000. Plaintiff's testimony to the effect that the written contract does not express the true agreement between the parties was contradicted by that of the plaintiff.

According to the plaintiff's own testimony and theory of the case, he is not entitled to recover in this action. If he is entitled to any relief it is to be given credit on his promissory note in accordance with his version of the agreement. In a note in L. R. A. 1916F, 538, it is said:

> "No case has been found in which a debtor has recovered back from his creditor money he has paid him, which at the time of payment was the money of the debtor, was justly due from the debtor to the creditor, and was paid and received in their individual capacities."

No such case has been cited by appellant herein. Appellant relies on Gregory v. Clabrough's Executors, 129 Cal. 475, 62 P. 72. That case involved a payment by a mortgagor to his mortgagee of money to which the latter was not entitled; the payment being made under a mutual mistake of law. The mortgagor was not given credit on the mortgage note or in the subsequent foreclosure suit, which resulted in a judgment for the full amount of the debt, without any deduction on account of such payment. The decision in that case, therefore, is not in point.

The judgment is affirmed.

We concur: PLUMMER, J.; BUCK, Justice pro tem.

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81 Cal. App. 312

PEOPLE v. SHAW et al. (Cr. 931.)

(District Court of Appeal, Third District, California. Feb. 14, 1927.)

1. Criminal law 🔑1071—Appeal is ineffectual and will be dismissed, where application for transcript does not state grounds of appeal (Pen. Code, § 1247).

Under Pen. Code, § 1247, appeal is ineffectual and must be dismissed, where application for transcript neither states nor attempts to state the grounds of appeal; it not being aided by anything stated in the notice of appeal.

2. Criminal law 🔑1131(2)—Court will of own motion dismiss appeal, where it has not jurisdiction.

Court will of its own motion dismiss appeal, in absence of motion or suggestion by respondent, where, by reason of failure of appellant to take proper steps, it is without jurisdiction to consider the appeal.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Ralph Shaw and John Trowbridge were charged with, and on trial Trowbridge was convicted of, manslaughter and violation of statute as to stopping automobile and rendering assistance after accident, and he appeals. Appeal dismissed.

Fred J. Harris and M. F. Shelley, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The appellant was convicted of the crime of manslaughter and also of the offense of failing to stop and render assistance, after have run down and killed a boy riding on a bicycle, on one of the public highways of the county of Sacramento, state of California, on or about the 9th day of January, 1926. His appeal is prosecuted from an order denying a motion for a new trial.

On the 25th day of March, 1926, after an order denying defendant's motion for a new trial had been made and entered, the defendant filed a notice of appeal, which, omitting the title, is in the following words and figures:

> "You and each of you will please take notice, and notice is hereby given you, that the appellant above named, John Trowbridge, appeals to the Third District Court of Appeal in and for the state of California from the judgment of the above-entitled court made and entered on the 25th day of March, 1926, denying his motion for a new trial; that the said appeal will be and is taken on all the records, papers, and files now or hereafter on file, relative to said action with the clerk of the above-entitled court.
>
> "Dated: March 25, 1926.
>
> "Fred J. Harris,
> "M. F. Shelley,
> "Attorneys for Defendant."

On the same day appellant filed his application for a transcript of the phonographic reporter's notes, which application, omitting the title, is in the following words and figures:

> "You and each of you will please take notice, and notice is hereby given you, that John Trowbridge, the defendant and appellant above named, having heretofore taken an appeal to the Third District Court of Appeal in and for the state of California from the judgment and order of the above-entitled court denying his motion for a new trial made and entered on the 25th day of March, 1926, demands a full and complete transcription of phonographic and/or stenographic notes made of all the matters and things pertaining to the above-entitled criminal matters and numbers in the above-entitled

court, on the 18th, 19th, and 22d days of March, 1926, or any other dates: the same being necessary for appellant in order to prosecute and properly present his case before the Third District Court of Appeal in and for the state of California.

"Dated: March 25, 1926.

"John Trowbridge,
"Defendant and Appellant."

[1] The transcript was prepared and certified to this court, covering some 541 pages, and we are now asked to examine said transcript and determine therefrom whether or not the evidence was sufficient to justify the verdict in finding the defendant guilty of manslaughter. This, however, would be of no avail to the appellant because we have, for reasons herein about to be stated, no jurisdiction to interfere with the order or judgment of the trial court. Section 1247 of the Penal Code provides:

> Upon the taking of an appeal, the appellant "must, within five days, file with the clerk and present an application to the trial court, stating in general terms the grounds of the appeal and the points upon which the appellant relies, and designate what portions of the phonographic reporter's notes it will be necessary to have transcribed to fairly present the points relied upon. If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

This subdivision of section 1247 of the Penal Code has been construed by the District Court of Appeal a number of times, and it has been uniformly held that a statement of the grounds upon which the appeal is based must be set forth in the application, and that since the amendment to this section in 1911 such provision is mandatory. In the case of Rhodes v. Sargent, 17 Cal. App. 54, 118 P. 727, this matter came before the court upon mandamus proceedings; an order having been made directing the judge of the trial court to show cause why he should not be required to certify to the correctness of the transcript prepared in that case. Upon the hearing it appeared that the grounds for the appeal were not stated and the court in that case held the language of the section mandatory and denied the application for the writ. In People v. All, 38 Cal. App. 544, 176 P. 883, the question of the failure of the appellant to comply with the subdivision of section 1247 which we have quoted was again before the court. The court there said:

> "The Attorney General objects to any consideration of these appeals for the reason that the record does not show that an application stating the grounds of the appeal was filed by the defendant as required by section 1247 of the Penal Code. This objection was called to the attention of defendant's attorney by the service upon him of respondent's brief more than a month prior to the submission of the case in this court. No suggestion has been made that the record is incomplete, and we therefore assume that appellant failed to comply with the requirements of said section 1247, by neglecting to file the application required by that section. The filing of such application is mandatory. The section itself declares that, 'if such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken' "—citing authorities to the same effect.

In the case of People v. Sanders, 60 Cal. App. 742, 214 P. 246, the proceeding was before the court upon a suggestion of diminution of record, and in considering such question the court, upon its own investigation of the record, discovered that the application for a transcript of the testimony failed to state the grounds of the appeal, or any of the points relied upon as made mandatory by the section and following which the cases which we have cited were referred to, and concluded its opinion as follows:

> "It also appears that there has been no effectual appeal from the final judgment of conviction because of appellant's failure to specify in any way the grounds of such appeal. The appeal from the final judgment is dismissed."

In the case of People v. Flaherty, 61 Cal. App. 775, 215 P. 699, it is also held:

> "An appeal in a criminal case is wholly ineffectual and must be dismissed where the application required to be filed under section 1247 of the Penal Code fails to state the grounds of appeal."

In People v. Hill, 248 P. 714, this court had before it a question identical with the one here being considered. The application in that case was no more wanting in jurisdictional requisites than is the case at bar. This court there said:

> "It is clear that no attempt was made in the application to state the grounds of the appeal or the points upon which the appellant relies. It has been held uniformly that the provisions of section 1247 are mandatory and that failure to comply substantially therewith is fatal"—citing the cases which we have heretofore referred to.

[2] An examination of the application in the case at bar shows that there was no attempt whatever made to set forth the grounds of the appeal, nor is the application aided by anything contained in the notice of appeal. No motion was made to dismiss this appeal, nor has any suggestion been made by respondent that this court is without jurisdiction to consider the same, but this is fully answered by an excerpt taken from the case of Bienenfeld v. Fresno Milling Co., 82 Cal. 425, 22 P. 1113:

> "Not having jurisdiction of the appeal, we must dismiss it. The only embarrassment we experience in arriving at this determination is caused by the omission of respondent to raise the point. But we cannot proceed further in a case after discovering that we have no juris-

diction, whether the point is raised by counsel or not."

In 2 California Jurisprudence, p. 496, § 240, the rule applicable is thus stated:

> "If the appellate court has no jurisdiction over the subject-matter of the action, it will dismiss the appeal even though the point has not been raised by the respondent, since it is wholly without authority to proceed in such a case."

In 7 Ruling Case Law, p. 1043, § 75, it is said:

> "A court will recognize want of jurisdiction over the subject-matter even if no objection is made, and therefore whenever a want of jurisdiction is suggested, by the court's examination of the case or otherwise, it is the duty of the court to consider it, for if the court is without jurisdiction it is powerless to act in the case. As heretofore shown, the jurisdiction of a court over the subject-matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court, as such, by the consent of the parties."

It follows from what has been said that the appeal in this case must be and the same is hereby dismissed.

We concur: FINCH, P. J.; HART, J.

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81 Cal. App. 210

HAYES v. O'MARR. (Civ. 4547.)

(District Court of Appeal, Second District, Division 1, California. Feb. 5, 1927.)

1. Limitation of actions 🔑25(3)—Cause of action on note held governed by four-year statute.

Where defendant executed promissory note July 1, 1913, payable in one year from date, cause of action on note *held* barred four years after July 2, 1914, notwithstanding payments of interest, last of which was December 1, 1921.

2. Limitation of actions 🔑151(2)—Promise to pay outlawed note created new obligation, and was itself basis of action.

When new promise or acknowledgment of indebtedness was made after cause of action on note was barred by statute of limitations, new promise created a new obligation, and was itself basis of action.

3. Limitation of actions 🔑193—Plaintiff, suing upon conditional promise to pay outlawed note, must plead and prove that condition came into being.

Plaintiff, suing on defendant's promise to pay outlawed note, when defendant would sell some property, must plead and prove that defendant had sold property before he could recover on new promise.

4. Limitation of actions 🔑149(2)—Law cannot imply unqualified promise to pay outlawed note, where promise was clearly qualified.

Law cannot imply an unqualified promise to pay outlawed note, where promise was clearly qualified by statement that he would pay as soon as he sold some property.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action on a promise to pay an outlawed note by Jerry Hayes against John O'Marr. From a judgment for defendant, plaintiff appeals. Affirmed.

Treadwell, Tompkins & Clark, of San Diego, for appellant.

W. C. Wilde, of San Diego, for respondent.

YORK, J. The only point involved on this appeal is as to whether the action was barred by the statute of limitations.

The appeal, which comes here on the judgment roll alone, is from a judgment in favor of defendant. The action is based upon an alleged breach of contract to pay money. It appears that the defendant and his wife, Kate O'Marr, executed a promissory note in favor of plaintiff on July 1, 1913, for $1,000, payable in one year from date. Interest was paid up to December 1, 1921. It does not appear in what manner interest was paid until the last payment was made, which was on December 8, 1921. This payment, it may be assumed, was made by check, signed by the defendant, since the letter written and signed by defendant at that time says: "You will find hear inclosed my check for interest."

[1, 2] The cause of action on said note was barred four years after July 2, 1914. It is settled that, when the new promise or acknowledgment of indebtedness is made after the bar of the statute, the new promise creates a new obligation, and is itself the basis of the action. Concannon v. Smith, 134 Cal. 14, 66 P. 40. This action must therefore be considered as based upon a new contract. The check, which is assumed to have been signed by the defendant, was accompanied by the statement that defendant could not pay the note then. The letter, as set out in the findings, said:

> "San Diego, Calif., Dec. 8, 1921.
>
> "Mr. Jerry Hayes—Dear Sir: I reseaved a letter from Mr. Frank T. Hook asking me to pay note $1,000.00 and Interest $64.17. I cant pay note now untill I sell som property. I havnt sold the hous I bilt last winter when you was hear. I am in hopes to sell befor spring you will find hear inclosed my check for interest hope it will be sadisfactory.
>
> "Yours very truly,
> [Signed] John O'Marr."

[3, 4] There is no claim by plaintiff that defendant ever sold the property. Where such a promise is made, there must be pleading and proof that the condition has come in-

to being, on which the promise was made. Van Buskirk v. Kuhns, 164 Cal. 472, 475, 476, 129 P. 587, 44 L. R. A. (N. S.) 710, Ann. Cas. 1914B, 932; Snyder v. Dederichs, 39 Cal. App. 628, 179 P. 535. In the case of Clunin v. First Federal Trust Co., 189 Cal. at page 253, 207 P. 1011, it was said:

> "It is clear from all these decisions that no writing is sufficient as an acknowledgment under section 360, unless it contains some reference to a debt, which, either of itself or with the aid of permissible evidence of extrinsic facts in explanation, amounts to an admission that there is a debt existing to the creditor to whom the writing is sent which the debtor is liable to pay and willing to pay."

Also, see Searles v. Gonzalez, 191 Cal. at page 430, 216 P. 1004, 28 A. L. R. 78, where the court said:

> "It is well established that the Code section does not prescribe any form in which an acknowledgment or promise sufficient to lift the ban of the statute of limitations shall be made. It is sufficient if it shows the writer treats the indebtedness as subsisting and one which the debtor is liable and willing to pay. From this acknowledgment the law implies the promise to pay."

But the law cannot imply an unqualified promise where the promise is clearly qualified by a statement relating to facts which are to exist before the promise will become direct and positive.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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81 Cal. App. 356

CARL v. EADE. (Civ. 4802.)

(District Court of Appeal, Second District, Division 1, California. Feb. 15, 1927.)

1. Contracts 🔑303(4)—One preventing performance of some act, on which obligation depends, cannot set up nonperformance as defense to action on obligation.

Ordinarily, one who voluntarily prevents the performance of some act, on which an obligation depends, will be precluded from setting up such nonperformance as a defense in an action on that obligation.

2. Brokers 🔑75—Vendor, accepting quitclaim deed from insolvent purchaser in satisfaction of trust deed, held liable to broker for commission payable out of money due from purchaser.

Where vendor of real estate, after agreeing to pay broker balance of commission due out of payment due from purchaser under trust deed, on insolvency of purchaser accepted a quitclaim deed from him and filed a satisfaction and release of the trust deed, *held* vendor, in legal effect, prevented purchaser from complying with terms of his contract and was accordingly liable to broker for commission.

3. Brokers 🔑86(1)—In action for realty broker's commission, payable out of payment due from purchaser, finding that defendant, without consent of broker, accepted reconveyance from purchaser held warranted.

In real estate broker's action for commission payable out of money due from purchaser under trust deed, finding that defendant, without consent, connivance, or collusion of broker, had entered into an agreement with the insolvent purchaser to accept reconveyance in satisfaction with the trust deed *held* warranted where defendant did not deny the reconveyance, but only that the purchaser was not thereby prevented from making payment out of which commission was payable.

4. Interest 🔑44—Broker held entitled to interest on recovery of commission from time when due (Civ. Code, § 3287).

Real estate broker *held* entitled, under Civ. Code, § 3287, to interest on commission recovered from time when commission became due.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Ida May Carl, executrix of the last will and testament of Fred W. Carl, deceased, against George Eade, to recover broker's commission on sale of real estate. Judgment for plaintiff, and defendant appeals. Affirmed.

Gilbert F. Wyvell, of Los Angeles, for appellant.

George M. Pierson, of Los Angeles, for respondent.

HOUSER, J. It appears that one Fred W. Carl, as a real estate agent, sold for defendant certain premises at a price of $18,000; that the terms of sale were $2,000 cash and other property, the assumption by the purchaser of a mortgage on the property amounting to $6,000, and a note and trust deed back to the seller for the sum of $10,000, of which amount $1,000, was made payable on the 1st day of January, 1922. The commission to be paid by defendant to said Carl for making the sale was the sum of $900, of which amount $170 was paid in cash and the agreement for the payment of the balance was represented by the following memorandum, signed by the defendant:

> "I hereby agree to pay to Fred W. Carl the sum of $730 in full of commission on the sale of the property at 1717 N. Van Ness Ave., Hollywood, Cal., the same to be paid out of the $1,000 payment to be made to me by the purchaser on January 1, 1922."

The evidence disclosed the further facts that, before the 1st day of January, 1922, the purchaser became insolvent; that the $1,000 mentioned in the foregoing agreement was not paid on January 1, 1922, but that two days later defendant entered into an agreement with the purchaser of the property to accept from him, in the name of a daughter of defendant, a quitclaim deed to the property; and that some time thereafter defendant filed a full satisfaction and release of said trust deed. Because of the fact that the purchaser of the property failed to pay the $1,000 which became due on January 1, 1922, defendant refused to pay the balance of the commission in accordance with the provisions of the agreement hereinbefore set forth. On such facts judgment was ordered in favor of plaintiff, and defendant has appealed therefrom to this court.

[1] The ordinary rule is that one who voluntarily prevents the performance of some act, upon which an obligation depends, will be precluded from setting up such nonperformance as a defense.

In volume 13, page 647, of Corpus Juris, the principle is laid down that "a party to a contract cannot take advantage of his own act or omission to escape liability thereon"; and in the same volume, at page 648, it is stated that "where he prevents the fulfillment of a condition precedent or its performance by the adverse party, he cannot rely on such condition to defeat his liability."

The case of Wolf v. Marsh, 54 Cal. 228, was an action on an instrument in writing by which the defendant promised to pay to the plaintiff a certain sum of money on the "understanding" that if certain coal mines yielded no profits to the promisor, then the obligation was null and void. In deciding the point the court said:

> "Before the mines had yielded any profits to the defendant, he sold and conveyed his interest in them to a stranger. By so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary, that 'if one voluntarily puts it out of his power to do what he has agreed, he breaks his contract, and is immediately liable to be sued therefor, without demand, even though the time specified for performance has not expired.' Bishop on Cont. § 690."

In the similar case of Poirier v. Gravel, 88 Cal. 79, 25 P. 962, an identical conclusion was reached by the court.

In the case of Long v. Saufley, 79 Cal. 260, 21 P. 757, it appears that the defendant promised to pay to the plaintiff a certain sum of money if the plaintiff would point out property out of which a judgment against a third person could be collected. The plaintiff pointed out the required property, but the defendant chose to compromise his claim rather than attempt to make the collection out of the property in question, and accepted a lesser sum than was due on the judgment. It was held that the plaintiff could recover the amount of money which was promised to him by the defendant.

In the case of Bagley v. Cohen, 121 Cal. 604, 53 P. 1117, the defendant promised to pay a certain sum of money out of the profits realized from his business. Shortly thereafter the maker of the note sold his business. It was held that his liability became fixed when he voluntary put it out of his power to make any profit out of his business. To the same effect are Love v. Mabury, 59 Cal. 484; Crane v. McCormick, 92 Cal. 176, 28 P. 222; Carter v. Rhodes, 135 Cal. 46, 66 P. 985.

[2] It is apparent that on the failure of the purchaser of the property here in question to pay the $1,000 due on January 1, 1922, defendant might have "foreclosed" on his deed of trust, which course would have involved a considerable delay and some expense. However, defendant chose the cheaper and shorter method of regaining possession of the property as hereinbefore indicated. Whether by "foreclosing" on the trust deed defendant would have been relieved from his obligation to pay to plaintiff the balance due on the commission for the sale of the property is a question not before this court. We think it clear, however, that notwithstanding the insolvency of the purchaser, in legal effect, defendant by his action prevented the purchaser from complying with the terms of his contract, and, accordingly, that the principal announced in the cases heretofore cited will apply. Defendant's liability follows as a matter of course.

[3] Appellant complains that the court erred in making a finding, in substance, that, without the consent, connivance, or collusion of Fred W. Carl (the agent), defendant entered into the agreement with the purchaser to reconvey to defendant the property to which reference has been had. The issue presented by the complaint in the action of whether the conveyance was made with the "consent, connivance, or collusion" of Fred W. Carl was not denied in the answer of defendant; the only matter in that respect contained in the answer being that it was denied that:

> "Defendant entered into any agreement with said purchaser by virtue of which the purchaser did not make or has not made said payment of $1,000 or any part thereof."

In such circumstances, the trial court was justified in making the finding to which exception is taken by appellant.

[4] It is also suggested by appellant that the trial court erred in its conclusion that plaintiff was entitled to interest from January 1, 1922, on the amount due him as balance of his commission. No authority is cited by appellant to sustain such position. On the contrary, section 3287 of the Civil Code provides that:

> "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which

is vested in him upon a particular day, is entitled also to recover interest thereon from that day. * * * "

No prejudicial error appearing, the judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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81 Cal. App. 387

JAHNKE v. JAHNKE (TITLE INS. & TRUST CO., Intervener).
(Civ. 3176.)

(District Court of Appeal, Third District, California. Feb. 17, 1927.)

1. Fixtures 🔑35(3)—Whether tavern fixtures supplied by lessee became part of realty held fact question (Civ. Code, §§ 658, 660, 663).

In dispute as to whether tavern fixtures supplied by lessee became part of realty, question whether articles involved were so affixed to building as to become part thereof, within Civ. Code, §§ 658, 660, 663, was one of fact to be determined by trial court.

2. Fixtures 🔑14—Generally, intent of parties is controlling in ascertaining whether property supplied by lessee becomes part of realty.

As general rule, intent of parties is controlling criterion in ascertaining whether property supplied by lessee is permanently attached to land or retains its identity as personalty; character of annexation being subsidiarily employed to test such intention.

3. Fixtures 🔑35(2)—Evidence held to show that tavern windows, basement floor, Viking ship, grill room woodwork, plaster of paris boats, window reflectors, range hood, and looking glasses supplied by lessee were personalty (Civ. Code, §§ 658, 660, 663).

Evidence *held* to show that windows and window insets put in tavern by lessee, hard wood floor in basement, Viking ship, woodwork in grill room, plaster of paris boats, reflectors for windows, galvanized iron range hood, and looking glasses were not affixed to building so as to become part thereof, and constitute part of realty belonging to lessor's grantee, under Civ. Code, §§ 658, 660, 663.

4. Fixtures 🔑35(2)—Evidence held to show that tavern floor put in by lessee became part of realty.

Evidence *held* to show that hard wood floor in grill room of tavern, although put in by lessee, became part of realty, where floor was lagged and sleepers were lagged to floor, and to move flooring it would be necessary to leave bolt seat.

5. Appeal and error 🔑1011(1)—Conflict in testimony is for trial court's determination.

Conflict in testimony is for determination of trial court rather than appellate court.

6. Trial 🔑397(5)—In determining right to property put in tavern by lessee, finding that it was "personal property," "trade fixtures," or "fixtures" held unnecessary, in view of finding that appellant was not owner.

In determining whether property put in tavern by lessee had become part of realty, finding that property was "personal property," "trade fixtures," or "fixtures" *held* unnecessary, where there was finding that appellant was not owner of property involved, since if findings, taken together, are such that court can say ultimate facts necessarily result therefrom, they are sufficient.

7. Appeal and error 🔑931(1)—Trial court's findings must be liberally construed to support judgment, and reconciled to prevent conflict on material issues if possible.

Findings made by trial court must be given liberal construction in support of judgment, and are, if possible, to be reconciled to prevent any conflict on material issues.

Appeal from Superior Court, Los Angeles County; W. P. Cary, Judge.

Action by Magdelene Jahnke, as executrix of the estate of Adolph Jahnke, deceased, against Carl Jahnke, in which the Title Insurance & Trust Company intervened. From the judgment, intervener appeals. Affirmed, as modified.

Lester W. Roth and Louis M. Lissner, both of Los Angeles, for appellant.

Warren L. Williams and Seymour S. Silverton, both of Los Angeles, for respondent.

PRESTON, Justice pro tem. This is an appeal by the intervener, Title Insurance & Trust Company, a corporation.

The facts are these: On March 15, 1915, one M. Lissner executed a lease to Adolph Jahnke for certain real property situate at 524 South Spring street in the city of Los Angeles, known as "Jahnke's Tavern," for a period of approximately seven years; said lease expiring on March 31, 1922. Immediately after the execution of the lease, the said lessee, Adolph Jahnke, proceeded to fit up, alter, and remodel the leased premises (Jahnke's Tavern) for the purpose of conducting a restaurant and café business therein, and installed therein certain property which forms the subject-matter of this action.

On June 7, 1917, the said M. Lissner and the other owners of the building conveyed the "Lissner building," of which "Jahnke's Tavern" was a part, to the said Title Insurance & Trust Company, the intervener and appellant in this action. Prior to the expiration of said lease the said Adolph Jahnke sold the said "Jahnke's Tavern" and assigned the lease and all rights thereunder to the defendant, Carl Jahnke, and one George Kohn, and on or about March 13, 1922, Kohn sold all his interest to the said Carl Jahnke. On March 13, 1922, and before the expiration of the lease, a chattel mortgage was executed by Carl Jahnke to the said Adolph Jahnke. Said chattel mortgage was given as security for 15 $1,000 promissory notes, and said mortgage included certain property in the said "Jahnke Tavern," and included the property claimed by said intervener, Title Insurance & Trust Company.

The said Adolph Jahnke died testate in the city of Los Angeles on the 18th day of March, 1923, and thereafter his will was duly admitted to probate, and on the 25th of April, 1923, letters testamentary were issued to Magdelene Jahnke, the plaintiff in this action.

None of the notes or any interest thereon were paid, and on the 21st of June, 1923, the said Magdelene Jahnke, as executrix of the estate of Adolph Jahnke, brought this action to foreclose said chattel mortgage. On the 16th of July, 1923, said Title Insurance & Trust Company intervened in said action and filed their complaint in intervention against the plaintiff herein, claiming to own certain property located in the said "'Jahnke Tavern," a portion of which is included within said chattel mortgage. A trial was had before the court sitting without a jury, and the court found that the plaintiff was entitled to judgment, and that the said chattel mortgage be foreclosed as to the following chattels enumerated therein, and located at 524 South Spring street in the city of Los Angeles, in what is known as the "Jahnke Tavern," to wit, 16 windows and window insets; two hard wood floors, one in basement and one in grill room; Viking ship; woodwork in grill room; two plaster of paris boats; 16 reflectors for windows; one galvanized iron range hood; all looking glasses.

From this portion of the judgment the intervener appeals. Title Insurance & Trust Company were declared to be the owners of certain other personal property described in the mortgage.

The said defendant, Carl Jahnke, remained in possession of the premises known as "Jahnke Tavern" as a month to month tenant, until on or about the 28th of June, 1923, and about said time he was halted in his attempt to remove said property heretofore mentioned by an injunction from the intervener.

The appellant, Title Insurance & Trust Company, urges a number of grounds for a reversal of that part of the judgment appealed from. The principal contention of appellant is that the above-enumerated articles must be classed as either "fixtures" or "trade fixtures." It seems to us, however, that we must first determine whether the articles of property involved are fixtures or mere personal property, for, unless said articles are affixed to the realty, the question of fixtures, or trade fixtures, becomes immaterial.

Section 658 of the Civil Code provides: "Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land; 4. That which is immovable by law." Section 663 of the same Code provides: "Every kind of property that is not real is personal." Therefore the articles in question in this case were personalty unless they were affixed to the land, for it is only in that sense that they can be brought within the above classification of real property.

Section 660 of the Civil Code also provides:

> "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws."

It has been held that this section is simply a rule for general guidance, concerning itself more with ultimate than probative facts. Gosliner v. Briones, 187 Cal. 557, 204 P. 19.

[1] Whether the articles involved in this case were so affixed to the building as to become a part thereof and thereby become realty was a question of fact to be determined by the trial court upon the evidence presented. Gosliner v. Briones, supra; Pennybecker v. McDougal, 48 Cal. 160; Miller v. Waddingham, 91 Cal. 377, 27 P. 750, 13 L. R. A. 680.

[2] As a general rule, the intent of the parties is a controlling criterion in ascertaining whether property is permanently attached to the land or retains its identity as personalty; the character of the annexation to the land or other realty and the use made of the property are important considerations, but in most cases are subsidiarily employed for the purpose of testing the intention of the parties. Hendy v. Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Lavenson v. Standard Soap Co., 80 Cal. 245, 22 P. 184, 13 Am. St. Rep. 147; Jordan v. Myres, 126 Cal. 565, 58 P. 1061; Western, etc., Tel. Co. v. Modesto Irr. Co., 149 Cal. 662, 87 P. 190, 9 Ann. Cas. 1190; Dutton v. Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340; Gosliner v. Briones, supra.

[3, 4] In the case at bar the trial court found by implication at least that the articles of property here involved were not affixed to the building so as to become a part thereof, and thereby constitute a part of the realty, and the findings of the court in this regard seem amply supported by the evidence.

Arthur S. Heineman, a witness called by the intervener, testified, in substance, as follows:

> "That he drew the plans and specifications for the fixtures in controversy; that he received all of his instructions concerning the drawing of the blue prints and work from Mr. A. Jahnke; and that his agreement concerning the matter was with him; that the window framing and the structural partitions in the walls could be removed by drawing the tacks; that that would leave an unfinished wall; that when the window is taken out, the wall is seen

through the frameway; that the sash and glasses removed by taking out the bolts and turning the fastenings; that he had about twelve conferences with Mr. Jahnke before the plans were drawn; that Mr. A. Jahnke instructed him to install the things down there in such a manner that they could be removed; that the superwainscoting in the west end of the basement is of sycamore and is attached to the hard wood floor resting on the sleepers; that it was nailed to the floor or toe nailed, and was put up in sections and not constructed on the premises; that there is running from the wainscoting a balustrade or rail, about 3 feet high and about 12 feet long, running east and running to another short balustrade or block against which it rests; that they were brought into the establishment by Mr. Cedarquist and set up; that no part of them was made on the premises; that he installed the flooring on the main floor or in the grill room; and that his recollection is that this floor was lagged and that the sleepers were lagged to the floor, and to move the flooring it would be necessary to unscrew that bolt and leave a bolt seat there; that there is nothing that would injure the cement flooring other than to make a little hole with an iron nut in it; that he installed the plaster boats; that they are light troughs and hang by straps from the rafters and are supported by means of wrought iron straps and the straps are screwed by means of bolts into the floor beams; that the straps are not attached to the bolts in any way, and the boats could be removed by being slipped out from the straps; that the fixtures were built in the basement and grill room and were built especially for restaurant and café purposes; that the fixtures could be taken out and put in another place of similar dimensions or a place of different dimensions; that the panels and walls could all be taken out and put in another place on a floor with modifications; that at the time the wainscoting was installed it was figured at about $1 a foot but that it was worth about $3 at that time; that he thought it could be taken out and used elsewhere at a profit."

The witness N. H. Cedarquist testified as follows:

"I put in the panels in the tavern. They were fabricated at the factory and assembled in the grill room. They can be taken out by removing them, and they can be removed without breaking them. We can remove the panel and take it right out through the doors. You do not have to take any of the walls out. The hard wood flooring in the upstairs grill, as far as I can remember, was nailed to sleepers which were laid on the cement floor. The sleepers were not tied into the wall. All the stuff can be taken out and put in another building. I constructed the windows on the west end and on the south side of the basement, and the frames and the sash in the frames were made at the factory complete. The frames were then shoved right into the openings which were made on the job previously. The frame is in there loose, and that applies to the windows all the way around. The windows could be taken out and used in any other place under the same conditions. I do a lot of work fixing windows for stores and offices and banks, and the specifications generally provide that they can be put in and taken out and moved elsewhere. I made the Viking ship. It was built at the factory and brought up, and it was built so it could be stuck right over the end of structure of the stairway leading downstairs. The Viking ship was constructed on the platform of that stairway on a frame set up against a cement. The sashes down stairs, I believe, could be taken out by pulling them out; there are no nails, tacks, or screws there anywhere. It is not even tacked to the wooden structure. I would say they would be sold at $3 a foot. We often use fixtures that are built specially for one place in a place of different dimensions. The staff work could be removed without removing the panels, but the panels could not be removed without removing the staff work. If the Viking ship was held in place by an expansion bolt, the bolt would not be imbedded in the cement. The socket would be imbedded in the cement, and the bolt would be in the railing. By removing the bolt, the socket would be left in the cement. The sash is held by a loose pin butt, the same as these lights are here above, with hooks, or either with springs. A loose pin butt is where you pull a peg and take the sash out."

Carl Jahnke, the defendant, testified that he was in the tavern while the panel in the grill room was being done, and that said panel work was nailed on the skeleton and primed and tar paper used to preserve the wood from moisture, and that the said paneling was not nailed to the wall. He further testified as follows:

"The Viking ship was brought down all intact and put up against this reinforced concrete base in a kind of toggleboard, I would call it. It has since been removed from the place where it used to be. The hard wood flooring in the basement was laid on 2x4, and the hard wood is nailed on the 2x4, and the 2x4 is just raised on the concrete. They are not nailed to the building in any way. The other floor in the west end of the basement is laid practically the same way. The floor at the west end was laid on sleepers of 2x4 and was toe nailed—it was not nailed in any way to the building, and the sleepers were not attached to the concrete or the building. The plaster of paris boats are hung with four chains, and the chains have got a little plug that is screwed into the ceiling, and the chain is attached to the plug and connected onto the hook that is on the side of the boat. The boats could be removed by being lifted off the screws. The window reflectors in the windows have mirrors in them. They hang down on a piece of wire from a gas or water pipe from that fake wall, and you get the effect of sunshine in the windows. There were about 16 of them altogether."

[5] There is other testimony to the same effect, and also testimony to the effect that negotiations were carried on between the appellant and Carl Jahnke looking to the execution of a new lease, but a new lease was never actually executed, and that was the reason given by Carl Jahnke for continuing in the premises after the expiration of the original lease. There is also some conflict in the testimony

given, but that was for the trial court's determination, and there is ample evidence in the record to support the trial court's conclusion that the articles never became affixed to the building so as to become a part of the realty.

[6, 7] Appellant also contends that the trial court failed to find on material and vital issues of the case, because it did not find whether the property in question was "personal property," "trade fixtures," or "fixtures." There is no merit in this contention. The court did find, however, that appellant and intervener was not the owner of the property involved. Ths finding is adverse to appellant and is a sufficient finding on the material and vital issue of the case. The trial court did not, in express language, find that the property in question had not become a part of the realty, but in view of the foregoing finding that said property was not the property of appellant a specific finding whether it was mere personal property, or fixtures, was, in the instant case, entirely unnecessary. The general rule is this: If the findings, taken together, are such that the court can say the ultimate facts necessarily result therefrom, they are sufficient. Tower v. Wilson, 45 Cal. App. 123, 188 P. 87; Breyfogle v. Tighe, 58 Cal. App. 304, 208 P. 1008. Moreover, the findings made by the trial court must be given a liberal construction in support of the judgment and are, if possible, to be reconciled so as to prevent any conflict upon material issues. Price v. Occidental Life Ins. Co., 169 Cal. 800, 147 P. 1175, and cases therein cited.

Therefore, giving the findings in the case at bar a liberal construction, it necessarily results therefrom that the property involved herein did not become a part of the building in which it was installed, and therefore did not become a part of the realty, but retained the character of personal property.

It is also contended by appellant that the court found that appellant and intervener was the owner of one hard wood floor in the grill room, and that the plaintiff and respondent was the owner of one hard wood floor in the basement, but that the judgment provided that the two hard wood floors, one in the basement and one in the grill room, be awarded to plaintiff and respondent. An examination of the record convinces us that this contention must be sustained. The hard wood floor in the grill room should, under the findings, have been awarded to the appellant and intervener herein. This is manifestly an inadvertence, and the judgment should be modified by awarding the hard wood floor in the grill room to the appellant and intervener herein.

The judgment is modified by striking from paragraph 4 thereof, "2 hard wood floors, one in basement, one in grill room," and inserting in lieu thereof, "one hard wood floor in basement," and by inserting at the end of paragraph 5, "one hard wood floor in grill room." As so modified, the judgment is affirmed, the appellant to recover costs of appeal.

We concur: FINCH, P. J.; PLUMMER, J.

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81 Cal. App. 360

SNODGRASS v. SNODGRASS (two cases).
(Civ. 5433.)

(District Court of Appeal, First District, Division 1, California. Feb. 17, 1927.)

1. Appeal and error 🔑1011(1)—Findings on conflicting evidence are conclusive.

On conflicting evidence, findings supported by evidence cannot be disturbed on appeal.

2. Account stated 🔑18(2)—Payment 🔑63(3)—Payment for services rendered and on account stated may be proved under general denial.

In action on common counts for services rendered and on account stated, payment may be proved by defendant under answer denying allegations of complaint, and need not be specially alleged.

3. New trial 🔑89—Plaintiff suing for services rendered and on account stated held not entitled to new trial on ground of surprise because of proof of payment not pleaded.

In action on common counts for services rendered and on account stated, in which defendant interposed general denied, plaintiff was not entitled to new trial on ground of surprise because of defendant's proof of payment, where plaintiff made no claim that he was misled by any affirmative act or statement of defendant, but only because defendant made no suggestion he would rely on payment as defense.

4. Appeal and error 🔑237(2)—Motion for continuance on ground of surprise is necessary to make point available on appeal.

Party who claims to have been surprised by evidence adduced by his adversary must move for continuance in order to avail himself of that point on appeal.

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions by David E. Snodgrass against Harold G. Snodgrass, consolidated for trial. Judgments for defendant, and plaintiff appeals. Affirmed.

Joseph J. Geary, of San Francisco, for appellant.

Arnold C. Lackenbach, of San Francisco, for respondent.

CASHIN, J. Appeals from the judgments entered for defendant in two actions brought by appellant to recover for services alleged to have been rendered to defendant at his request.

The cause of action in each complaint was stated in the form of two common counts, one for the value of services rendered, and the other upon an account stated; it being alleged in each count that the claim was unpaid. The actions, numbered 150686 and 150687 respectively, as shown by the register of actions in the trial court, were by stipulation of the parties tried together, and the appeals are presented on the same transcript.

The allegations of the complaint, which were denied, were found to be untrue, and appellant contends that the findings on the issues in the first case are not sustained by the evidence.

[1] While the testimony in that case was conflicting on the questions whether services were rendered and an account stated as alleged, the record discloses sufficient evidence to support the findings of the court on these decisive issues, and its conclusions cannot be disturbed. Del Monte Ranch Dairy Co. v. Bernardo, 174 Cal. 757, 164 P. 628; City of San Diego v. Hall, 180 Cal. 165, 179 P. 889.

The notice of intention to move for a new trial in the second action designated as grounds thereof those provided by section 657 of the Code of Civil Procedure with the exception of the second subdivision thereof, and stated that the motion would be made upon affidavits and upon the minutes of the court. Appellant contends that his affidavits supporting the motion on the grounds of surprise and conduct on the part of his adversary by which it was alleged that he was prevented from having a fair trial, not having been met by counter affidavits, the denial of the motion was erroneous.

As stated, the allegation that services were rendered was denied. It appears, however, from the testimony of defendant and his witness that services were rendered for the agreed compensation alleged; but, according to this testimony, appellant was paid at the time of their performance. It appears from the affidavits mentioned that defendant and his witness testified that appellant received from the former a check in the sum of $500, which was the amount claimed in the action, as compensation for the services alleged; that appellant then owed respondent and his witness sums aggregating the amount of the check, which upon its receipt appellant then paid by its indorsement and redelivery. This testimony, by which appellant alleged that he was surprised, was denied by him at the trial, and he alleged in his affidavit that the check mentioned was not received in payment of the claim, or as part of the transaction involved in the action; that he was not indebted, as testified by defendant and his witness; that this, with further testimony by the latter that at the time the loans were made to appellant he was in necessitous circumstances, was wholly untrue; that he is now able to show by the record of a certain bank that at the times mentioned he had on deposit therein sums equal to the amount claimed to have been loaned, his affidavit in the latter respect being supported by that of an officer of the bank mentioned. He urges further that, in negotiations looking to a settlement of the action, which were had before the trial, no suggestion was made by defendant that the claim had been paid; that from this and the fact that payment was not affirmatively pleaded as a defense he was surprised by the testimony mentioned; and that he was not prepared to meet such testimony at the time of the trial.

[2] No motion for a continuance was made, and it is not contended that the evidence as to the condition of appellant's bank account was not readily available. While it has been held that the negative allegation of nonpayment in actions of this character need not be proved (Melone v. Ruffino, 129 Cal. 514, 62 P. 93, 79 Am. St. Rep. 127; Janeway & Carpender v. Long Beach Paper & Paint Co., 190 Cal. 150, 211 P. 6), under an answer denying the allegation payment may be shown (Wetmore v. San Francisco, 44 Cal. 294; Mickle v. Heinlen, 92 Cal. 596, 28 P. 784; Bank of Shasta v. Boyd, 99 Cal. 604, 34 P. 337; County of Mendocino v. Johnson, 125 Cal. 337, 340, 58 P. 5; Brooks v. Ardizzone, 9 Cal. App. 215, 98 P. 393). It is not contended that in the course of the negotiations mentioned appellant was misled by any affirmative act or statement by defendant, but by the fact alone that the latter made no suggestion that he would rely upon payment as a defense to the action.

[3, 4] In view of the issue made by the pleadings and the rule mentioned above, we are of the opinion that it cannot reasonably be urged that either plaintiff or his attorney were misled by defendant's silence, or that surprise in a legal sense can be predicated thereon. As stated, no application for a continuance was made, nor are adequate reasons shown for a failure to do so. It is the general rule that a party who claims to have been surprised by the evidence adduced by his adversary must move for a continuance, or he will not be permitted to avail himself of that point on appeal. Doyle v. Sturla, 38 Cal. 456; Heath v. Scott, 65 Cal. 548, 552, 4 P. 557; Bailey v. Richardson, 66 Cal. 416, 5 P. 910. The circumstances shown do not in our opinion bring the case within the exception stated in Delmas v. Martin, 39 Cal. 555, and we are satisfied that the motion was properly denied.

The judgments are affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

81 Cal. App. 317

NATIONAL BANK OF NEW ZEALAND, Limited, v. FINN, Sheriff. (Civ. 3198.)★

(District Court of Appeal, Third District, California. Feb. 14, 1927. Hearing Denied by Supreme Court April 15, 1927.)

1. Shipping 🔑106(5) — Bank's lien on shipment held not lost, though its correspondent, as garnishee in action against shipper, delivered check representing proceeds of shipment to sheriff (Code Civ. Proc. § 544).

Where San Francisco correspondent of New Zealand bank, which had discounted draft against shipment of copra, as garnishee in action against shipper, delivered check representing proceeds of shipment to sheriff, together with a letter notifying him that New Zealand bank claimed title as against shipper, *held*, lien or title of New Zealand bank was not thereby irrevocably lost, in view of Code Civ. Proc. § 544.

2. Shipping 🔑106(5)—Bank's surrender of bill of lading to shipper's factor who guaranteed to remit proceeds of shipment held not to destroy its lien for amount of discounted draft (Civ. Code, §§ 2026–2030, 2369).

Where New Zealand bank discounted draft against shipment of copra, and, after consignee's rejection of shipment, authorized its San Francisco correspondent to deliver papers to shipper's factor, who guaranteed to remit proceeds less expenses, and where factor gave San Francisco bank check for proceeds which was garnished as property of shipper, *held*, New Zealand bank's surrender of bill of lading and other papers to shipper's factor did not destroy its lien, in view of Civ. Code, §§ 2026–2030, 2369.

3. Factors 🔑11—Relation of principal and factor is fiduciary, and requires factor to scrupulously account to principal.

The relation of principal and factor is of a fiduciary character, and carries with it the elements of a trust, requiring the factor to scrupulously account to his principal.

4. Factors 🔑11—Factor is both bailee and sales agent bound by contract with principal.

A factor is both a bailee and a sales agent, and is bound by his contract with his principal.

5. Factors 🔑18, 31—Factor cannot set up adverse claim to property or its proceeds.

A factor cannot set up an adverse claim to the property or its proceeds, as against his principal.

6. Factors 🔑64—As against one having notice, principal can follow funds or property delivered to factor to sell.

Principal can follow the funds or property delivered to factor to sell, as against any one having notice of facts.

7. Factors 🔑65—Factor with knowledge of owner's agreement to devote proceeds first to repayment of advances by bank is bound accordingly.

Where owner of goods indebted to bank for advances for purchase price causes goods to be shipped to his factor under agreement, of which factor has knowledge, that proceeds are to be applied to bank's advances, factor receiving goods with knowledge of that understanding is bound to act accordingly, and, until bank is paid, cannot apply any of proceeds toward prior obligations of owner.

8. Shipping 🔑106(5)—Lien of New Zealand bank discounting draft against shipment of copra held not lost when shipment was resold by shipper's factor after having been rejected by consignee.

Where New Zealand bank discounted draft against shipment of copra, and, after consignee's rejection thereof, authorized its San Francisco correspondent holding draft with bill of lading attached to deliver bill of lading to shipper's factor, who agreed to remit to it proceeds of resale, *held*, resale by factor did not destroy lien of New Zealand bank on shipment or proceeds which were garnished in hands of San Francisco bank in action against shipper.

9. Shipping 🔑106(5)—Lien of bank releasing bill of lading against shipment on agreement of shipper's factor to remit proceeds held to attach to proceeds, though agreement did not expressly so provide.

Where New Zealand bank discounted draft against shipment of copra, and, after consignee's rejection thereof, authorized its San Francisco correspondent to deliver bill of lading to shipper's factor, who guaranteed in writing to remit proceeds less expenses to San Francisco bank, *held*, lien of New Zealand bank attached to proceeds of shipment, notwithstanding written guaranty of factor did not specifically so provide; the use of particular words being unnecessary.

10. Banks and banking 🔑156, 159—Bank, receiving check or bill of exchange for collection, does not take title, and relation resulting is only that of principal and agent.

If a check or bill of exchange is taken by bank for collection only, bank does not take title, but acts merely as collection agent, and relation resulting is not that of debtor and creditor, but that of principal and agent.

11. Shipping 🔑106(5)—Evidence held to sustain finding that bank discounted draft, rather than took it for collection only.

Evidence *held* to sustain finding that New Zealand bank discounted, rather than took for collection, draft against shipment of copra, which was not overcome by fact that bank sent draft to its San Francisco correspondent "for collection" only.

12. Garnishment 🔑200—Third party claim to garnished check held sufficient, though not served until after sheriff had made return on writ (Code Civ. Proc. § 689).

Third party claim against sheriff in possession of garnished check *held* sufficient, though not served until after sheriff had made return on writ of garnishment; there being nothing in Code Civ. Proc. § 689, requiring claim to be served at any particular period of time.

13. Sheriffs and constables 🔑130—That third party claimant of garnished property might have intervened in original action is no defense to his action against sheriff for conversion.

That third party claiming garnished property might have intervened in original action is no

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★Hearing denied by Supreme Court.

bar to the maintenance of an action by such party against sheriff for conversion of garnished property after notice of claim.

14. Sheriffs and constables 🔑128—Third party claimant of garnished property held not estopped by statutory provisions from maintaining action for conversion thereof (Code Civ. Proc. §§ 710½–713½).

Third party claimant of garnished property is not estopped by Code Civ. Proc. §§ 710½–713½, from maintaining action for conversion of such property.

15. Sheriffs and constables 🔑137(1) — It is sufficient allegation of service of third party claim to garnished property if instrument is set forth according to legal tenor or effect.

In action by third party claimant of garnished property for conversion thereof, it is generally a sufficient allegation of service of third party claim to set forth instrument according to legal tenor or effect thereof.

16. Pleading 🔑403(4)—Defect in allegation of service of third party claim to garnished property held cured by answer.

In action by third party claimant of garnished property for conversion thereof, any defect in allegation of service of third party claim *held* cured by answer.

17. Sheriffs and constables 🔑128—New Zealand bank held entitled to sue sheriff for conversion of check garnished while in hands of its San Francisco correspondent (Civ. Code, §§ 1818, 1878).

Where New Zealand bank discounted draft against shipment of copra, and, after rejection of shipment by consignee, authorized its San Francisco correspondent to deliver bill of lading to shipper's factor, who guaranteed to remit the proceeds of resale less expenses, and where checks representing such proceeds in hands of San Francisco bank were garnished as property of shipper, *held*, relation between New Zealand and San Francisco bank was that of principal and agent, and not debtor and creditor, and New Zealand bank had right to sue sheriff for conversion of check after notice of its claim; Civ. Code, §§ 1818, 1878, being inapplicable.

18. Payment 🔑21—Receipt of check does not of itself discharge indebtedness, which remains until check is honored or accepted in discharge.

Creditor's receipt of check does not of itself discharge indebtedness for which check was issued, but such indebtedness remains until check is honored or in some way accepted in discharge of obligation.

19. Trover and conversion 🔑16—General or special ownership of property converted is sufficient to support action.

To enable one to recover for conversion of personal property, he must have general or special ownership therein at time of tort, though legal title is not necessary.

20. Trover and conversion 🔑16—Actual possession of chattel at time of conversion will sustain trover, except as to owner or one claiming under him.

Actual possession of chattel at time of its conversion will sustain trover, except as to true owner or one claiming under him, even though title be conceded to be in a third person.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the National Bank of New Zealand, Limited, against Thomas F. Finn, as Sheriff of the City and County of San Francisco. Judgment for plaintiff, and defendant appeals. Affirmed.

W. S. Andrews and A. E. Shaw, both of San Francisco, for appellant.

Gavin McNab, Nat Schmulowitz, and A. D. Duncan, all of San Francisco, for respondent.

PLUMMER, J. Action by plaintiff for the value of a certain check alleged to have been converted by the defendant. Plaintiff had judgment in the sum of $17,884.48, from which judgment the defendant appeals.

In September, 1920, the plaintiff was a national bank organized and existing under an act of the General Assembly of New Zealand and will hereafter be referred to as the "New Zealand Bank." At the same time and prior thereto, John Burns & Co., Limited, was a corporation organized and existing under a general act of the same Assembly and will hereafter be known as "Burns." At the same time, the Fiji Planters' Co-operative Association, Limited, of Savu Savu, Fiji Islands, were planters and shippers of copra, and will hereafter be referred to as the "Fiji Planters." During the same period of time the firm of Geo. Wills & Sons, Limited, was a corporation maintained under the laws of the United Kingdom of Great Britain and Ireland, doing business at San Francisco, Cal., and will hereafter be known as "Wills."

In September, 1920, the Fiji Planters offered Burns a shipment of copra; Burns arranged through Wills to charter a vessel in San Francisco to load the copra, and Wills chartered the schooner Narwhal. Burns accepted the offer of the Fiji Planters and opened a letter of credit in favor of the Fiji Planters with the New Zealand Bank for £20,000 to cover the cargo of copra. The copra was to be shipped to Wills and Wills was to resell the copra. Burns advised Wills to sell the copra. On October 12, 1920, Wills, in its own name, entered into a contract with John Rothchild & Co. of San Francisco for the sale of the copra to the latter at 7½ cents per pound. The contract was made for shipment of the copra in October, November, and December, 1920. The copra was not shipped until the early part of January, 1921. The contract provided for payment as follows: Net cash against seller's sight draft with attached documents, consisting of bill of lading, invoices, etc. Thus no one could get title or possession of the copra other than the owner and holder of the sight draft until the draft should be paid. Rothchild neither paid the draft nor received the goods. The cargo was rejected by Rothchild on the ground that the shipment was not made at the time limited in the contract. When the copra arrived in San Francisco in 1921, the price had declined so that when the copra was finally disposed of it only brought gross 3½ cents a pound. Burns was an old and large customer of the New Zealand Bank and was at the times mentioned indebted to the bank in the sum of £200,000. On February 1, 1921, Burns delivered to the New Zealand Bank a general letter of hypothecation, the latter clause of which reads:

> "This letter shall not affect or detract from the bank's general lien according to the law of banker and customer, over all property or any securities in your custody not specifically charged by this letter belonging to us."

This general letter of hypothecation authorized the bank to take possession and to proceed at once and without notice to sell at its absolute discretion, and in such manner and at such times as should be thought fit, all or any part of the goods represented by any shipping documents held by the bank, and apply the net proceeds thereof in payment of all bills, etc., and in liquidation of any debts or liabilities of Burns to the New Zealand Bank. The bank was handed by Burns the bill of lading, invoices, and insurance policies. On February 7 the New Zealand Bank credited the general account of Burns with £20,000 to meet the draft Burns was paying on account of the Fiji Planters. The account of Burns was thus credited with the full amount of the draft of Burns on Wills, drawn by Burns on account of the shipment of copra. The course of business between Burns and the New Zealand Bank was such that, if a bill was drawn in connection with the sale of goods, and documents accompanied the bill of exchange, and the New Zealand Bank discounted the same or made an allowance on the same, an invoice, bill of lading, and insurance policy invariably accompanied the bill of exchange. The bill of lading was indorsed:

> "John Burns & Co., Limited, Robt. Burns, Managing Director, as agents for the Fiji Planters' Co-operative Association, Limited."

This was a general indorsement according to custom so that the bill of lading could be negotiated by delivery.

The New Zealand Bank sent to the Canadian Bank of San Francisco for "collection and credit" through the London office of the New Zealand Bank the draft for £20,000 drawn by Burns on Wills, which it had obtained as herein stated. On March 24, 1921, the Canadian Bank received the letter from the New Zealand Bank inclosing draft, the invoices, custom certificates, insurance policy, and bill of lading for the copra, accompanied by the following letter:

> "Auckland, 9th February, 1921. For favor of collection and credit through our London office I enclose herewith our remittance—BB 777 John Burns & Co., Limited, £20,000 at sight, dated 8th February, 1921. The draft is supported by invoice, custom certificate, insurance policy for £50,000 and bill of lading for 589 tons 12 cwt. of copra per Barq Narwhal. £50,000 the balance of insurance is covered by consignee's instructions—Second of exchange will reach you by later mail, together with duplicate documents. Kindly advise date of payment direct to this office and to our London office."

The Narwhal reached San Francisco April 14, 1921. Rothchild inspected the captain's log-book, found the date of loading, rejected the cargo, and refused to pay therefor. This led to considerable correspondence by cable and otherwise between the Bank of New Zealand, the Canadian Bank, the Canadian Bank with Wills, relative to the sale of the copra. Wills also cabled Burns.

So far as pertinent, the cablegrams and letters are as follows: On April 20, 1921, the Canadian Bank, to which all the papers relating to the cargo had been forwarded by the New Zealand Bank, cabled the New Zealand Bank as follows:

> "Your 777 drawee states documents should be surrendered unconditionally as buyers reject cargo. Wills says cannot act unless given free hand. Instruct."

At the same time Wills cabled Burns:

> "Bank will only release on impossible conditions. Imperative you should arrange surrender documents unconditionally immediately. Otherwise we cannot proceed in accordance with contract."

On April 20 Burns cabled Wills:

> "What unreasonable guarantee do bank want? We have asked Miller to see you. Give him full particulars."

On April 22 the New Zealand Bank cabled the Canadian Bank as follows:

> "Do not surrender documents unconditionally. Burns instructs Wills must give a guarantee that all proceeds copra up to £20,000 sterling handed over to you towards the payment of draft."

On April 22 Wills cabled Burns again:

> "Bank demand guarantee payment total proceed twenty thousand pounds. Cannot agree to. We are prepared to pay them proceeds after deducting all charges and expenses."

On April 22 Mr. Mitchell for the Canadian Bank wrote Wills as follows:

> "San Francisco, Cal., April 23, 1921 (should be April 22, 1921). Re Draft Burns & Co., on Yourselves £20,000. Referring to the draft we have received from the National Bank of New Zealand, Limited, Auckland, for £20,000 against shipping documents per Narwhal we beg to advise that we have to-day received the following cable in regard thereto: 'Our 777 do not surrender documents unconditionally. Burns instructs Wills must give a guaranty, that all proceeds copra up to £20,000 sterling handed over

to you towards the payment draft Burns have telegraphed G. J. Miller to watch their interests. Will probably interview you.' In this connection we understand that you will give us a guaranty to hand us the proceeds of the copra less freight, commission, insurance, arbitration fees, and allowances, which may be made by the arbitration, legal, and handling charges, and we would be obliged if you would kindly confirm this understanding in order that we can submit it to the National Bank of New Zealand, Limited, Auckland, by cable."

On the same day Wills wrote the Canadian Bank, in reply thereto, the following letter:

"We have to acknowledge your letter of today's date, which advises us of the cable you have received from the National Bank of New Zealand, Limited, Auckland, in connection with the draft on the cargo of copra per the Narwhal. As advised you on the telephone, we cannot agree to the stipulation made by the National Bank of New Zealand, Limited, whereby we guarantee to remit you the proceeds for the copra of £20,000. Mr. G. J. Miller has called on us and we have explained the situation to him thoroughly in the same manner as we have done with your good selves, and we beg to advise you that we are ready to comply with the last paragraph of your letter, to give you a guaranty to hand you the proceeds of the copra less charges as set forth in yours under reply. As you will readily understand, any expenses in connection with the cargo of the Narwhal must be for account of Messrs. John Burns & Co., Limited."

Following which the Canadian Bank on April 26th wrote Wills as follows:

"Referring to our letter of 23d April and yours dated 22d April, re draft of John Burns & Co., Limited, on your good selves for £20,000, we beg to hand you herewith shipping documents covering cargo of copra in bulk, per schooner Narwhal and in consideration thereof would you be good enough to give us a guaranty to hand us the proceeds of this copra less freight, commission, insurance, arbitration fees and allowances, legal and handling charges."

On April 27, 1921, Wills replied as follows:

"In reply to yours of even date, we have to acknowledge receipt of the documents for the cargo of copra in bulk per the schooner Narwhal and we hereby guarantee to hand you the proceeds of the sale of this copra, less freight, commissions, insurance, arbitration fees and allowances, legal and handling charges," in connection with the cargo, sent Wills, etc.

All the documents relating to the cargo were thus placed in the hands of Wills authorizing him to proceed with the sale thereof by the plaintiffs and turn over the proceeds to the Canadian Bank for the benefit of plaintiffs. Wills proceeded with the sale, paid all the bills, expenses, charges, commissions, etc., and rendered a statement to the Canadian Bank thereof showing the net proceeds of the cargo to be the sum of $17,888.48, and at the same time delivered to the Canadian Bank a check or bill of exchange in the following words:

"Voucher No. ——. In full settlement of undermentioned bills. Proceeds from Narwhal copra Due John Burns Co., Limited, Net 17888.48 George Wells & Sons, Limited, 230 California street, San Francisco, Cal. Aug. 16, 1922. Pay to the order of Canadian Bank of Commerce $17,888.48 (seventeen thousand eight hundred eighty-eight dollars forty-eight) for George Wills & Sons, Limited, A. H. Anderson. To the British American Bank, 11–3 San Francisco, Cal., John Baxter."

Immediately thereafter the defendant in this action, as sheriff of the city and county of San Francisco, under a writ of attachment, issued in an action begun by Wills against Burns, served upon the Canadian Bank a notice of garnishment, under and by which the defendant purported to garnishee all moneys and credits in the hands, or under the control of the Canadian Bank belonging to Burns. To this notice of garnishment the Canadian Bank made reply that it had no funds or credits belonging to Burns. Thereafter the check herein referred to was accepted by the British-American Bank, but never cashed by the Canadian Bank or credit therefor given to the plaintiff, the New Zealand Bank. Thereafter, and on or about the 21st day of November, 1922, the New Zealand Bank served a notice upon and filed with the defendant a third party claim, notifying the defendant that the plaintiff, the New Zealand Bank, claimed the check and the proceeds represented thereby. Subsequently the check referred to was indorsed by the Canadian Bank, and on or about the 28th day of December, 1922, delivered to the custody of the sheriff, accompanied by a letter of that date referring to the garnishment served upon the Canadian Bank on the 16th day of August, 1922, and, among other things, stated:

"That the Canadian Bank of Commerce received the said check and the funds represented by said check for the account of the National Bank of New Zealand, Limited, and for your information you are advised that the National Bank of New Zealand, Limited, claims to be the owner of and entitled to the possession of the said check and the funds represented by said check. The Canadian Bank of Commerce does not care to assume the responsibility of determining who is the owner of the said check or who is entitled to the proceeds represented by said check, and it is therefore accordingly placing the said check in your possession and under your control, pursuant to the levy of the writ above mentioned, but with the express reservation and understanding that in so doing the Canadian Bank of Commerce of San Francisco refuses to recognize that the said check and the funds represented thereby, or any part thereof, belong to John Burns & Co., Limited."

The third party claim of the plaintiff was again served upon the defendant and the defendant required of and obtained of Wills an indemnity bond. Wills, having obtained judgment against Burns, took out an execution, acting under which, the check referred to was cashed and the money represented thereby turned over to Wills on account of its judgment against Burns. Thereupon this action was begun by the plaintiff against the defendant for the conversion of said check and for the recovery of the sum of $17,888.48, the value thereof.

The trial court found that on the 16th day of August, 1922, the check or bill of exchange was delivered to the Canadian Bank of Commerce by the drawer thereof for the account of the National Bank of New Zealand and that the plaintiff was the person beneficially interested in said check, and entitled to the moneys represented thereby, and that the British American Bank on that date stamped upon the face of said check or bill of exchange its certificate of acceptance; that the check was not voluntarily delivered by the Canadian Bank to the sheriff, but was delivered to the sheriff in pursuance of the garnishment; and that the defendant was notified that the check and the funds represented thereby belonged to the New Zealand Bank. The trial court also found that the defendant wrongfully converted said check and likewise wrongfully applied the proceeds thereof in satisfaction of the judgment held by Wills against Burns. The court further found that, while the bill of exchange was made payable to the Canadian Bank, the Canadian Bank represented the Bank of New Zealand for the purpose of collecting the check and the proceeds represented thereby; that the Bank of New Zealand was the owner of said bill of exchange and the only one entitled to receive the proceeds. The court further found that the defendant wrongfully refused to deliver said personal property or the proceeds thereof to the plaintiff, and, as a conclusion of law, the court determined from the facts found that the plaintiff was entitled to judgment in the sum prayed for, and judgment was entered for the plaintiff in the sum hereinabove mentioned.

Upon this appeal the defendant sets forth nine distinct allegations of error upon the part of the trial court, on every one of which defendant insists the judgment of the trial court should be reversed: (1) When the Canadian Bank delivered the indorsed check to the sheriff, respondent irrevocably lost any lien or title it had to the check or bill of exchange; (2) that, when respondent surrendered the bill of lading and other papers relative to the shipment of the cargo of copra to Wills, it lost its lien, if any, upon the copra and the proceeds to be derived therefrom; (3) that, if respondent retained any lien when the bill of lading was delivered to Wills, it was lost when Wills sold the copra to the El Dorado Oil Works; (4) that the draft on Wills was taken for collection only and was not discounted by the New Zealand Bank; (5) that no third party claim was served upon the appellant after his reception of the indorsed check; (6) that the third party claim served by respondent did not comply with section 689, Code of Civil Procedure; (7) that plaintiff's complaint does not allege service of third party claim, and therefore fails to state a cause of action; (8) that the findings are insufficient to support the judgment; (9) and that plaintiff had no title to the check nor right to possession thereof and cannot maintain this action of trover.

[1] We will consider these assignments of error in the order above set forth. By reference to the letter dated December 28, 1922, it will be noticed that the Canadian Bank of Commerce did not surrender the check as the property of Burns, nor without giving to the defendant notification of the fact that it had not received said check as the property of Burns. There is nothing in the transcript which indicates that the New Zealand Bank authorized the Canadian Bank to deliver the check or bill of exchange to the defendant. The transcript does show that the same attorneys acted for the Canadian Bank who appeared in behalf of the plaintiff in this action. Whatever action the Canadian Bank may have taken with relation to the check, its liability, if any, is fixed by the garnishment. As stated in Marshall v. Wentz, 28 Cal. App. 540, 153 P. 244:

> "The liability of the garnishee is fixed by the service upon him and as of the date of the service and continues until one of two things happens: (1) the discharge of the attachment; or (2) the satisfaction of the judgment."

Section 544, Code of Civil Procedure, provides that in all cases where the garnishment is served upon any person whose property or credits are alleged to belong to the debtor named in the action, said party shall be liable to the plaintiff for the amount of such credits, etc., unless the same be delivered to the sheriff. The fact of whether the garnishee properly or improperly delivers property or credits alleged to belong to the judgment debtor does not, in any manner, affect the right or title of the true owner of the property or credits in the event that the garnishee has mistaken the true ownership, but the statute does provide for notifying the sheriff of the true ownership of the property or credits by a third party considering himself the owner thereof and the one ultimately entitled thereto, or to the proceeds thereof. It may be otherwise stated in this language: That the action of the garnishee in replying that he has no property or credits belonging to the debtor named in the attachment action or not delivering property under garnishment process to the sheriff has no determinative effect upon the title or ownership of the property or credits denied to be held, admitted to be held, or delivered to the sheriff. In 37 C. J. p. 336, § 57, it is said:

> "As a general rule a common-law or other lien dependent upon possession is waived or lost

by a lienholder voluntarily and unconditionally parting with possession or control of the property to which it attaches; and such lien cannot be restored thereafter by resumption of possession. But the lien is not waived or destroyed, except as to third parties, where there is an intention to preserve the lien, the lienholder only conditionally parting with the property, as where by special agreement he allows the owner to take the property into his possession without prejudice to the lien, or where he delivers it to an agent, servant, or trustee to hold for his benefit and subject to his lien. Nor is the lien lost where the property is taken from his possession without his consent by force or fraud, and where the property is taken from him involuntarily, as by a replevin suit, he may upon regaining possession sue to foreclose the lien. Where possession is not essential to the existence of the lien, the general rule does not apply."

In section 393, Bowers on the Law of Conversion, the text-writer thus states the rule:

> "The pledgee has a special property or interest in the chattel pledged, entitling him to the possession of it until the obligation secured is satisfied, not only as against the pledgor, but as against all the world—except the true owner in case the pledge has been wrongfully made. He is consequently entitled to maintain any action for the protection of his possession and special interest, not only against the pledgor—if he wrongfully retains possession—but against third persons who interfere with the same without right. Thus, where a third person, without authority, secured the property and returned it to the pledgor, he was held liable to the pledgee in trover. And the same liability was imposed upon an officer who took the property under an attachment even though the writ was regular on its face"—citing a number of authorities.

In the case of Einstein v. Dunn, 61 App. Div. 195, 70 N. Y. S. 520, subsequently affirmed by the court of appeals, it was held:

> "Where plaintiff acquired title to property stored in a warehouse by a transfer of the warehouse receipt and the issuance of a new one in his name, the delivery of the goods by the warehouseman to the sheriff on replevin process will not defeat a recovery against the sheriff for conversion, as a voluntary surrender by plaintiff, as the surrender was made by the warehouseman knowing and acknowledging plaintiff's right."

In the case at bar the delivery of the check or bill of exchange was made to the sheriff, not only with the knowledge brought home to the sheriff, but under the express statement and explicit declaration that the check and the proceeds thereof belonged to the plaintiff in this action. The case of Finch v. Finch, 12 Cal. App. 274, 107 P. 594, 598, decided by this court, does not present circumstances identical with those which we are considering, and hence is not in point. In that case the garnishee, following a refusal to disclose to the sheriff property in his possession upon a prior garnishment, subsequently turned over to the sheriff, under an execution later in date and subsequent in right, property in his possession belonging to the judgment debtor, which property was applied in satisfaction of the latter judgment, and it was held that the garnishee could not relieve himself from liability in any such manner, nor could the garnishee make his election as to the creditor whom he would favor by his reply to the garnishment. Nor does the case of Latta v. Tutton, 122 Cal. 279, 54 P. 844, 68 Am. St. Rep. 30, and Gault v. Wiens, 32 Cal. App. 1, 161 P. 996, bear upon the questions decisive of the issues at bar. In the Latta Case the substance of the decision is to the effect that a pledgee of property surrendering the same cannot acquire title thereto based upon a void judicial sale; and in the Gault Case it was held that, where a bank holding notes as collateral security surrendered them to the sheriff to be sold on execution to satisfy a judgment obtained against the pledgor, its lien as pledgee on such notes was thereby lost, and that the purchaser of such notes at the execution sale acquired only the right, title, and interest of the pledgor and took the same subject to all equities which might have been pleaded in an action thereon brought by the pledgor.

The record which we have heretofore cited amply entitled the trial court to find that the Canadian Bank, in surrendering the check or bill of exchange to the sheriff, was acting in its own behalf and not in the scope of its agency for the New Zealand Bank, irrespective of whether the Canadian Bank did or did not act voluntarily. That the action of the Canadian Bank, whether voluntary or involuntary, in this particular, or whether acting without or under compulsion of order of court, is outside the issues to be decided in this case and does not affect plaintiff's title, appears when the rule set forth in 28 C. J. p. 303, § 455, is applied, to wit:

> "The garnishee being a mere stakeholder, it is well settled that he may relieve himself of liability by payment of the amount owing by him, or delivery of the property of defendant in his possession, to the officer serving the writ. But the garnishee is not compelled to make such payment or delivery; this being a matter of privilege with him. However, under some statutes the court may require the garnishee to turn over to the court, or to the sheriff of like officer. * * * An order of court for a garnishee to pay money attached into court decides nothing with regard to the right of claimants to the money."

And, as stated in section 64, p. 340, 37 C. J.: Where a lienor is wrongfully deprived of or disturbed in the possession of the property, he may maintain trover and conversion for its value. In this particular we may call attention to the findings of the court that the Canadian Bank of Commerce indorsed the check or bill of exchange at the suggestion and request of the defendant and delivered said check or bill of exchange into possession and under the control of the defendant pursuant to the levy, notice of attachment, etc. As a summary of the law relative to appellant's first alleged error, it may be stated that the act of the Canadian Bank delivering the bill of exchange or check into the custody of the sheriff, without the direction so to do by the New Zealand Bank, could not convert the ownership of the New Zealand Bank and its right of possession to the bill of exchange, and the proceeds thereof, into property belonging to Burns. This being true, whether the Canadian Bank should have proceeded according to the sections of the Code of Civil Procedure relating to the determination of conflicting claims, or, as said in volume 4, § 132, California Jurisprudence, 249, becomes wholly immaterial, as the liability or nonliability of the Canadian Bank does not affect the rights of any of the other parties to this action.

[2] Did the surrender of the bill of lading and other paper relating to the shipment of copra to Wills for the purpose of making sale thereof affect the lien of the plaintiff upon the cargo, or its rights to the proceeds arising from the sale thereof? Sections 2026 to 2030 of the Civil Code fixes the powers and liabilities of Wills as a factor in this case. It is there provided that a factor must obey the instructions of his principal. In this case the principal was the New Zealand Bank, acting through its agent, the Canadian Bank of San Francisco. It is the duty of the factor to sell the goods and account to his principal for the proceeds, and under section 2369, Civil Code, the factor has the ostensible authority to deal with the property of his principal as his own in making sale of the property for the principal. We have thus a case of the delivery of the bill of lading and other writings authorizing the sale of the cargo of copra by a factor and not by the pledgor of the cargo. Even had the redelivery been made to the pledgor, it does not necessarily follow that the lien of the pledgee, if any, would thereby be extinguished. In Palmtag v. Doutrick, 59 Cal. 154, 43 Am. Rep. 245, it is said, quoting from the opinion on page 159:

> "As a general rule, it is, no doubt, true that the delivery back of the possession of the thing pledged with the consent of the pledgee terminates the bailment and his lien. Homes v. Crane, 2 Pick. [Mass.] 607; Jarvis v. Rodgers, 15 Mass. 389; Treadwell v. Davis, 34 Cal. 60 [601, 94 Am. Dec. 770]. But if the pledgor recover possession of the pledged property wrongfully, without the consent of the pledgee, the pledge is still valid. Walcott v. Keith, 2 Foster [N. H.] 196. And if it is delivered back to the pledgor in a new character, as a special bailee or agent, the pledgee will still be entitled to the pledge, not only against the owner but against third persons, for under such circumstances the possession is perfectly consistent with the existence of the original right of the pledgee. Macomber v. Parker, 14 Pick. [Mass.] 497; Reeves v. Capper, 5 Bing. [N. C.] 140, 141; Hays v. Riddle, 1 Sand. Sup. Ct. [N. Y.] 252."

The holding in the Palmtag Case was that the lien had not been lost.

Again, as said in 25 C. J. § 149, p. 416:

> "As in other agencies, the factor holds the goods of his principal and their proceeds when sold in the character of a trustee, and in the absence of statutes which furnish protection to persons dealing with factors, if the factor wrongfully dispose of the goods or proceeds, the principal may follow and recover them whenever he can trace them as distinct from those of the factor, into whosoever hands they may come, except a bona fide purchaser for value. * * *"

If the goods cannot be had their proceeds may be recovered.

[3-7] As said in section 2030, Civil Code, supra, the factor cannot relieve himself of responsibility for the remittance of the proceeds of a sale made by him without the consent of his principal. The relation of principal and factor is of a fiduciary character and carries with it the elements of a trust, requiring the factor to scrupulously account to his principal. 25 C. J. 342, § 5 et seq. A factor is both a bailee and a sales agent and is bound by his contract with his principal. Blackorby v. Friend, 134 Minn. 1, 158 N. W. 708, Ann. Cas. 1918E, 1199; Cordell v. Hall (C. C.) 34 F. 866; Hall v. Cordell, 142 U. S. 116, 12 S. Ct. 154, 35 L. Ed. 956. Nor can a factor set up an adverse claim to the property or to its proceeds as against his principal. See cases cited. Also Britton v. Ferrin, 171 N. Y. 235, 63 N. E. 954. Likewise, the principal can follow the funds or property delivered to a factor to sell as against any one having notice. Keys Comm. Co. v. Beatty, 42 Okl. 721, 142 P. 1102; Cable v. Iowa State Svgs. Bank, 197 Iowa, 393, 194 N. W. 957, 197 N. W. 434, 31 A. L. R. 748. Likewise, if an owner of goods, who is indebted to a bank for advances for the purchase price, causes the goods to be shipped to his factor under an agreement between the owner and the bank, of which the factor has knowledge, that the proceeds are to be applied to payment of the bank's advances, the factor receiving the goods with knowledge of that understanding is bound to act accordingly, and, until the bank is paid, cannot apply any of the proceeds toward prior obligations of the owner to the factor. Citizens' Bank v. Adams (C. C.) 84 F. 268; Cordell v. Hall (C. C.) 34 F. 866.

In support of its second assignment of error, appellant cites the case of Treadwell v. Davis, 34 Cal. 601, 94 Am. Dec. 770, to the point that a pledgee parting with possession of the pledge loses his lien. This case, however, while so holding, goes further and approves the principle that, when the proceeds of the pledged property are redelivered, the lien reattaches thereto. It appears from the Davis Case that when Templeton, having a lien evidenced by warehouse receipts, transferred the warehouse receipts to the plaintiff, retaining, however, his debt against Thompson, the pledgor, the transfer of the warehouse receipts was made to the plaintiff under an agreement that the plaintiff should hold the same as security for his own debt and also under an agreement to pay Templeton; the agreement being with the knowledge and consent of the owner or pledgor, as subsequently ratified by him. The court, in considering the loss and re-establishment of the lien, treated the question in this manner:

> "After surrendering the receipts to the plaintiff, and taking from him a written guaranty of the debt, he lost his lien on the goods. But did the plaintiff acquire a new lien, not only for the security of his own debt, but as an indemnity against the liability which he incurred to Templeton? This must depend upon the fact whether Thompson consented to the transaction when it was made, or ratified it afterward. Nothing could be plainer than that the plaintiff acquired a valid lien, provided it was mutually agreed between himself, Templeton, and Thompson that the plaintiff should guaranty the debt to Templeton, and should hold the goods for his indemnity and as a security for his own debt."

It was then held that the lien attached to the proceeds and plaintiff was entitled to recover the whole sum thereof. In the case at bar, all the parties connected with the transaction, including Burns, the original consignor, were cognizant of and consented to the arrangements hereinbefore referred to relative to the disposal of the cargo of copra and the application of the proceeds thereof. Referring again to 35 C. J. p. 370, § 58, we find:

> "Unless there is an agreement express or implied giving the factor the right to appropriate the proceeds of a sale to his own use and subject to the lien of the factor for commissions, advances, etc., the proceeds of goods sold by him belong to the principal and the factor is liable and bound to account to him therefor."

And, further:

> "If the factor has agreed to apply the proceeds in a particular manner, it is his duty so to do."

And, as stated in the section referred to, this applies to drafts drawn in favor of third persons and bills of exchange evidencing the proceeds.

[8] Assignment of error No. 3 that the plaintiff lost its lien, if any, to the cargo of copra and the proceeds, by reason of the sale thereof, is so closely connected with assignment No. 2 that the authorities which we have cited and are about to consider determine the holding which should be had concerning both of them. As supporting assignment No. 3, appellant cites the case of Maier v. Freeman, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151. The facts, however, in that case show it to be distinguishable from the one at bar. In the Maier Case, the mortgagee of sheep under a chattel mortgage authorized the mortgagor to make sale of the sheep; the mortgagor agreeing to deposit the proceeds in the bank to the credit of the mortgagee. It was held that the lien upon the sheep was extinguished by the sale and was not transferred to the proceeds in the hands of the mortgagor, but such proceeds were the property of the mortgagor until collected and paid over to the mortgagee, and therefore subject to attachment. Had the cargo of copra in this case been turned over to Burns and Burns had made sale thereof, then, and in that case, the unpaid proceeds in the possession of the purchaser from Burns would have been subject to attachment. We have, however, this state of circumstances: The merchandise was turned over to a factor for sale by the New Zealand Bank acting through the Canadian Bank, the proceeds collected by the factor in the way of a check and delivered to the Canadian Bank in the form of a check or bill of exchange, and thus the proceeds were in the possession of plaintiff through its agent at the time of the service of the garnishment process.

The contention of appellant in this particular is explicitly answered by the Supreme Court of this state in the case of McIntyre v. Hauser, 131 Cal. 11, 63 P. 69, 70. There a certain James Brown owned a herd of cattle upon which third parties held a chattel mortgage. Brown sold these cattle to the defendant; the sale being evidenced by a contract in writing. To this contract was appended a written statement to the effect that the cattle were mortgaged to these third parties (naming them) to secure the payment of an indebtedness owing to them by Brown, and it was further stated by the complaint that they approved and consented to such sale, provided the money derived therefrom was paid to them, the mortgagees. After the sale and before the money was actually paid over, the plaintiff, as a creditor of Brown, garnished the money in the hands of Hauser. It was held that the garnishment was ineffective and the mortgagees were entitled to the money. In so holding, the court said:

> "There is no question in this case as to the lien of the mortgages attaching to the proceeds of the sale of the cattle. Neither is the conclusion to which we have arrived opposed to the decision in Maier v. Freeman, 112 Cal. 8 [44 P. 357], 53 Am. St. Rep. 151. The facts of the two cases are widely variant. In that case the sheep had not been sold at the time the agreement between the mortgagor and mortgagee was made; and, in addition to that important fact, there, the mortgagor was to receive the proceeds of the sale of the sheep. Here neither of these controlling circumstances is presented. In order to constitute an equitable assignment of a debt, no express words to that effect are necessary."

Burns was not to receive the proceeds of the sale of the copra; he was not handling or making the sale. The sale was made by a factor recognizing the title of the plaintiff, and under the agreement to turn over the proceeds to the plaintiff's agent, the Canadian Bank. The McIntyre Case was affirmed in the case of Williams v. Corker, 144 Cal. 468, 77 P. 1004, where the circumstances were similar to the facts of the instant case and the inapplicability of the case of Maier v. Freeman was pointed out. In the principal case cited by the appellant, to wit, Utah-Idaho Live Stock L. Co. v. Blackfoot City Bank (D. C.) 290 F. 588, in support of assignment No. 3, the court, after setting forth many cases where mortgagees have surrendered their liens, makes the following observations:

> "It is not intended to suggest that the plaintiff could not have made an agreement with Robison that he should receive the proceeds of the sale and hold the same for plaintiff, or that such an agreement would not have been valid against attaching creditors, or against the defendant bank, with the notice it had before it applied the credit to the payment of the notes. But any finding that consent to the sale was coupled with a condition that the money should become the plaintiff's property, or should be subject to the lien of its mortgage, and that Robison was to be its agent or trustee to receive and pay the money over to the plaintiff, would have to rest upon nothing more substantial than surmise and conjecture."

[9] This language shows that there was no agreement in that case, as there is in this, that the proceeds were to be delivered or that the plaintiff was to receive the same in payment of the debt which it held against the mortgagor. It does not appear in the written instrument which we have hereinbefore set forth that there was in so many words a statement that the lien of the plaintiff on the copra should attach to the proceeds, but, as we have here shown, it is not necessary to use any particular form of words to evidence such an intention or purpose. When the bill of lading and other papers necessary to be turned over to the factor to transmit title to the purchaser from the factor upon the written agreement that the proceeds thereof were to be paid by the factor to the Canadian Bank, the agent of the plaintiff, it evidenced a purpose that the lien should reattach to the proceeds just as clearly and distinctly as if the writing had contained words such as:

> "It is hereby understood and agreed that the lien of the plaintiff on the cargo shall attach to the proceeds when paid over by Wills, the factor, to the Canadian Bank, the agent of the plaintiff."

All the parties to the transaction knew and understood that the proceeds arising from the sale of the cargo of copra were to be and were paid over to the Canadian Bank for the uses and purposes and benefit of the plaintiff. The memorandum or writing by Wills upon the bill of exchange or draft to the effect that it was the proceeds of the shipment of copra made by Burns was ineffective to change the true intent and purpose of the transaction and the payment over of the proceeds, and the trial court was correct in disregarding any such patent attempt to lay the foundation for the service of a writ of attachment or garnishee process, under the claim that the ownership of the proceeds vested in Burns.

[10, 11] Appellant's fourth assignment of error that the bill of exchange was taken by the New Zealand Bank from Burns for collection only is based, apparently, upon the assertion that the weight of the testimony is contrary to the findings of the court. The law seems to be well settled that, if a check or bill of exchange is taken for collection only by a bank, the bank does not take title, but acts merely as a collection agent, and that the property in the check or draft remains in the depositary, and that the relation arising from the transaction is not that of debtor and creditor, but that of principal and agent 3 R. C. L. 633. It is sufficient to say that the record discloses sufficient testimony, if believed by the trial court, to warrant the holding that the New Zealand Bank discounted the draft drawn by Burns, and the fact that it was sent to its agent, the Canadian Bank in San Francisco, for collection, does not contravene the statement of witness that the check was discounted. It would only go to the effect that the Canadian Bank did not rediscount the draft, but simply accepted the same and acted therein in relation thereto as the collection agent of its principal, the National Bank of New Zealand. Under this state of the record, we do not deem it necessary to extend the length of this opinion by quoting the testimony bearing upon this assignment set forth in the respondent's brief in support of the findings of the trial court.

[12] Assignments 5 and 6 will be considered together: That no third party claim was served and that the third party claim, as served, did not comply with section 689 of the Code of Civil Procedure. That no third party claim was served is based upon the fact that the third party claim, as amended, was not served until after the sheriff had made return on the writ of garnishment. Section 689 of the Code of Civil Procedure specifies that, if the property levied on is claimed by a third person by a written claim verified by his oath, or that of his agent, and is served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnifies the sheriff against such claim by an undertaking, etc.

There is nothing in the section requiring that the third party claim be served at any particular period of time after the attachment or garnishment, from which it would seem to follow that such claim may be made at any time before the sheriff has converted the property by sale, or by other means has subjected it to the satisfaction of the plaintiff's demands; that is, the third party will not be allowed to sleep upon his rights until the sheriff has placed himself in a position where it is impossible for him to deliver the property to the third party claimant or obtain an indemnity bond from the attaching creditor saving him harmless from the claims of third parties. The fact that the check was turned over after the sheriff made return upon the attachment does not release the attachment or garnishment. In the case at bar the sheriff acted upon the third party claim and demanded and obtained from the attaching creditor a bond of indemnity. This court has held in the case of Brinkley-Douglas F. Co. v. Silman, 33 Cal. App. 643, 166 P. 371, that when the sheriff does not object to the sufficiency of the notice and claim of the third party, but demands of the creditor that an indemnity bond be given, and an undertaking is given without objection on the part of the creditor, the sheriff waives any question as to the sufficiency of the notice or demand, citing Dubois v. Spink, 114 Cal. 289, 46 P. 95; Kellogg v. Burr, 126 Cal. 38, 58 P. 306. No objection was made by the defendant in this case either to the sufficiency of the notice or of the claim made by the third party. No objection was made by the creditor and the sheriff obtained his bond of indemnity. Whether the bond is or is not a nullity is not a matter that can be determined in this action nor is it a question which can in any wise affect the determination of this cause.

Section 689 of the Code of Civil Procedure has been so amended since some of the decisions based thereon have been rendered as to make statements therein inapplicable touching the question of the sufficiency of the third party claim relative to a statement of the title upon which the claim of the third party is founded. All that needs to be set forth now is the right to the possession of the property in question, which follows as a necessary consequence of a statement of the ownership by the third party of the attached or garnished property, nothing to the contrary appearing, because the right to possession follows the statement of ownership. The trial court having upon sufficient evidence found that the notice to the sheriff stated that the plaintiff was the owner and entitled to possession of the $17,888.48, represented by the check, and that demand was made for the release of the check and the moneys represented thereby, it may here be further said that the record shows that the demand and notice were made and served prior to the time of the subjection of the check or the proceeds in payment of the judgment held by Wills in his attachment suit.

The answer of the defendant does not deny the service of a written claim verified by an agent of the plaintiff being made and served upon the defendant. It only denies that no further or other notice or affidavit was served upon the defendant other than as set forth in Exhibit A, attached to the defendant's amended answer. The notice thus referred to states, in substance, being addressed to the sheriff of the city and county of San Francisco, to wit: You are notified that certain moneys heretofore, to wit, on the 16th day of August, 1922, attached by you by service and deposit of a writ of attachment upon the Canadian Bank of Commerce, San Francisco, Cal., are claimed by the National Bank of New Zealand, Limited. You are notified to order the release of said property and moneys to the National Bank of New Zealand; that the value of the same is $17,888.48. The affidavit is to the effect that the Bank of New Zealand is the owner and entitled to the possession of $17,888.48, represented by the check drawn by respondent Wills, dated August 16, 1922, made payable in favor of the Canadian Bank of Commerce and drawn upon the British American Bank of San Francisco; that the moneys represented by the said check have been garnished or attached by writ of attachment, etc., under an attachment requiring the defendant to attach the property of John Burns & Co., Limited; that John Burns & Co., Limited, has no interest of any kind or character whatsoever in or to the said sum of money. This exhibit calls attention to the check in question, sufficiently identifies the same to put the sheriff upon notice, and while the claim to the check and the claim to the money, or the value thereof, may not be as clearly and distinctly segregated or specified as might be possible, yet we think the language is sufficiently definite to carry home to the sheriff the ownership and claim of the respondent and sufficient to entitle him to act thereon, and having acted thereon, without objection as to the sufficiency of the same, to put him upon notice and obtain an indemnity bond, as herein stated, we think the cases which we have cited now preclude the urging of the insufficiency thereof as a defense to this action.

[13, 14] That a third party may intervene in the original action, as set forth in 5 California Jurisprudence, 184, § 19, is in no sense a bar to the maintenance by such third party of an action for conversion. Nor do the provisions of section 710½ to and including section 713½ of the Code of Civil Procedure estop the plaintiff in this action from maintaining an action sounding in trover. Our attention is called to the case of Arena v. Bank of Italy, 194 Cal. 195, 228 P. 441, as establishing the insufficiency of a third party claim in this case, and therefore the inability of the plaintiff to maintain this action. It is sufficient, however, to state that the facts in the Arena Case are readily distinguishable from the circumstances which we have here-

inbefore set forth. The Bank of Italy did not claim to be the owner of the property in question, but simply set forth the assignment of the property to the claimants, as security for the payment of a promissory note. The assignment showed on its face that it was not good as against creditors and the third party claim founded thereon likewise exhibited the insufficiency of the claim. The property in question consisted of a number of barrels of olives, cases of tomato puree, tomato oil, etc. The facts set forth in the claim showed that the merchandise had been pledged to the bank to secure a certain indebtedness due to the bank; that the bank, pursuant to certain agreements between itself and the owner of the merchandise, had permitted him to take and have possession of said merchandise, to remove the same from the warehouse wherein the merchandise had been stored pursuant to the pledge, and to take the same to his own premises on Front street in order to sell and dispose of the same; that the mortgagee or pledgee agreed to take the goods and hold the same for the benefit of the bank and sell the same for its account, etc. This case does not limit in any particular or overrule anything which is said in the McIntyre Case, supra, or the case of Williams v. Corker, supra, nor does it purport to restrict the holding in Kellogg v. Burr, Brinkley Douglas F. Co. v. Silman, supra. It is more in line with the case of Maier v. Freeman, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151, holding that, when the property comes into the possession of the mortgagor, it is subject to attachment. Thus the Arena Case, upon its face, refutes the claim of the third party.

[15, 16] As to the seventh assignment of error that the complaint did not sufficiently allege the service of a third party claim, we may state that it is generally held to be sufficient to set forth the instrument according to the legal tenor or effect thereof. 21 Cal. Jur. 45; Smith v. Jaccard, 20 Cal. App. 280, 128 P. 1023, 1026; Zucco v. Farullo, 37 Cal. App. 562, 174 P. 929. But there is a further and sufficient reason why this assignment is untenable. The defendant sets forth the instrument in hæc verba, states this was the kind of notice and claim served upon the defendant, and, having supplied the alleged insufficiency in the complaint, no cause of objection now exists. 21 Cal. Jur. 278; Kreling v. Kreling, 118 Cal. 413, 50 P. 546.

In support of the allegation that the findings are insufficient to support the judgment assigned as the eighth reason why reversal should be had herein, nothing further is set forth in the briefs than the questions which we have herein been considering, which we deem a sufficient answer to the eighth assignment without restatement.

[17] Finally, the appellant insists that the plaintiff, having neither title nor right to possession of the check, was not in a position to maintain this action. This position is assumed on the theory that the relation of debtor and creditor existed between the Canadian Bank and the New Zealand Bank and not one of principal and agent. In this particular we may call attention to the fact that the appellant, in his opening brief, strongly argues that the relation between the Canadian Bank and the respondent was that of principal and agent and that, therefore, the New Zealand Bank, having voluntarily, through its agent, delivered the check to the defendant, could not maintain any action for the conversion of the check, or of its proceeds, irrespective of the ownership of the property. To show that what is here stated correctly indicates the theory of the case adopted by the appellant in the first instance, we quote the following from his opening brief:

> "The relation between respondent and the Canadian Bank was that of principal and agent. As far as respondent is concerned, the Canadian Bank was merely acting as its agent for collection. Such being the case, the Canadian Bank had no authority to accept anything but money from Wills. Instead of money, the Canadian Bank accepted from Wills a check which it had certified. This was not a completion of its agency to collect and not until completion of collection can it be said that the proceeds had come into the possession of the respondent."

In support of this position appellant cites the cases of Henderson v. O'Conor, 106 Cal. 391, 39 P. 786; Luckehe v. First Nat. Bank, 193 Cal. 184, 223 P. 547. The latter case is cited to the effect that—

> "Until the proceeds come into the possession of respondent, it could obtain no lien thereon, nor could it exercise any right of set-off. The check never having been cashed, the act of agency of the Canadian Bank was never completed, and hence the proceeds never came into the legal possession of respondent. No lien on the proceeds, therefore, was ever vested in respondent after the delivery of the check by Wills to the Canadian Bank, whether by virtue of a statute creating a general banker's lien or by virtue of any general letter of hypothecation. Hence respondent never obtained any interest therein upon which it could predicate a third party claim."

This position assumed by the appellant is sufficiently answered by the California cases which we have heretofore cited in relation to the disposition of pledged property by the pledgee through a third person or factor with the understanding entered into by all parties interested that the proceeds of the pledged property should be turned over to the pledgee. As if in answer to the argument presented in the opening brief, the reply brief of appellant sets forth that the relation between the Canadian Bank and the Bank of New Zealand was at all times that of debtor and creditor; that the Canadian Bank simply occupied the position of a debtor of the New Zealand Bank, was the absolute owner of the check, owing the New Zealand Bank, if anything, simply the money, the value of the check, and therefore the respondent possessed no title to any of the property in question enabling it to maintain this action.

We may here state the record shows that the Canadian Bank never cashed the check which it received and never deposited to the credit of the New Zealand Bank in its account any funds represented by the check; that, in so far as any act is shown to have been taken or performed by the Canadian Bank in relation to charging itself either with the check or with any funds represented thereby, it assumed and acted only in the capacity of a collection agent, receiving property for the benefit of its principal. Appellant calls attention to section 1818 and section 1878 of the Civil Code. These sections, however, are inapplicable because these sections refer to the relation that arises between a depositor and depositary; in other words, had Wills been turning over his own property to the New Zealand Bank in the way of bills of exchange, or checks, as a customer ordinarily makes a deposit in the bank, then, and in that case, the sections would have full force and effect. The fact that the principal, the New Zealand Bank, had directed its collection agent, the Canadian Bank, to transmit the proceeds of the sale of the copra to what appears to be the parent bank with which the plaintiff was and is connected, does not alter the relationship existing at the date of the levy of the garnishment referred to herein. Again, if the relation of debtor and creditor eo instante arose between the Canadian Bank and the Bank of New Zealand, when Wills handed the check or bill of exchange representing the proceeds of the cargo of copra to the Canadian Bank, then, and in that case, there was nothing in the possession of the Canadian Bank belonging to Burns, and the conclusion is inescapable that the defendant has converted property and applied property not belonging to Burns to the uses and purposes of Wills in his attachment suit against Burns. This, however, would not entitle the respondent to maintain this action unless it had the ownership therein. We think the facts in this case distinguish it from the principal cases relied upon by the appellant in support of its second assumed position, to wit, Midway, etc., Co. v. Citizens' Nat. Bank, 25 Cal. App. 366, 143 P. 800, and Plumas County Bank v. Rideout, 165 Cal. 126, 131 P. 360, 47 L. R. A. (N. S.) 552. In both of these cases the transactions establish that the relationship of debtor and creditor had been established; the record kept by the parties interested showing clearly that such was the case, and that the usual course of banking in the handling of the checks and transferring funds giving rise to that relation had been followed.

[18] In the case at bar the Canadian Bank had never assumed the relation of debtor to the respondent, nor had the respondent by any of its acts ever charged the Canadian Bank as a debtor upon its books, but had all the time treated it as a principal would treat an agent, save and except that it was dealing with a corporate entity designated a bank instead of with an individual. This sufficiently appears by the written testimony in this case hereinbefore set forth. In this particular the language of the learned trial judge appears to us most pertinent:

> "As an evidence of the specific amount of this indebtedness and as conditional payment thereof, Wills & Sons issued its check drawn on its banker, or, in other words, issued an order on a banking institution which owed Wills & Sons the amount of the check. The receipt of the check by the Canadian Bank did not of itself discharge the original indebtedness for which the check was issued. That indebtedness remained until the check should be honored or in some way accepted in discharge of the obligation. Comptoir D'Escompte v. Dresbach, 78 Cal. 15, 20 P. 28; Utah Const. Co. v. W. P. R. Co., 174 Cal. 156, 166, 167, 162 P. 631; South S. F. P. & P. Co. v. Jacobsen, 183 Cal. 131, 134, 190 P. 628; Light v Stevens, 8 Cal. App. 74, 77, 103 P. 361; Goodman v. Williamson, 45 Cal. App. 664, 666, 188 P. 291. Hence delivery of the check did not at the time extinguish the obligation between Wills & Sons and the National Bank of New Zealand. Nor could Wills & Sons, by inscribing any memorandum on the check, transfer the ownership of the credit from the National Bank of New Zealand to John Burns & Co.
>
> "The check, though payable to, and placed in the possession of, the Canadian Bank of Commerce, represented a liquidated claim of the National Bank of New Zealand against Wills & Sons. And when Wills & Sons attached the check or the credit represented thereby, the status of affairs was little different from what it would have been if Wills & Sons had assigned to some one for collection its claim against Burns & Co., and then had had that assignee attach, as property of Burns & Co., the net proceeds of the sale of the copra in the hands of Wills & Sons really owing to the National Bank of New Zealand.
>
> "The Canadian Bank represented the National Bank of New Zealand as an agent to collect the indebtedness; and the mere fact that the Canadian Bank received, and at the time of the levy held, a check as conditional payment, cannot alter the ownership of the National Bank of New Zealand in the credit represented by the check, or prevent that bank, as the real beneficial owner, from having recourse to an action of conversion to recover the value of its property."

As was said by Lord Ellenborough in Stephens v. Elwall, 4 Maule & S. 259:

> "A person is guilty of conversion who intermeddles with my property and disposes of it; and it is no answer that he acted under the authority of another who had himself no authority to dispose of it."

Agreeing with appellant, as set forth in his opening brief, that the Canadian Bank at the time of its reception from Wills of the check or bill of exchange representing the proceeds of the cargo of copra guaranteed by Wills to be turned over pursuant to the direction of the New Zealand Bank, through its representative, the Canadian Bank, is correct, and that all the circumstances supported this conclusion, it is only necessary to cite a few authorities to confirm the right of respondent to maintain this action.

[19, 20] In section 19, p. 1043, of volume 24 Cal. Jur. the text-writer sets forth the general rule as to the right to maintain trover in the following language:

> "To enable one to recover for the conversion of personal property, he must have had a general or special ownership of the property at the time of the tort. Legal title is not necessary; any special valuable interest in the property accompanied with the right of possession is sufficient. Actual possession of a chattel at the time of its conversion will sustain trover, except as to the true owner or one claiming under him, even though the title be conceded to be in a third person. So also one who has a present right to possession may maintain the action. Manifestly, however, one cannot maintain the action where he had neither possession, right of possession, nor any title in the property claimed at the time of the conversion."

In 28 Am. & Eng. Cyc. of Law (Second Edition) p. 661, we find the following:

> "An agent may be guilty of the conversion of chattels intrusted to him by his principal so as to render him liable in trover to the principal, or the action may be maintained by the principal against third persons who wrongfully acquire the property from the agent. Unless the principal is entitled to possession of the chattels as against the agent, he cannot, of course, as against the latter, maintain trover therefor; but a wrongdoer who takes the chattels from a factor cannot set up the lien of the factor in defense to an action of trover against him by the principal."

There is also another principle which applies to this proceeding and gives the respondent a right of action: The fact that the check or bill of exchange was not applied by the Canadian Bank to the uses and purposes of the respondent as theretofore directed. This principle is stated in section 440 of the Law of Conversion by Bowers, to wit:

> "From the cases cited it is gathered that a general owner of a chattel cannot maintain trover therefor during the continuance of a definite term for which he has parted with possession; but where a bailee, during the term of the bailment, has put the chattel to a different use from that for which it was bailed, the owner thereupon becomes entitled to immediate possession * * * and may maintain trover for its conversion."

The control of the Canadian Bank, as the agent of the respondent and the special property of the Canadian Bank, if any, in and to the check or bill of exchange, was for the express purpose of applying the proceeds of the sale of the copra to the discharge of the indebtedness of Burns to the New Zealand Bank, evidenced and created by the bill of exchange theretofore discounted by the New Zealand Bank at the inception of the transaction out of which this controversy arises, and, when the check or bill of exchange evidencing the proceeds arising from the sale of the cargo of copra was placed in the possession of the defendant, it was in contravention of the rights of the respondent, and gave rise to an immediate cause of action on the part of the plaintiff herein. That the Canadian Bank may have rendered itself liable by turning the check or bill of exchange over to the defendant does not militate against either the ownership of the proceeds of the sale of the copra, or the right of the respondent to maintain this action. As to the cargo of copra, the rule is clear that the pledgee, to wit, the respondent, if considered only as a pledgee, has the right to maintain trover for the conversion thereof. Bowers on the Law of Conversion, §§ 392 and 393. The latter section deals with the right of the pledgee to maintain trover against third persons. While there are some cases to the contrary, notably the case of Herring v. Tilghman, 35 N. C. 392, holding to the contrary, the weight of authority supports the rule set forth in 28 Am. & Eng. Ency. of Law (2d Ed.) 656, to wit:

> "The owner of evidences of indebtedness, such as bills, notes, bonds, etc., may maintain trover in his own name for their conversion though he could not have maintained in his name an action on the instrument itself. Donnell v. Thompson, 13 Ala. 440; Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 188; Clowes v. Hawley, 12 Johns. (N. Y.) 486."

The text-writer in 28 Am. & Eng. Ency. of Law, 656, supra, further states:

> "The owner of a note may maintain trover therefor, though there had been no indorsement of the note to him."

Likewise:

> "In trover for check sent by the debtor to his creditor and wrongfully converted by a third person, it is no defense that the check was not received by the plaintiff in absolute payment of his indebtedness."

Thus, even though the check or bill of exchange delivered by Wills to the Canadian Bank was not absolutely payment pro tanto of the indebtedness of Burns to the respondent, the right of the plaintiff to maintain trover therefor existed. The cases are almost legion on the subject of the right to maintain trover by one having either an absolute, a general or a special property in the property converted, and it would serve no useful purpose to review any considerable number of the authorities bearing upon this question cited by counsel in this cause. If it be admitted that the Canadian Bank was the agent of the New Zealand Bank in the transactions which we have detailed, and which we think must be admitted, the weight of authority is overwhelmingly in favor of the maintenance of this cause by the respondent as the principal having a general ownership in the proceeds of the sale of the cargo of copra. As we have shown, the form in which such proceeds are evidenced is immaterial as to the ownership and ultimate right of possession. We conclude that the plaintiff in this action was and is the real party in interest.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; BUCK, Justice pro tem.

81 Cal. App. 23

TATTERSON et al. v. STANDARD REALTY CO. et al. (Civ. 5671.)★

(District Court of Appeal, First District, Division 2, California. Jan. 25, 1927. Petition for Rehearing Denied Feb. 24, 1927. Hearing Denied by Supreme Court March 24, 1927.)

1. Pleading 🔑36(2)—Real estate broker, who joined in salesman's action for commissions, expressly waiving his rights in salesman's favor, could not recover.

Where real estate broker, employing salesman, joined in salesman's action for commission for exchange of property, and set up contract with salesman by which salesman was to have entire commission for negotiating exchange, broker *held* not entitled to recovery, having waived its rights in salesman's favor.

2. Brokers 🔑42—Real estate salesman, employed by licensed broker, could not recover commission for exchange of property for which he was not employed or compensated by employer (St. 1919, p. 1252, § 1, and §§ 2, 20b [as amended by St. 1923, pp. 93, 98, §§ 1, 9]).

Where real estate salesman changed employment, being entitled to all commissions on old listings under agreement with new employer, who was licensed broker, he could not recover commission for exchange of property under old listing for which he was not employed or compensated by broker for noncompliance with St. 1919, p. 1252, § 1, and sections 2, 20b (as amended by St. 1923, pp. 93, 98, §§ 1, 9), defining real estate salesman as one employed for compensation by licensed broker to negotiate sale or exchange of real estate as whole or partial vocation.

3. Brokers 🔑94—Statute defining real estate salesmen does not authorize salesman to execute contract for exchange of property in own name (St. 1919, p. 1252, and acts amendatory thereof).

St. 1919, p. 1252, and acts amendatory thereof, defining real estate broker and salesman, and requiring license, do not authorize execution of contract for exchange of property by real estate salesman in his own name.

On Petition for Rehearing.

4. Appeal and error 🔑832(2) — Rehearing should not be granted to amend minutes to show striking of part of complaint, where matter alleged appeared elsewhere.

Rehearing should not be granted to permit amendment of minutes of lower court, and to change record on appeal to show striking of paragraph of amended complaint, where matters contained therein appeared in another paragraph of complaint.

5. Brokers 🔑42—Person, not real estate salesman, could not recover commission for exchange of property, though commission was provided for solely by contract of principals (St. 1919, p. 1252, § 2, as amended by St. 1923, p. 93, § 1).

Person not within definition of real estate salesman, under St. 1919, p. 1252, § 2, as amended by St. 1923, p. 93, § 1, could not recover commission for exchange of property, though promise to pay commission was contained in contract between principals to exchange agreement, where seller was not claiming commission as part of consideration, and where amount to be so paid was specifically designated as real estate commission.

Appeal from Superior Court, Alameda County; J. A. Smith, Judge.

Action by Norman W. Tatterson, in which Carl H. Nieper was joined as coplaintiff, against the Standard Realty Company and others. Judgment for plaintiffs, and defendants appeal. Reversed.

G. E. Duke and A. A. Montagne, both of Oakland, for appellants.

Daniel Rygel and George M. Naus, both of Oakland, for respondents.

STURTEVANT, J. Norman W. Tatterson commenced an action against the defendants to recover a sum of money alleged to be due as commissions earned by him in effecting an exchange of real properties. Thereafter the defendants appeared and such proceedings were had that the trial court made an order authorizing the plaintiff to file an amended complaint joining Carl H. Nieper as a coplaintiff. An amended complaint was filed, the defendants demurred thereto, their demurrer was overruled, and thereupon they answered, and a trial was had before the court sitting without a jury. The trial court made findings of fact in favor of the plaintiffs, and, from a judgment entered thereon, the defendants have appealed under section 953a of the Code of Civil Procedure.

The appellants present a large number of points, but, in the view that we take of the record, it will not be necessary to consider all of them.

As to the plaintiff Carl H. Nieper, we think that the demurrer of the defendants should have been sustained. In their complaint the coplaintiffs alleged:

★Hearing denied by Supreme Court.

"I. That at all times herein mentioned the said Carl H. Nieper was and is a real estate broker, duly licensed by the real estate board under the State Real Estate Department Act of the state of California, and doing business as a real estate broker in the state of California, with his principal place of business in the city of Oakland.

"II. That at all times herein mentioned plaintiff Norman W Tatterson was a real estate salesman, duly licensed by the real estate board under the State Real Estate Department Act of the state of California, and in the employ of said Carl H. Nieper as a real estate salesman fully authorized to make contracts of sale or exchange of real property in his own name as the agent of said Carl H. Nieper. That said Norman W. Tatterson did enter into agreement with said defendants with the knowledge and consent of said plaintiff Nieper as his authorized agent and salesman.

"III. That said Carl H. Nieper did agree with said Norman W. Tatterson that he the said Norman W. Tatterson was to have and receive as his compensation for securing the execution of the contract on file herein such sum as the defendants agreed to pay.

"IV. That he hereby waives all of his right in and to the said sum to said Norman W. Tatterson.

"V. That the said defendants G. E. Duke and M. E. Duke, his wife, John Doe and Richard Doe are the owners of the Standard Realty Company, a fictitious copartnership doing business in the city of Oakland, county of Alameda, state of California.

"VI. That on the 15th day of July, 1925, the above-named plaintiff and defendants executed, delivered, and entered into a contract in writing bearing the date of that day, a copy of which said contract is hereby attached and marked 'Exhibit A' and made a part of this complaint.

"VII. That said plaintiff has fully performed all of his terms of the contract, and that said defendants have not performed all of their terms of the contract, to wit, the payment to the said Norman W. Tatterson of the sum of $1,500, as and for commissions for services rendered.

"VIII. That on the 20th day of July, 1925, the said offer of exchange made by the said defendants was accepted in writing by the party of the second part of the said contract hereinbefore mentioned as Exhibit A, and defendants were notified of the said acceptance on the 21st day of July, 1925, by plaintiff Norman W. Tatterson.

"IX. That there is now due, owing and unpaid the sum of $1,500."

Exhibit A, attached to the amended complaint, is an exchange agreement, written on the approved form of the California Real Estate Association, and by its terms the Standard Realty Company offers to exchange properties in the city of Richmond, Contra Costa county, for properties located in the city of Berkeley, county of Alameda, for the terms therein designated. A paragraph therein is as follows:

"Norman W. Tatterson of Oakland, Cal., is hereby authorized to act as agent for all parties hereto, and may accept commission therefrom, and, should this offer be accepted by the second party, the undersigned agree to pay said agent $1,500 commission for services rendered to become due on the execution of this agreement by all parties hereto."

The offer purports to be signed on July 15, 1925, by the Standard Realty Company and to have been accepted on July 20, 1925, by an acceptance in writing executed by Maggie Gregg, the owner of the property located in Berkeley. Neither the offer nor the acceptance is signed by any one else.

The complaint pleaded Nieper out of court in favor of his coplaintiff Norman W. Tatterson. In paragraphs III and IV it is alleged:

"That said Carl H. Nieper did agree with said Norman W. Tatterson that he the said Norman W. Tatterson was to have and receive as his compensation for securing the execution of the contract on file herein such sum as the defendants agreed to pay.

"That he hereby waives all of his right in and to the said sum to said Norman W. Tatterson."

On the trial of the case, uncontradicted evidence was introduced in the form of a writing dated June 27, 1925, by which the allegations of paragraphs III and IV of the amended complaint were proved. But in making findings no finding was made in response to said paragraphs.

[1] It follows that the demurrer should have been sustained, because as to Nieper the complaint was insufficient, and, furthermore, that, in the absence of the demurrer, no judgment should have been entered in favor of the respondent Nieper.

[2] As to the respondent Tatterson, the appellants present numerous attacks, the general scope of which is to contend that Exhibit A was illegal, and that the amended complaint did not state facts sufficient, and that the proof was not sufficient to establish a right in favor of Tatterson under the provisions of chapter 605, Statutes of 1919, and the acts amendatory thereof.

The record discloses that, prior to the month of June, 1925, Carl H. Nieper was a duly licensed broker, and that Seulberger-Dunham & Co. was a duly licensed broker; that Tatterson was a duly licensed real estate salesman in the employment of Seulberger-Dunham & Co.; that on the 27th day of June, 1925, he applied to have his license as a salesman transferred from that company to Carl H. Nieper; that it was transferred on the 29th day of June, 1925. It further appears that, at the time Tatterson attempted to make this change, he claimed to have certain listings or unfinished business on hand; that on June 27, 1925, Nieper addressed a letter to Tatterson in which he stated:

"In return for your co-operation and transferring your salesman's license above mentioned I agree to let you retain all commissions or profits from the sales you may make that are now pending."

It further appears that the exchange transaction involved in this case is one of the listings which the plaintiff Tatterson so claimed to have at the time that he became an employee of Nieper, and, except as we have stated, that Nieper never employed Tatterson "for a compensation," or otherwise, to effect the exchange involved in this case. No writing was produced showing or tending to show that Tatterson, in so far as the transaction involving this exchange was concerned, acted or was acting as the agent of Nieper, was employed by Nieper, or compensated by Nieper.

The statute (St. 1919, p. 1252, as amended by St. 1921, p. 1294, and St. 1923, p. 93) provides:

> "Section 1. It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor.
>
> "Sec. 2. A real estate broker within the meaning of this act is a person, * * * who, for a compensation, * * * negotiates the * * * exchange of real estate, * * * for others as a whole or partial vocation.
>
> "A real estate salesman within the meaning of this act is one who for a compensation is employed by a licensed broker to * * * negotiate the * * * exchange of real estate, * * * as a whole or partial vocation.
>
> * * * * * * * *
>
> "One act, for a compensation, of * * * offering for another to * * * exchange real estate, * * * shall constitute the person, * * * making such offer [of] * * * exchange * * * a real estate broker or salesman within the meaning of this act.
>
> * * * * * * * *
>
> "Sec. 20b. Every officer, agent or employee of any company, and every other person who * * * willfully violates or fails to comply with any of the provisions of this act, * * * is guilty of a public offense, and shall be punished by imprisonment in the state prison or the county jail for a term not to exceed two years, or by a fine of not to exceed two thousand dollars. * * *"

From the foregoing provisions contained in the statute it is clear that the Legislature has divided all persons, who for a compensation negotiate for others exchanges of real estate, into two classes—(1) brokers, and (2) salesmen—and has prohibited others (except certain classes of persons not here involved) from engaging in such business without first complying with the statute. It has also placed restrictions and limitations on brokers and salesmen and has provided penalties for violations. In the case entitled Riley v. Chambers, 181 Cal. 589, at page 593, 185 P. 855, 856 (8 A. L. R. 418), speaking of this particular statute, the court said:

> "Now the single primary purpose of the act is to require of real estate brokers and salesmen that they be 'honest, truthful and of good reputation.' All of its provisions, including the requirement of a license, are but incidental to this single purpose and designed to accomplish it."

Tatterson does not claim he was a broker. He did not allege nor prove, and the court did not find, that he was employed by Nieper to conduct this particular exchange nor that he was so employed for a compensation. On the other hand, Tatterson claimed that it was personal business which he took to the house of Nieper, and that Nieper authorized him to complete it.

[3] The trial court found the facts as alleged in paragraph II of the amended complaint in the words of said paragraph. The expression, "fully authorized to make contracts," was but a conclusion. It was not a statement that Nieper for a compensation had employed Tatterson to make a contract of exchange. The expression that Tatterson was authorized to make contracts of exchange of real property "in his own name" is another conclusion, and, as we think, an improper conclusion on a question of law. The statute does not directly or indirectly authorize that method of executing one of the contracts enumerated in the statute.

The judgment is reversed.

We concur: KOFORD, P. J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. [4] Respondents in their petition for a rehearing have urged that a rehearing be granted, so that sufficient time shall be available to them to take the necessary proceedings to amend the minutes of the court below and change the record on this appeal correspondingly. They state that in this way they will be able to show that paragraph IV of the amended complaint was stricken out by the court below. We are not disposed to follow this suggestion, because, even with paragraph IV stricken out, paragraph III of the complaint also shows that plaintiff Nieper has passed over to Tatterson all his interest in the commission.

[5] Respondents, reinforced by new counsel, urge now for the first time that the illegality of the contract sued on is collateral, inasmuch as the promise to pay commissions to Tatterson is contained only in the contract between the principals to the exchange agreement. They claim that this commission is really a part of the consideration due to the seller from the buyer. But this is not a case where the buyer is retaining for himself a part of the agreed consideration, upon the claim that the seller has directed an application of it in performance of a void contract. Here the exchange contract was not consummated, and in this action we are not determining whether the consideration named is due and payable from the defendant to the seller. The clause containing the promise upon which this action is based specifically

designates the $1,500 as real estate commission, and this action is brought to recover that sum as such.

The petition for a rehearing is denied.

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81 Cal. App. 398

PEOPLE v. KELLEY. (Cr. 1410.)

(District Court of Appeal, Second District, Division 1, California. Feb. 18, 1927.)

1. Criminal law 🔑447—In prosecution for obtaining money by trickery, rule that oral testimony is inadmissible to vary written instrument held inapplicable.

In prosecution for obtaining money by trick or device, rule applied in civil actions that oral testimony is inadmissible to vary terms of written instrument is inapplicable, since state was not party to contract and may introduce oral evidence to show defendant's intention in making it.

2. Criminal law 🔑829(4)—In larceny case, striking from instruction direction to acquit if defendant intended to return property held not prejudicial, in view of instruction given.

In prosecution for grand larceny, striking from instruction direction to acquit if defendant intended to return property to owners or give them interest in corporation at their option, under contract, *held* not prejudicial, where court instructed that felonious intent to permanently deprive owners of property must have existed at time of taking.

3. Criminal law 🔑814(3)—Court need not give instruction related to special theory of defense requiring evidence for its support, in absence of such evidence.

Where offered instruction is related to special or affirmative theory of defense, requiring evidence for its support and as to which there was no evidence, court is not required to give such instruction.

4. Criminal law 🔑829(4)—In larceny case, refusal of instruction to acquit if defendant took property under honest belief that he had right to take it held not error, in view of instruction given.

In prosecution for grand larceny, refusal of instruction to acquit if defendant took property under honest belief that he had legal right to take it *held* not error, where court instructed that defendant at time of taking must have had felonious intent to permanently deprive owners of property.

5. Larceny 🔑65—Evidence held to support conviction for grand larceny.

Evidence *held* sufficient to sustain conviction for grand larceny, where defendant induced complaining witnesses to part with their money as cash bond to secure position in business conducted by defendant.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

John F. Kelley was convicted of grand larceny, and he appeals. Affirmed.

M. C. Spicer, of Los Angeles, and A. M. Drew, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

CONREY, P. J. Appellant was found guilty on six counts of an information charging grand larceny. The alleged crimes, as shown by the evidence, consisted in the obtaining of money from certain persons through the operation of a trick or device, by means of a fictitious firm or partnership, for the transaction of a pretended business, in connection with which the victims were induced to yield possession of their money to the defendant.

The principal grounds of appeal as indicated by the briefs are (1) errors in admitting testimony to add to, controvert, or vary the terms of certain written instruments; (2) refusal to give three instructions requested by defendant; (3) that the verdict is contrary to law and the evidence in several stated particulars. The nature of the case may be illustrated by the evidence concerning count 1, which charged larceny of the sum of $500, belonging to one Agnes Lubeck. On the 3d day of December, 1925, Mrs. Lubeck executed and delivered to the defendant her check for the sum of $500, which in due course was paid to the defendant. At the same time, she and the defendant executed a contract, in writing, the one with the other, reading as follows:

"This agreement made and entered into by and between John F. Kelley and Agnes Lubeck, on the 3d day of December, 1925, witnesseth: That the said John F. Kelley agrees to employ the said Agnes Lubeck at a salary of $150 per month to act as office manager of that certain business known as the Auto Theft Bureau of America. The said Agnes Lubeck hereby agrees to accept the above-mentioned position at the above-mentioned salary, and to execute said position to the best of her ability. The said Agnes Lubeck hereby pays to the said John F. Kelley the sum of $500, and the said sum is to be used as a bond until March 1, 1926, when, at that time, it is to be returned to the said Agnes Lubeck in cash or in five shares of the common stock of the Auto Theft Bureau of America, at the option of the said Agnes Lubeck. In the event the said Agnes Lubeck takes the amount out in stock, the said Kelley further agrees to buy said stock back again, at the price of $125 per share.

"[Signed] John F. Kelley.
"Agnes Lubeck."

The following facts are gleaned from the testimony of Mrs. Lubeck. On or about November 17, 1925, in response to an advertisement in the Los Angeles Times offering a partnership in a realty firm, Mrs. Lubeck called on the defendant at his office on Sunset boulevard, in the city of Los Angeles. Defendant said to her that he wanted to sell a half interest in his realty business, which he said had been in operation some four years and was a well-paying business; that it would require about $1,700. This interview did not lead to any sale of any interest in the business. A few days later, in a telephone conversation, defendant told Mrs. Lubeck that he had disposed of his real estate business, but that he had something else to offer. In response to that suggestion, Mrs. Lubeck called a second time at defendant's office. He asked her if she would like to manage a crew of girls in a new business. He said that they were going to organize a business in connection with an auto theft bureau, and he would like to have her manage a crew of girls in one of the departments. About December 1, 1925, Mrs. Lubeck went to work in the office of this Auto Theft Bureau as manager of the multigraph department. On the 2d or 3d of December defendant said to Mrs. Lubeck that it would require a cash bond for her position, which would be that of general office manager. She replied that she could give him a surety bond. He responded that it would not do; that he did not need the money, but he wanted a cash bond for good faith; that that cash bond would be placed in trust and would not be needed, "and that it would be my option to get it—I could get it back the 1st of March, in three months time." It was on the basis of these statements made by the defendant, and in reliance thereon, that Mrs. Lubeck paid over to the defendant said sum of $500 and executed the said written contract. The Auto Theft Bureau of America, as described to Mrs. Lubeck by the defendant, was a corporation of which he was president and general manager, which corporation was to engage in the recovery of stolen automobiles in accordance with an elaborately devised scheme for identification of the automobiles of the corporation's customers, and for the detection and recovery of the cars of those customers whenever they should be stolen, and particularly when attempts were made to take such cars to distant places or out of the state. About the 25th of January, 1926, the defendant left Los Angeles, and Mrs. Lubeck did not see him again until he was brought to trial in this action.

Mrs. Lubeck continued her employment in the office of the purported corporation until the 2d day of February, 1926. She received $75, her pay for the first two weeks. Very early during that period she found that instead of an abundance of money the institution was short of funds. Before defendant left for San Francisco he asked Mrs. Lubeck to pay him another $500, saying that "all of this money would be put in a trust, and that there would be an amount of $60,000, * * * that there would always be a certain surplus fund to take care of any deficit in any way, and it could not fail"; that the payment of this additional $500 would be necessary to hold her position further. Fortunately she did not comply with this demand.

Evidence was received showing how the defendant received other sums of money from the several other persons mentioned in the other counts of the indictment. All of the transactions were similar and consisted in obtaining said moneys as "cash bonds" or as "guarantee of good faith" of the victims who were to be honored with positions in the Auto Theft Bureau of America. For the purpose of showing that the intent of the defendant was to trick the applicants into delivering money to him, and that the supposed positions and employments were fictitious, the prosecution introduced evidence showing the condition of the bank accounts of defendant, and other facts concerning the representations of the defendant and his transactions in connection with the supposed business. On the basis of all of this evidence (which we have endeavored only briefly to indicate), the defendant was convicted as first herein stated.

[1] Appellant contends that the court erred in admitting oral testimony over appellant's objection for the purpose of adding to, controverting, or varying the terms of the several written contracts, one of which has been set forth herein. Appellant seeks to apply in this criminal action the rule commonly applied to civil actions under which extrinsic evidence is not admissible to add to, controvert, or vary the terms of a written instrument. He argues that it was erroneous to admit such extrinsic evidence for the purpose of showing the intent of the defendant in the transactions; that it was erroneous because the intention of the parties to a contract must be gathered from the contract itself when the terms thereof are not ambiguous, and that on such a contract the intent of the parties is a question of law for the court, and not a question for the jury to decide. There is no merit in the point stated.

"The state is a party to the prosecution but no party to the contract. If the contract when offered by the people is conclusive as against them, it certainly would be a perfect defense if offered by the accused, but it is not possible that the people in the prosecution of a defendant charged with crime can be estopped in any such manner. * * * The defendant's guilt of the offense charged must appear to the jury beyond a reasonable doubt, from all the evidence placed before it, and this contract but bears its part in furnishing light—be that light strong or weak—upon the ultimate fact as to the guilt or innocence of the defendant. The rules of evidence in civil cases as to a direct or collateral attack upon the contract by any of the parties to it are entirely inapplicable to any thing involved in this case." People v. Martin, 102 Cal. 558, 566, 36 P. 952, 953.

[2] The court struck out from defendant's requested instruction No. 1 that part thereof

which would have instructed the jury that, if they believed from the evidence that it was the intent of the defendant to return their property to the owners, "or to give them an interest in the Auto Theft Bureau of America at their option, as is provided in the several written contracts executed between the owners and the said defendant, Kelley, at the time the property was received," then and in that case, it would be the duty of the jury to find the defendant not guilty of the crime of grand larceny. But the court in the same instruction did state that to constitute larceny, as set forth in the several counts of the information, there must have existed at the time of the taking a felonious intent on the part of the defendant to permanently deprive the owners of their property, and that if the jury believed from the evidence that the defendant did not so intend, that then it was the duty of the jury to find the defendant not guilty of the crime of grand larceny. The instruction as given was amply sufficient and the defendant was not prejudiced by the modification of which he complains.

[3, 4] The court refused to give defendant's requested instruction No. 2, reading as follows:

> "If you believe from the evidence that the defendant, Kelley, took the property of the owners mentioned in counts 1, 2, 3, 4, 5, and 6 of the information under an honest belief entertained by him at the time of the taking that he had a legal right to take the property, then it is your duty, under the law, to find the defendant not guilty of the crime of larceny as charged in said counts, even though he was mistaken in such belief."

Counsel for the people make no criticism of the instruction itself. The only reply made on behalf of respondent is to the effect that no evidence was introduced in support of defendant's theory that he mistakenly used the money of the complaining witnesses under a claim of right in that they were copartners with him. Respondent contends that for this reason the refusal to give the requested instruction was not prejudicial to the rights of defendant. If the offered instruction had been related to some special or affirmative theory of defense, requiring evidence for its support, and as to which there was no evidence, it would not have been the duty of the court to give such instruction. But this instruction was properly applicable to the case because it was directed to the very essence of the prosecution's case, which involved an intent to steal, as a part of the felonious taking of property. Assuming that the instruction was correct, the one and only valid reason for the refusal of this instruction—and we deem it a sufficient reason—is that the rule invoked by the instruction is sufficiently stated in the instruction given by the court that to constitute larceny as set forth in the informaion, there must have existed, at the time of the taking, a felonious intent on the part of the defendant to permanently deprive the owners of their property.

We are further of the opinion that the court's refusal to give defendant's requested instruction No. 3 would be justified by the giving of the instruction last above mentioned, even if this proposed instruction was in all respects a correct statement of the law. But said offered instruction No. 3 would have been misleading to the jury in that it attempted to incorporate with the theory of an absence of fraud or deception a statement of the rule under which written contracts are ordinarily deemed to express the whole agreement between the parties. Under the instructions as given, the jury must have well understood that, in the absence of fraud or deception on the part of the defendant, he should not be convicted.

[5] Finally, appellant contends that the evidence is not sufficient to sustain the verdict in this, that there is no sufficient evidence to prove that the defendant took the money from the complaining witnesses for his own use or with intent to deprive them, or either of them, of the money which he did take and receive, and that there is no evidence sufficient to support the implied finding that the title to said money remained in the respective owners thereof. We are satisfied that there was evidence sufficient to warrant the jury in believing that the defendant falsely represented to the complaining witnesses that the Auto Theft Bureau of America was a corporation; that he was president of the corporation; that "cash bonds" were required from the complaining witnesses in order that they might hold executive positions in said corporation; and that the money received would be put in trust as bond money; all of which was false in fact and false in intention of the defendant. The evidence further shows not only that the checks of the complaining witnesses were cashed by the defendant, but there is evidence tending to prove that the moneys so received from the complaining witnesses were placed by the defendant in his personal bank account, or in an account in the name of the Auto Theft Bureau, for the purpose of being used and which actually were used for purposes other than those indicated in the representations made by the defendant. The evidence was sufficient to establish the fact that the property taken was the property of the complaining witnesses which they intended to leave with the defendant only temporarily and under a promise that it would be returned to them later. The evidence was sufficient as a whole and in its multitude of circumstances, to convince a reasonable mind, and beyond a reasonable doubt, that the pretended auto theft bureau and its pretended business were, in effect, a fictitious organization, with only so much show of realty as was necessary to en-

able the defendant to fool the trusting individuals from whom by that means he obtained possession of their money. The case is thus brought within the definition of larceny "by trick or device," as explained in numerous decisions. People v. Edwards, 72 Cal. App. 102, 236 P. 944.

The judgment and order are affirmed.

We concur: HOUSER, J.; YORK, J.

81 Cal. App. 270

BYRNE v. WESTERN PIPE & STEEL CO. OF CALIFORNIA et al. (Civ. 3184.)★

(District Court of Appeal, Third District, California. Feb. 8, 1927. Hearing Denied by Supreme Court April 8, 1927.)

1. Trial ⚷228(1)—Instruction stating necessity of finding negligence and proximate cause held not erroneous for omitting charge on contributory negligence, given in other instructions.

No error lies for omitting mention of the necessity of finding plaintiff's lack of contributory negligence in instructing jury that they must find defendant's negligence the proximate cause of plaintiff's damage before plaintiff may recover; contributory negligence charges being given elsewhere.

2. Damages ⚷113—Measure of damages, where automobile injured cannot be completely repaired, is value before accident minus value after repaired, plus costs of repair.

If an automobile negligently damaged in collision cannot be completely repaired, the measure of the owner's damages is the difference between its value before the injury and its value after repairs have been made, plus the reasonable cost of the repairs.

3. Damages ⚷217—Where automobile injured could not be completely repaired, instruction that damage was either value before minus value after injury, or repair costs, held erroneous.

Instruction that the measure of damages, in a case where an automobile was injured so that it could not be completely repaired, was either the value before the accident minus the value after, or, in the alternative, the repair costs, *held* erroneous.

4. Highways ⚷184(2)—Burden is on defendant to prove contributory negligence of automobile driver.

Defendant has burden of proving plaintiff guilty of contributory negligence, in action for damages resulting from automobile collision.

5. Appeal and error ⚷1033(5)—Appellant cannot complain of erroneous instruction favoring him.

Where court erroneously instructed jury to the effect that appellee had burden of proof, appellant cannot complain, since error favored him.

6. Damages ⚷217—Instructing no recovery under defendant's cross-complaint because insurance company paid damage to automobile, held erroneous, where loss of use also alleged.

Instruction to jury, in action following automobile collision, that defendant could not recover damages under his cross-complaint because the damages to his automobile were paid by the insurance company, *held* erroneous, since the cross-complaint also asked damages for loss of use of automobile.

7. Appeal and error ⚷1068(3)—Where verdict for plaintiff impliedly found defendant negligent, precluding recovery on cross-complaint, erroneous instruction on cross-complaint held harmless.

Error in a negligence case, in instructing jury that defendant could not recover on his cross-complaint, *held* harmless, where there was a verdict for the plaintiff which implied that defendant was negligent, so that he could not have recovered on his cross-complaint in any event.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by A. A. Byrne against the Western Pipe & Steel Company of California and H. G. Tallerday. Judgment for plaintiff and against H. G. Tallerday, and he appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

FINCH, P. J. Plaintiff recovered judgment against defendant Tallerday for damages sustained in a collision between motor vehicles. Tallerday has appealed from the judgment. The defendants alleged contributory negligence, and Tallerday filed a cross-complaint for damages sustained by him in the collision.

[1] Appellant contends that there is a substantial conflict in the evidence upon the issues raised by the answer and cross-complaint, and that therefore certain alleged errors in the instructions are prejudicial. The defendants requested the court to charge the jury as follows:

> "In order, therefore, to find a verdict for the plaintiff, you must not only find from a preponderance of all the evidence that the defendant was negligent; but also that such negligence was the proximate cause of the damages to the plaintiff; *and you must further find that the evidence fails to show by a preponderance thereof that the plaintiff was guilty of negligence, however slight, contributing proximately thereto; otherwise your verdict must be for the defendant.*"

[2, 3] The court struck out the words herein italicized, and gave the instruction as so modified. Appellant says that "an instruc-

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★Hearing denied by Supreme Court.

tion which directs a verdict if the jury finds certain facts to be true is reversibly erroneous, unless it embraces all things necessary to show such liability." But the instruction as given does not direct a verdict for the plaintiff if certain facts are found by the jury to be true. It merely states two facts which must be found in favor of plaintiff before he can recover. In at least three other instructions the court stated that plaintiff could not recover if the jury found that he was guilty of negligence which contributed to the damages sustained by him. The jury could not have been misled by the instruction. The court gave the following instructions, the first at defendants' request and the second at the request of the plaintiff:

> "The measure of damages for the breach of an obligation not arising from contract is the amount which will compensate for all of the detriment proximately caused. This detriment, in the absence of total destruction of the property, is the difference in the value of the property immediately before and after the injury; provided, however, if the injury be capable of repair at an expense less than the diminution in value of the property as injured, the damage is limited to the cost of making such repair. These different measures of damage are exclusive of one another; that is to say, if the expense of repair is less than the diminution in value, then the measure of damage to be adopted is the cost of repair, and in such event you may not assess any damages because of any alleged diminution in the value of the car."
>
> "If you believe from the evidence that plaintiff is entitled to recover, then in assessing damages you may allow him such sum not exceeding the amount claimed, to wit, $2,391.05, as will compensate him for the loss and damage, if any sustained, as follows:
>
> "(1) Reasonable cost of necessary repairs to the truck, if any.
>
> "(2) The difference, if any, in the value of the truck after it was repaired and its value before it was damaged.
>
> "(3) Reasonable value of the loss of the use of the truck while the same was being repaired, if any.
>
> "(4) Reasonable value of the liquor damaged or lost, if any."

The first of these instructions is substantially in the language of the opinion in Kincaid v. Dunn, 26 Cal. App. 686, 687, 148 P. 235. The instruction is applicable where the injury can be entirely repaired. In Rhodes v. Firestone Tire, etc., Co., 51 Cal. App. 569, 573, 197 P. 392, 394, it is said:

> "The usual measure, however, to apply in the ascertainment of damages in cases where personal property has been negligently injured but is susceptible of repair, and the one we prefer to follow, is that which makes the measure of damages the difference in value immediately before and immediately after the injury, subject, however, to the proviso that if it can be entirely repaired at a less expense than the diminution in value because of the injury, the measure of damages is the reasonable cost of repairs."

The evidence herein shows that the value of the truck after it was repaired was much less than its value before the injury, but that its value after such repairs were made greatly exceeded the total amount awarded for the cost of repairs and depreciation. In repairing a machine which has been injured, it is sometimes necessary to install new parts, with the result that the value of the machine is greater after the repairs have been made than it was before the injury. In such a case it has been said:

> "Evidence of the fair cost of the repairs, made necessary by the injury, less the increased value of the repaired machine, above its value before the accident, was legitimate evidence of the plaintiff's damage." Cadwell v. Town of Canton, 81 Conn. 288, 70 A. 1025; Chapleau v. Manhattan Oil Co., 178 Wis. 545, 190 N. W. 361; Blanke v. United Rys. Co. (Mo. App.) 213 S. W. 174.

It has been held in several cases that, if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. Monroe v. Lattin, 25 Kan. 351; Larson Bros. Wholesale Grocery Co. v. Kansas City, Kan., 115 Kan. 589, 224 P. 47; Yawitz Dyeing & Cleaning Co. v. Erlenbach (Mo. App.) 221 S. W. 411; Blanke v. United Rys. Co., supra; Coleman v. Levkoff, 128 S. C. 487, 122 S. E. 875; Chicago, R. I. & G. Ry. Co. v. Zumwalt (Tex. Com. App.) 239 S. W. 912; Thompson v. Field (Tex. Civ. App.) 164 S. W. 1115; Cooper v. Knight (Tex. Civ. App.) 147 S. W. 349; Metcalf v. Mellen, 57 Utah, 44, 192 P. 676. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs. The instruction given at defendants' request is incorrect as applied to the facts of this case, and the one given at plaintiff's request correctly states the law. The appellant cannot justly complain that an instruction requested by him is erroneously favorable to him.

[4, 5] The court correctly defined the term "preponderance of evidence" and in another instruction stated:

> "Before the plaintiff can recover in this action, it must first appear to your satisfaction, by a preponderance of the evidence, that the defendants, or their servant, were guilty of some act of negligence which directly contributed to the accident. It must also appear to your satisfaction that the plaintiff was without fault or negligence on his part which may in anywise have contributed to the accident."

Appellant complains that the two instructions are inconsistent, and that therefore the error therein is prejudicial. But the error therein was against the plaintiff and favorable to the defendants. The burden was on the defendants to prove contributory negligence, but by the instruction quoted the court charged the jury, in effect, that the burden was on the plaintiff to prove that he was not negligent and that such proof must be made to the "satisfaction" of the jury. The language of the court in Wood v. Moulton, 146 Cal. 317, 320, 80 P. 92, 93, is applicable to the question here raised. It is there said:

> "The sixth instruction fairly stated the law. Appellants certainly are not injured because in a later instruction the court laid down a rule more favorable to them than the law justifies."

[6, 7] Appellant's machine was damaged in the collision. His cross-complaint alleges that the machine was damaged in a stated amount, and that, in addition to such damage, he was deprived of the use of the machine for 14 days, to his damage in the sum of $140. It appeared at the trial that appellant's machine was insured against accidents, and that the insurance company paid the cost of repairs after the injury caused by the collision. The court instructed the jury that "defendant H. G. Tallerday is not entitled to recover on his cross-complaint by reason of the fact that his damage was paid by his insurance carrier." This was clearly error. Whatever may be the rule as to the cost of repairs which the insurance carrier paid, the instruction is erroneous as applied to the damages claimed for loss of use of the machine. The error, however, was harmless, because, by returning a verdict for the plaintiff against the appellant, the jury impliedly found that appellant was negligent, and that the plaintiff was free from negligence, facts which precluded a recovery by appellant on his cross-complaint without reference to the erroneous instruction.

The judgment is affirmed.

We concur: BUCK, Justice pro tem.; PLUMMER, J.

In re CLARY'S ESTATE. (Civ. 3114.)★

(District Court of Appeal, Third District, California. Feb. 17, 1927. Hearing Granted by Supreme Court April 18, 1927.)

1. Executors and administrators 🔑513(5)—Former opinion, denying jurisdiction to require personal representative of deceased executor to account on distribution of estate of testator, held not res judicata of proceedings against personal representative for accounting (Code Civ. Proc. § 1639).

Opinion on former appeal, refusing to require accounting of personal representative of deceased executor on petition for settlement of final account and final distribution of estate of testator, *held* not res judicata of proceeding under Code Civ. Proc. § 1639, to require accounting of personal representative of deceased executor, where former appeal was determined on ground that court had no jurisdiction to determine matter on distribution, but that proper remedy was by petition for accounting.

2. Executors and administrators 🔑513(9)—Account of personal representative is not final as to matters therein which have not been adjudicated.

Account of personal representative, though final as to all matters adjudicated, is not final as to unadjudicated items.

3. Executors and administrators 🔑50—On qualifying, executor becomes voluntary trustee of assets of testator's estate, including debt owed by him to testator.

Executor, on qualifying, becomes trustee of property and assets of estate of testator, including debt owed by him to testator, holding estate for benefit of devisees and legatees under will.

4. Executors and administrators 🔑50—Personal representative of deceased executor could be required to account for his debt due estate at time he qualified despite lapse of time thereafter; statute of limitations being inapplicable (Code Civ. Proc. § 1447).

Personal representative of deceased executor could be required to account to estate for balance due on promissory note executed by executor to testator, notwithstanding lapse of time between maker's qualification as executor and death, under Code Civ. Proc. § 1447, providing moneys due from executor to testator at time executor qualifies become assets of testator's estate in executor's hands, as statute of limitations does not run where parties occupy fiduciary relationship.

5. Limitation of actions 🔑102(1)—Statute of limitations does not run during continuance of fiduciary relationship.

Statute of limitations does not run where parties occupy fiduciary relationship towards each other, so long as such relationship is not repudiated.

6. Executors and administrators 🔑464—Executor's duty to account, being continuous, devolves upon personal representative on death.

Duty of executor to account is continuing duty, which devolves upon his personal representative at time of death.

7. Executors and administrators 🔑75—Personal representative acts in fiduciary capacity.

Personal representative acts in fiduciary capacity with relation to parties interested in estate.

8. Limitation of actions 🔑102(2)—Fiduciary relationship of executor to estate prevents running of statute of limitations.

Fiduciary relationship of executor to estate and parties interested therein stops running of statute of limitations, and precludes reliance thereon in action against personal representative of executor for accounting, irrespective of

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★For opinion of Supreme Court adopting opinion of Court of Appeal, see 264 P. 242.

whether statute might be pleaded in action on debt itself.

9. Executors and administrators 🔑294—Personal representative of testator held entitled to retainer and set-off for debt of deceased executor due estate, as against remote heirs claiming portion distributable to deceased executor.

Right of retainer and set-off for debt of deceased executor due estate could be exercised by personal representative of testator against remote heirs claiming under deceased executor for portion of estate which would have been his, inasmuch as portion of estate distributable to deceased executor could not be given to his heirs direct, but only to deceased executor's estate to be administered upon and then distributed after payment of debts.

10. Executors and administrators 🔑3(1)—Distribution could not be made direct to heirs of deceased legatee, but should first go to estate for administration and distribution.

Distribution of portion of estate of testator given to deceased executor could not be made direct to executor's heirs, but only to estate of deceased executor, to be administered upon and then distributed to his heirs, after payment of debts and ascertainment of right to inherit.

11. Executors and administrators 🔑464—Surviving executor could require accounting by personal representative of deceased executor for debt due estate, though no claim was filed (Code Civ. Proc. § 1639).

Surviving executor of testator *held* entitled to accounting by deceased executor for debt due estate, under Code Civ. Proc. § 1639, providing accounting may be had on petition of successor of executor who dies, notwithstanding no claim was ever filed against estate of deceased executor.

12. Executors and administrators 🔑463—Neither of two executors could avoid duty to account for assets, though coexecutor was under like duty (Code Civ. Proc. §§ 1622–1639).

Where two executors qualified pursuant to will of deceased, no one of executors could avoid duty under Code Civ. Proc. §§ 1622–1639, of accounting for moneys coming into their hands and for all moneys and properties for which they were chargeable, notwithstanding like obligation rested on coexecutor.

Appeal from Superior Court, Yolo County; Ernest Weyand, Judge.

In the matter of the estate of Abraham E. Clary, deceased. Proceedings by the surviving executor to require the personal representative of Charles M. Clary, deceased executor, to account for the balance due on a promissory note made and executed by Charles M. Clary to Abraham E. Clary. On appeal from an order requiring an accounting. Affirmed.

Griffin, Boone & Boone and Edward T. Taylor, all of Modesto, for appellant.

Grant & Bailey, of Woodland, for respondent.

PLUMMER, J. This matter is before us upon an appeal from an order of the superior court, made and entered in the matter of a proceeding had and taken in said estate, as authorized and provided for in section 1639 of the Code of Civil Procedure, requiring the personal representative of Charles M. Clary, deceased, to account to the estate of Abraham E. Clary, deceased, for the balance due upon a promissory note made and executed by Charles M. Clary to Abraham E. Clary.

It appears from the record that on or about the 1st day of August, 1918, Charles M. Clary made, executed and delivered to Abraham E. Clary his promissory note for the sum of $3,000, due one day after date; thereafter, and while this note was uncollected, the said Abraham E. Clary died testate in the county of Yolo, and Charles M. Clary and E. F. Clary, pursuant to the last will and testament of said Abraham E. Clary, were appointed, and on the 6th day of December, 1920, qualified as the executors of the estate of Abraham E. Clary, deceased; thereafter, and on or about the 4th day of April, 1921, the said Charles M. Clary died intestate in the county of Monterey, state of California. Certain payments were made upon said promissory note by the said Charles M. Clary, and, upon the accounting taken and had in the superior court of Yolo county, the sum of $2,965.91 was found to be the remainder due upon said note, against which sum, the distributive share of $1,257.50 otherwise coming to the estate of Charles M. Clary, deceased, from Abraham E. Clary, deceased, was ordered retained as an offset and payment pro tanto of the moneys due from the estate of Charles M. Clary, deceased, to Abraham E. Clary, deceased.

[1] This matter was before this court upon a previous appeal, wherein it was sought to adjudicate questions relative to the indebtedness of the estate of Charles M. Clary to Abraham E. Clary, upon distribution in the estate of Abraham E. Clary, deceased. Estate of Clary, 71 Cal. App. 22, 234 P. 851. Upon that appeal it was held by this court that the court had no jurisdiction to hear and determine the matter of an accounting on the part of the personal representative of the estate of Charles M. Clary, deceased, for moneys due the estate of Abraham E. Clary, deceased, upon distribution, and thereupon to order a set-off or retainer of the distributive share of the estate of Abraham E. Clary, deceased, which would otherwise be due and payable to the estate of Charles M. Clary, deceased, as payment pro tanto of the indebtedness of Charles M. Clary, deceased, to the estate of Abraham E. Clary, deceased; that section 1639 of the Code of Civil Procedure specified the procedure which must be taken in such cases, and that such procedure is now the exclusive remedy; that such an ac-

counting cannot be had upon distribution, nor can such an accounting be had in a suit in equity. The portion of the decree of the superior court sitting as a court of probate purporting to adjudicate these matters was reversed. As we read the opinion of the Estate of Clary, supra, no other questions were adjudicated and determined upon the former hearing of this cause, and therefore there is no basis for the plea of res adjudicata urged by appellant upon this hearing. It is further specifically pointed out in the opinion to which we have referred that the procedure provided by section 1639 of the Code of Civil Procedure is the one to be followed by the executor of the estate of Abraham E. Clary, deceased, in order to compel the desired accounting. The language of the opinion is, "The proceeding for such accounting must be inaugurated under said section of the Code of Civil Procedure," and then concludes that, as the court did not follow such procedure, the action taken by it was without jurisdiction. The opinion referred to does cite a number of authorities in which it is held that assets cannot be collected upon distribution, but there is nothing in the opinion which prohibits, or in any way tends to prohibit, the superior court of Yolo county, on the going down of the remittitur, from proceeding, if proper pleadings were filed therefor, under section 1639 of the Code of Civil Procedure, to enforce the desired accounting.

Upon the going down of the remittitur, after the prior hearing of this cause, the surviving executor of the estate of Abraham E. Clary, deceased, instituted proceedings under and in accordance with the provisions of section 1639 of the Code of Civil Procedure to enforce an accounting by the representative of the estate of Charles M. Clary, deceased, of the amount of property and moneys in his hands belonging to the estate and constituting a part of the estate of Abraham E. Clary, deceased, at the time of the death of said Charles M. Clary, deceased, and upon this accounting an order fixing the indebtedness, as we have herein stated, was made in the probate court of Yolo county.

The proceedings had in the first instance, leading to the first appeal and the proceedings had in the appeal now before us, were and are both based upon section 1447 of the Code of Civil Procedure, under the terms of which all moneys due from the executor to a testator at the time the executor qualifies as such become assets of the estate of the testator in the hands of the executor, and hence renders the executor liable for the same as if so much money was in his hands. The note in this case was due at the time of the qualification of Charles M. Clary as executor of the estate of Abraham E. Clary, deceased, but against this note the statute of limitations had not yet run. This period would not have expired until some 18 months after the death of Charles M. Clary, deceased. The exact dates are immaterial. No accounting was ever made or rendered by Charles M. Clary, as executor of the estate of Abraham E. Clary, deceased, of the amount due upon said note or of what the Codes specify shall be considered as so much cash in his hands, nor was any accounting ever made or had thereof by the personal representative of Charles M. Clary, deceased, until the institution of the proceedings herein. The surviving executor of the estate of Abraham E. Clary filed an acount of his administration of said estate, called a "final account" and also a report therewith. In the account, termed a "final account," the surviving executor, E. F. Clary, made no mention of the promissory note herein referred to, but did attempt, as we have herein stated, to make collection of the same upon distribution as therein prayed for.

[2] Upon this appeal it is urged that the whole matter presented herein was and is res adjudicata; also that the proceeding is barred by the statute of limitations. A number of cases are cited upholding the finality of a final account, from which no appeal has been prosecuted, or which has been adjudicated upon appeal, in addition to urging that the questions involved herein have once been passed upon by this court, which we have just stated to be without merit. That an account becomes final as to all matters adjudicated, the authorities abundantly establish, but it is also true that it is not final as to nonadjudicated items. The text-writer in 24 C. J. p. 1029, § 2484, thus states the rule:

> "A final settlement is conclusive as to all matters, the proper subject of account, included in such a settlement or necessarily involved therein; but it is not conclusive as to matters not included or necessarily involved therein, or as to matters not within the jurisdiction of the court. The settlement is not conclusive as to assets not accounted for in such statement or received thereafter, but as to such assets the personal representative may be required to make a further settlement."

In the Matter of Estate of Ross, 179 Cal. 358, 182 P. 303, the Supreme Court, having before it this same question, there said:

> "The settlement of an account is not conclusive, 'except as to such items as are included in it and actually passed upon by the probate court.'"

[3-5] See, also, Estate of Adams, 131 Cal. 415, 63 P. 838, where the same holding is had.

When Charles M. Clary, on the 6th day of December, qualified as an executor of the last will and testament of Abraham E. Clary, deceased, he became a voluntary trustee of the property and assets of the estate of Abraham E. Clary, deceased, holding the same for the benefit of the devisees and legatees, under the terms of the last will and testament of Abraham E. Clary, deceased. Thus, as pointed out in 16 California Jurisprudence, p. 420 et seq., §§ 30 to 37, the rule is that the statute of limitations does not run where the parties occupy a fiduciary relationship toward each other, so long as such relationship is not repudiated. Thus, a guardian may not acquire title by adverse possession against his ward, nor an agent against his principal, nor an executor against the heirs. As to the latter, the rule is stated in this language:

> "Pending the administration of an estate, the possession of an administrator is not adverse to that of an heir; he cannot acquire an adverse title by possession for the statutory period."

In MacMullan v. Kelly, 19 Cal. App. 700, 127 P. 819, the court, having before it the question of the running of the statute of limitations where one occupied the position of a voluntary trustee, thus announced the rule:

> "It is a rule of law in this and other jurisdictions that the statute of limitations does not begin to run in favor of a defendant chargeable as the trustee of an express trust during the life of the trust. In order to set the statute in motion it is necessary that such a trustee, by some act or declaration, positively and unequivocally repudiate the trust, and that notice of such repudiation be brought home to the beneficiary. This rule is so well settled and so generally recognized that no argument is necessary to support its reiteration."

The court then cites a number of cases supporting the rule. The same rule is set forth in the case of Taylor v. Morris, 163 Cal. 718, 127 P. 66. In the case of Elizalde v. Murphy, 163 Cal. 681, 126 P. 978, the court had before it the consideration of a plea of the statute of limitations against requiring the representative of a deceased person to account for funds belonging to the estate, and held as follows:

> "The action was simply an action for an accounting—an action to compel the personal representative of a trustee after his death, and the sureties upon his bond as such trustee, to give an account of the property held by the trustee, and of his administration of the trust, to have that account audited and settled by the court, and a balance struck,"—citing Osment v. McElrath, 68 Cal. 466, 9 P. 731, 58 Am. Rep. 17. "The duty of the administrator to account is a continuing duty, and does not become barred. Estate of Sanderson, 74 Cal. 199, 15 P. 753; Cook v. Ceas, 147 Cal. 614, 82 P. 370."

It was held in that case that an accounting does not depend upon any questions of fraud or malversation. It was simply a duty of the administrator or executor, while alive, to account for the trust funds in his hands, and, upon his death, the duty of the personal representative so to do.

In behalf of their plea, appellants cite the case of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, and refer to the following language contained in the opinion:

> " 'The naming of a person as executor does not thereby discharge him from any just claim which the testator has against him, but the claim must be included in the inventory, and the executor is liable for the same, as for so much money in his hands, when the debt or demand becomes due.' Code Civ. Proc. § 1447. As a necessary consequence, if defendant Forrest S. Rowley owed the $10,000 here in controversy on June 3, 1915, when he became executor, he became chargeable with that sum as for so much money in his hands and continued liable therefor, irrespective of the running of the period of the statute of limitations against the debt itself, by reason of the change in the character of his obligation due to his intervening fiduciary capacity."

[6-8] From this it is argued that the statute of limitations has run against the note involved in this action and therefore that an accounting cannot be had. The language quoted, however, holds exactly the contrary. As we read it, it means that, irrespective of the lapse of time which would ordinarily bar an action upon the note, the executor, by reason of his fiduciary capacity, becoming chargeable with the note in his hands as so much money, is in that capacity, precluded from pleading the bar of the statute, and therefore, so long as the trust relation continues, the statute does not run. The duty to account is a continuing one, as stated in Elizalde v. Murphy, and devolved upon Charles M. Clary until the date of his death and immediately devolved upon his personal representative, and, applying the reasoning of the court in the case of Minifie v. Rowley, the fiduciary relationship of the parties stops the running of the statute and precludes reliance upon such plea, irrespective of whether the statute might or might not have been pleaded as against an action on the note itself.

[9, 10] Likewise, the facts in the case of Schaeffer, 53 Cal. App. 493, 200 P. 508, render it readily distinguishable from the case at bar. In the Schaeffer Case the note against which the right of retainer or set-off was claimed was barred by the statute of limitations before the death of the testator, and hence there was neither right nor remedy existing at the time of the appointment of an executor or administrator. Furthermore, in the Schaeffer Case, no relationship of trust or confidence had been created prior or subsequent to the running of the statute. In the case at bar there was a subsisting and enforceable obligation, both at the date of the death of the testator and upon the qualification of Charles M. Clary as an executor, nor does the question of retainer or set-off strictly arise in this case as against the heirs of Charles M. Clary, deceased. Under our procedure and the law of this state, whatever portion of the estate of Abraham E. Clary, deceased, should or may finally reach the possession of the heirs of Charles M. Clary, deceased, does not affect the rule applicable here, as distribution of the estate of Abraham E. Clary, of the portion, if any, distributable to Charles M. Clary, deceased, would not and could not be made to his heirs, but only to his estate, to be taken possession of by his personal representative, administered upon, and then distributed. Under the rule announced in Estate of Pina, 112 Cal. 14, 44 P. 332, followed in Estate of Strong, 119 Cal. 663, 51 P. 1078, and, also, the case of Galvin v. Mutual Savings Bank, 6 Cal. App. 402, 92 P. 322, the heirs of Charles M. Clary, deceased, would take the residue of his estate only after administration had thereon, payment of debts, etc., and the ascertainment of who the heirs of Charles M. Clary are. The right of retainer or set-off is recognized as applicable upon distribution in this state. Estate of Gamble, 166 Cal. 254, 135 P. 970; Estate of Angle, 148 Cal. 102, 82 P. 668. In states where the law and procedure concerning the devolution, administration, and distribution of estates are different from that which prevails in California, and the remote heirs take directly and not from their immediate ancestor, it is held that children stand in the same position as the father when the question of the right of retainer or set-off of a debt due by the father to the estate of the grandfather of the children is involved. Adams v. Yancey, 105 Miss. 233, 62 So. 229, 47 L. R. A. (N. S.) 1026; note to Stenson v. H. S. Halvorson Co., Ann. Cas. 1916D, 1294; Wilson v. Channel, 102 Kan. 793, 175 P. 95, 1 A. L. R. 987, and extended note beginning on page 991. See, also, Woods et al. v. Knotts et al., 196 Iowa, 544, 194 N. W. 953, 30 A. L. R. 768, and annotations thereto beginning on page 775. In many of the cases cited in the annotations to the cases referred to, debts barred at the time of the death of the testator are allowed to be set off. It may be stated that there are some decisions cited in the notes holding that the right of retainer or set-off does not exist as to remote heirs, who succeed directly, and not from the immediate ancestor, but the great weight of authority is to the contrary, and the cases which hold that the right of retainer or set-off cannot be exercised as against remote heirs have no application in this state, for the reasons which we have stated, that they are only entitled to the residue of the estate coming to the immediate ancestor after payment of his debts, as ascertained upon administration of the immediate ancestor's estate.

[11] Appellants further object that no claim was ever filed by the surviving executor of the estate of Abraham E. Clary, deceased, against the estate of Charles M. Clary, deceased, citing the case of In re Smith, 108 Cal. 115, 40 P. 1037. This case, however, has been overruled and the procedure adopted by the surviving executor which we have been considering, is held to be the proper procedure. In re Philbrook, 47 Cal. App. 683, 191 P. 77; Estate of Randall, 188 Cal. 339, 205 P. 118, hold that the filing of a claim is not prerequisite to instituting proceedings for an accounting under section 1639 of the Code of Civil Procedure.

[12] Under the various provisions of article 2 of chapter 10 of title 11 of the Code of Civil Procedure, it is the duty of an executor and coexecutor to account for all moneys coming into their hands and for all moneys and properties with which they are chargeable, and this duty was incumbent upon Charles M. Clary, deceased, irrespective of a like obligation which rested upon his coexecutor, F. E. Clary.

The proceeding before us is one for an accounting, and is not one involving collection of assets upon distribution, as was the case upon the prior appeal in the Estate of Clary, 71 Cal. App. 22, 234 P. 851, and, as we have said, the cases there relied upon and necessitating a reversal are not applicable here, save and except in so far as they hold that the proceeding now before us is the one that should have been taken in the first instance.

Some minor objections have been urged upon this appeal, but, as they do not affect the substantial rights of the parties, are not set forth in this opinion.

The correctness of the accounting and the indebtedness ascertained by the probate court not being questioned, it follows from what has been said that the order and decree of the trial court should be, and the same are hereby, affirmed.

We concur: FINCH, P. J.; HART, J.

81 Cal. App. 364

SCHAINMAN v. SOMMER et al. (Civ. 5554.)

(District Court of Appeal, First District, Division 2, California. Feb. 17, 1927.)

1. Partnership ⚷17—Any uncertainty whether agreement was partnership held eliminated by practical construction of parties.

Any uncertainty as to whether agreement for carrying on contracting business, not specifically designated as partnership agreement, created a partnership was rendered certain by subsequent agreement entitled, "Agreement for dissolution of partnership," and pleadings in suit to dissolve partnership and for accounting, which throughout referred to arrangement between parties as copartnership.

2. Partnership ⚷303—Court properly divided losses of partnership, as provided in partnership agreement, and balance in proportion provided for division of profits, where division, as agreed, would have left half of losses unpaid (Civ. Code, § 2404).

Where division of losses in accordance with stipulation in partnership agreement would have left about one-half of losses unpaid, court properly followed agreement so far as parties had expressly stipulated and apportioned balance of losses in same proportion in which partners had agreed to share profits, in view of Civ. Code, § 2404.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by Paul Schainman against I. M. Sommer and another for dissolution of partnership and for an accounting. Judgment for defendant named, and plaintiff appeals. Affirmed.

Hilton & Christensen, of San Francisco, for appellant.

Nat. Schmulowitz and Peter S. Sommer, both of San Francisco, for respondents.

KOFORD, P. J. This is an appeal by plaintiff in an action of partnership dissolution and accounting, resulting in a judgment in favor of defendant Sommer and against plaintiff for $4,651.45. In this opinion we will use the word defendant as referring to defendant Sommer alone. The record on appeal is the judgment roll alone. The parties entered into a written agreement November 5, 1920, which is the agreement found to be the partnership agreement. Another agreement was entered into by the parties dated February 1, 1923, called by the parties, "Agreement to dissolve copartnership." These two agreements are shown in the judgment roll as exhibits to plaintiff's complaint. The court took and settled the account between the two parties and gave its findings and judgment as stated above.

Appellant claims that the court erred in so finding and deciding. He claims the agreements show that the parties were not copartners. He further claims upon this appeal that, under said agreements, he was not liable for losses beyond the amount of his investment, to wit, $15,000.

The agreement of November 5th does not use the word copartnership, but it provides for the carrying on of a general contracting business by the defendant under the "fictitious firm name and style of I. M. Sommer & Co." It provides that plaintiff's name shall not be used in the business transactions; that he shall put up $15,000 to be used in said business; that profits shall be divided one-third to plaintiff, and two-thirds to defendant; that profits shall accumulate until defendant's share thereof shall equal plaintiff's $15,000. Paragraph 4, sec. [d]. It also provides in paragraph 5 that losses resulting from said business shall be borne by the parties in the following manner, to wit:

> "(a) The party of the second part is to bear all losses up to the amount of his invested capital, to wit, $15,000, plus the amount of any profits that said party of the second part may have drawn, or to which he may be entitled at the time of said losses. (b) The party of the first part is to bear all losses up to the amount of his invested capital, plus the amount of any profits said party of the first part may have drawn or to which he may be entitled at the time of said losses. (c) The above division of losses is to be in effect only so long as the party of the first part has not $15,000 invested in the business, as set forth in paragraph 4, section (d). After said party of the first part has a credit of $15,000 invested in the business, as set forth in paragraph 4, section (d), then the share of losses arising in said general contracting business shall be borne equally by the parties hereto."

[1] The evidence which may have shown how the parties acted under this agreement is not before us as it was before the trial court, but the agreement of February 3d, made and signed by the parties, shows how they regarded the first agreement. It is headed and named "Agreement to dissolve partnership," and reads "Whereas, the parties above named have been conducting a general contracting business as copartners, under the fictitious name and style of I. M. Sommer & Co.," etc., and "Whereas, said copartnership arrangements were set forth in that certain agreement dated the 5th day of November, 1920," and throughout the entire agreement the business arrangement is referred to as a copartnership. If there was any uncertainty about the first agreement constituting a copartnership, that uncertainty has been made certain by the construction placed upon it by the parties. Kennedy v. Lee, 147 Cal. 596, 82 P. 257; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275; Kales v. Houghton, 190 Cal. 294, 212 P. 21.

⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Furthermore, plaintiff's complaint alleges and repeats the allegation in many paragraphs that the arrangement was a copartnership. His prayer is, among other things, "that the copartnership be dissolved and an accounting be made, and," etc. The partnership is admitted by the defendant's answer and it is impossible to see how the court could have made any different finding than the one made. It was not an issue in the case under the pleadings.

[2] Plaintiff also complains that by this judgment he was made to pay for losses in excess of what he agreed to in paragraph 5, subdivision (a), quoted above. The method of arriving at this judgment is shown in exhibit No. 1, attached to the court's findings. The $15,000 having been exhausted in paying losses, defendant advanced some $17,000 in payment of further losses. The court made defendant responsible for about $5,000 of this on account of inventory, assets on hand, and profits withdrawn. The balance was charged two-thirds to defendant and one-third to plaintiff, making the amount of the judgment given. It is true that in this way plaintiff paid more than specified in paragraph 5 (a), above quoted. Plaintiff wholly overlooks that he also promised and agreed with defendant that defendant's contribution to losses should be as stated in paragraph 5 (b). But all the debts had to be paid, despite the fact that the parties expressly provided for the payment of less than one-half of what proved to be the actual losses. Section 2404 of the Civil Code reads as follows:

> "An agreement to divide the profits of a business implies an agreement for a corresponding division of its losses, unless it is otherwise expressly stipulated."

Plaintiff claims the implied agreement is not available because the parties had "otherwise expressly stipulated," but the stipulation did not cover all the losses. In making the division of losses here, the court followed the agreement of the parties so far as they had expressly stipulated, and thereafter and to the extent they had not stipulated the court apportioned the losses in the same proportion as the parties had agreed to divide profits. In so doing it correctly followed the implied agreement declared in Civil Code, section 2404.

The judgment appealed from and the order denying a new trial are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

200 Cal. 474

Ex parte MAKINGS. (Cr. 2931.)

(Supreme Court of California. Feb. 21, 1927.)

1. Fish ⚷15—Complaint held to charge offense of transporting crabs from designated fish and game district (Pen. Code, § 628, subd. [c], as amended by St. 1925, p. 455).

Complaint charging that petitioner unlawfully transported and carried crabs from fish and game district No. 1½ into Marin county sufficiently charged violation of Pen. Code, § 628, subd. (c), as amended by St. 1925, p. 455.

2. Fish ⚷9—Statute prohibiting transportation of crabs held valid (Const. art. 4, § 25½; Pen. Code, § 628, subd. [c], as amended by St. 1925, p. 455).

Under Const. art. 4, § 25½, permitting Legislature to divide state into fish and game districts and enact laws for protection of fish and game deemed appropriate to respective districts, Pen. Code, § 628, subd. (c), as amended by St. 1925, p. 455, prohibiting transporting crabs caught in designated game districts to any point outside such districts is valid, although it permitted transporting within districts.

3. Fish ⚷9—Constitutional provision for legislative control of fish and game should be liberally construed (Const. art. 4, § 25½).

Const. art. 4, § 25½, permitting Legislature to divide state into fish and game districts, and to enact laws to protect fish and game, deemed appropriate to respective districts, is remedial in character, and should be liberally construed.

4. Fish ⚷9—In construing constitutional provision for fish and game districts, courts should consider subject-matter (Const. art. 4, § 25½).

In construing Const. art. 4, § 25½, permitting Legislature to divide state into fish and game districts and enact legislation deemed appropriate to respective districts, courts should consider subject-matter with which it deals and endeavor to ascertain true meaning of language used.

5. Fish ⚷9—Purpose of constitutional provision for fish and game districts is to give Legislature ample power to protect fish and game (Const. art. 4, § 25½).

Purpose of Const. art. 4, § 25½, permitting Legislature to divide state into fish and game districts and to enact laws deemed appropriate for respective districts, was to take from local authorities right to regulate fish and game and to invest such power exclusively in Legislature and to give Legislature ample power adequately to protect game and fish.

6. Fish ⚷8—Legislature has most extensive powers over fish and game.

Legislature has most extensive power over fish and game within its jurisdiction.

In Bank.

Application of James A. Makings for a writ of habeas corpus, to be directed to constable of Sausalito township, Marin county. Writ discharged, and petitioner remanded.

See, also, 247 P. 923.

Puter & Quinn and Marc F. Morrison, all of Eureka, for petitioner.

B. D. Marx Greene, of San Francisco, and Ralph W. Scott, of Los Angeles, for respondent State Fish and Game Commission.

Henry E. Greer, Dist. Atty., of San Rafael, for respondent.

CURTIS, J. [1] Petition for writ of habeas corpus. The petitioner is in the custody of the constable of Sausalito township, county of Marin, under a warrant of arrest issued out of the justices' court of said township, upon a complaint charging that on or about the 12th day of March, 1926, he unlawfully transported and carried crabs from fish and game district No. 1½ into the county of Marin, state of California.

Under the authority conferred upon the Legislature by section 25½ of article 4 of the Constitution, the state has been divided into some sixty-seven fish and game districts. By section 628 of the Penal Code, as amended by St. 1925, p. 455, it is provided:

> "(c) Every person who ships or offers for shipment or who transports or carries any species of crab from fish and game districts one and one-half, five, six, seven, seven A, eight and nine, either to a point outside of the state or into any part of the state other than in districts one and one-half, five, six, seven, seven A, eight and nine, or who holds any crabs in live cars within said fish and game districts, is guilty of a misdemeanor.
>
> "For the purposes of this act a live car shall be any box, crate or pen in which live crabs are kept."

[2] The seven districts mentioned in said subdivision (c) are situated in the northwestern part of the state, and they form one compact and contiguous body of land and water. No part of the county of Marin is in any of said districts. It is apparent, therefore, that the complaint against petitioner charges a violation of this subdivision (c) of section 628 of the Penal Code, as amended. It is the contention of petitioner that this section of the Penal Code, in so far as it attempts to prohibit the transportation or shipment of crabs from the fish and game districts therein enumerated into any other part of the state other than into said seven districts named in said section is unconstitutional and void. His contention is based upon the fact that a number of fish and game districts are grouped together in said section, and a general prohibition as to shipment of crabs therefrom is made or attempted to be made applicable to the territory composed of all of said districts, with the result that crabs from any one of said districts may be shipped into any or all of the other districts of said group, but cannot be shipped into any other part of the state. Petitioner admits that it is perfectly legal for the Legislature to provide that crabs shall not be shipped from one fish and game district into any other part of the state, but contends that the Legislature is without power, by grouping a number of districts together or in any other manner, to provide that crabs or any other kind of fish or game may be shipped from one district into another district or into a group of districts and prohibit their shipment into the remaining districts of the state. By section 25½ of article 4 of the Constitution, "the Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts." This section was incorporated into the Constitution by an amendment adopted by the people in 1902, and—

> "the obvious purpose of this amendment was to remove the former restriction of article 4, § 25, subd. 33, which prohibited the enactment of a local law 'where a general law can be made applicable,' and in no wise limits the sovereign power of the state over fish and game, or of the Legislature to legislate concerning the same. On the contrary, it increases the legislative discretion by authorizing local laws on the subject." Paladini v. Superior Court, 178 Cal. 369, 372, 173 P. 588, 590; In re Marincovich, 48 Cal. App. 474, 483, 192 P. 156.

Petitioner asserts that by this amendment to the Constitution the Legislature is given authority to divide the state into fish and game districts and make any other legislation applicable to any one of said districts, but that it has no power to make regulations applicable to two or more of said districts without making the same apply to the state generally. We find nothing in the language of this constitutional provision that would indicate that it should be given such a narrow construction. Neither is petitioner's contention supported by any of the authorities cited in the argument of counsel or in the briefs filed herein. The cases relied upon by petitioner for this purpose, in so far as this state is concerned, are Paladini v. Superior Court, 178 Cal. 369, 173 P. 588; In re Cencinino, 31 Cal. App. 241, 160 P. 167; In re Marincovich, 48 Cal. App. 474, 192 P. 156; and In re Mascolo, 25 Cal. App. 92, 142 P. 903. The Paladini Case, as we have before noted, decided, among other things, that the obvious purpose of section 25½ of article 4 "was to remove the former restriction of article 4, § 25, subd. 33, which prohibited the enactment of a local law 'where a general law can be made applicable,' and in no wise limits the sovereign power of the state over fish and game, or of the Legislature to legislate concerning the same. On the contrary, it increases the legislative discretion by authorizing local laws on the subject." In the Cencinino Case the court held that by this constitutional amendment the power theretofore exercised by counties and other local authorities to regulate fish and game had been transferred from such authorities to the Legislature, and the sole power to protect the fish and game of the state was now conferred upon the Legislature. In Re Marincovich, supra, it was contended that section 636 of the Penal Code, which sought to prohibit the use of a certain kind of a fishing net in fish and game district No. 20 was unconstitutional as special and local legislation. It was held that section 25½ of article 4 of the Constitution, citing the Paladini Case as authority, had removed certain restrictions against special and local legislation by specially authorizing local legislation for the protection of fish and game. In the Mascolo Case the petitioner was charged with a violation of the penal statute prohibiting the use of a trawl net for fishing in fish and game district No. 6. This statute made it unlawful to use such a net in district No. 6, and in the waters of Monterey Bay. It was claimed that the statute was illegal, for the reason that it included, not only district No. 6, but the waters of Monterey Bay, which were included in and formed a part of district No. 5. The court held that, even conceding that that part of the statute referring to Monterey Bay was beyond the powers of the Legislature to enact, as it was an attempt to legislate as to a part only of an established fish and game district, its illegality would not affect the provisions of the statute referring to district No. 6, of which the petitioner was charged with a violation. Petitioner also relies upon a number of authorities of other jurisdictions, particularly the cases of Jonesboro, etc., v. Adams, 117 Ark. 54, 174 S. W. 527, and State v. Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561. The former of these cases was decided by the Supreme Court of Arkansas and the latter by the Supreme Court of South Carolina. These authorities are of little assistance to us, for the reason that in neither of these states is there a constitutional provision similar to section 25½ of article 4 of our Constitution.

[3-5] This section of the Constitution is remedial in character, and should be given a liberal construction.

> "It is well settled that a remedial statute must be liberally construed, so as to effectuate its object and purpose. Although due regard will be given the language used, such an act will be construed, when its meaning is doubtful, so as to suppress the mischief at which it is directed, and to advance or extend the remedy provided, and bring within the scope of the law every case which comes clearly within its spirit and policy. Clearly, the remedial effect of provisions should not be impaired by construction. * * *" 23 Cal. Jur. 801.

In construing this section of the Constitution, the court should consider the subject-matter with which it deals in its endeavor to ascertain the true meaning of the language used. As we have already seen, it was the purpose of this amendment to the Constitution to take from local authorities the right to regulate the fish and game of the state and to invest such power exclusively in the Legislature. In so doing, the powers of the Legislature to protect the fish and game of the state were increased over those previously intrusted to that body. As we read the section, we think it most apparent that its purpose was to clothe the Legislature with ample power to adequately protect the fish and game of the state. This was to be accomplished by authorizing the Legislature to divide the state into fish and game districts and to enact such laws for the protection of the fish and game as the Legislature might deem appropriate for the respective districts. The fish and game of the state are made up of various kinds and species, differing from each other in so many respects that it would be difficult, if not impossible, to enumerate such differences. On account of this great variety of kind and species, it was necessary that the regulations adopted by the Legislature for the protection of the fish and game be in some measure commensurate with the various kinds and species of fish and game existing in the different parts of the state. Very often in a given territory there may exist a number of different varieties of fish and game, each requiring special legislation in order that they may be properly protected. It may be necessary, on account of the peculiar and varied conditions under which the deer in this district are found, to divide the area into a number of different game districts in order to properly protect the deer found therein. On the other hand, the conditions under which the quail in this territory are found appear to be the same in the several parts of this territory. It is necessary, however, on account of the deer therein, to divide this territory into a number of districts. Such a regulation would not be necessary when it comes to the protection of quail, but, after the territory has been divided into the several districts for the protection of the deer, there is nothing in this constitutional provision which prevents the Legislature from enacting one general regulation as to quail throughout said territory, and make it applicable to all the districts therein. In our opinion a reasonable construction of section 25½ of article 4 clearly implies that the power to pass such an enactment has been left to the discretion of the Legislature.

There are also other considerations which might determine the Legislature in the enactment of laws, the purpose of which is to protect the fish and game of the state. One of such considerations is the desire on the part of the Legislature to permit the largest use of fish and game compatible with the reasonable protection thereof. The Legislature undoubtedly found it necessary to divide the territory comprising the seven districts enumerated in subdivision (c) of section 628 of the Penal Code into seven districts in order to adequately protect all the fish and game found therein. It further found that to permit the crabs taken from the waters within such territory to be shipped into and used in the several districts comprising the same would not endanger the permanent supply of crabs produced in said waters, but to permit the crabs of said territory to be shipped generally throughout all parts of the state would result in their depletion and possibly in their final destruction. Under such conditions it was undoubtedly within the power of the Legislature to enact such legislation as would protect the crabs of said district and at the same time to permit the use of the crabs produced therein by the largest possible number of people of the state. It is conceded by petitioner that it would have been perfectly legal for the Legislature to have provided that crabs caught in any one of said districts should not be shipped or transported out of the district in which they were caught. Under such a regulation petitioner would have had no right to transport crabs from said district No. 1½, or from any of the other districts into the county of Marin. How is he damaged or injured by the present law which permits the crabs from district No. 1½ to be used in the other districts of said territory as well as in district No. 1½? Petitioner claims that he is discriminated against by being denied the right to ship crabs out of said district No. 1½, while the people in the other districts are given this right. He would be discriminated against to the same extent by a statute prohibiting the shipment of crabs out of district No. 1½. He concedes that this would be legal because the Legislature has the right to pass such legislation. As we have already shown, the Legislature also has the right to prohibit the shipment of crabs from the territory comprising said seven districts. It follows, therefore, that such discrimination, if it can be called such, is not illegal.

[6] It is well established in this state that the Legislature has most extensive powers over the fish and game within its jurisdiction. As was said by this court in Ex parte Maier, 103 Cal. 476, 483, 37 P. 402, 404 (42 Am. St. Rep. 129):

> "The wild game within a state belongs to the people in their collective, sovereign capacity; it is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good. To this extent it is conceded that the state may go. But it is contended that to go further, and prohibit the sale of game lawfully killed elsewhere and brought here as private property, is in effect to destroy private property, and that this is going beyond a proper exertion of the police power. While it is true that the power to regulate is not the power to destroy, in its absolute sense, it is, nevertheless, true that the right to regulate frequently and as a necessary sequence carries with it the right to so control and limit the use or enjoyment of private property as to amount to its destruction."

This language has been frequently referred to with approval. People v. Haagen, 139 Cal. 115, 72 P. 836; Ex parte Kenneke, 136 Cal. 527, 69 P. 261, 89 Am. St. Rep. 177; In re Phoedovius, 177 Cal. 238, 241, 170 P. 412; Geer v. State of Connecticut, 161 U. S. 519, 527, 16 S. Ct. 600, 40 L. Ed. 793. In view of these considerations, we are firmly of the opinion that the regulation enacted by subdivision (c) of section 628 of the Penal Code does not contravene any provision of the Constitution, and that it is a legal and valid enactment of the Legislature. It follows, therefore, that petitioner's imprisonment is legal and the writ should be discharged.

It is therefore ordered that the petitioner be remanded, and the writ discharged.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

200 Cal. 482

In re GRACEY'S ESTATE.★

GRACEY v. GRACEY et al.

(Sac. 3916.)

(Supreme Court of California. Feb. 21, 1927. Rehearing Denied March 21, 1927.)

1. Wills 🔑70—Validity of holographic codicil, probated in California, held governed by law thereof, so as not to require witnesses (Civ. Code, § 1376).

Validity of holographic codicil, offered for probate in California, *held* governed by Civ. Code, § 1376, and hence sufficiently proved, though not attested by witnesses as required by law of state of testator's domicile.

2. Conversion 🔑15(1)—Will authorizing sale of realty held not to work conversion into personalty on testatrix's death (Civ. Code, § 1338).

Holographic will, authorizing executor "to sell all or any of my real estate or personal property," did not work equitable conversion of realty in California into personalty, under Civ. Code, § 1338, on death of testatrix.

3. Conversion 🔑15(1)—Statute as to effect of will directing conversion of realty into money held merely declaratory of common-law doctrine of equitable conversion (Civ. Code, § 1338).

Civil Code, § 1338, providing that when will directs conversion of real property into money such property and all its proceeds must be deemed personalty from time of testator's death, is simply declaratory of common law,

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★Rehearing denied.

and doctrine rests on principle that equity considers as done what ought to have been done.

4. Conversion 🔑16(1)—Executor's mere discretionary power to sell realty does not work equitable conversion into personalty.

Mere discretionary power of executor to sell realty does not work equitable conversion thereof into personalty on testator's death.

5. Conversion 🔑15(1)—Will, giving named person property remaining after paying bequests, vested title to realty in him on testatrix's death, and surplus proceeds thereof remained realty for distributive purposes (Civ. Code, § 1341).

Will, giving named person any money or property remaining after payment of funeral expenses and bequests, vested title to real property in him at moment of testatrix's death, under Civ. Code, § 1341, and when whole of realty was sold by executor to pay specific bequests surplus retained its character as realty for purposes of distribution.

6. Conversion 🔑1—Equitable conversion is device to bring about equitable results, accomplish testator's intent, and benefit beneficiaries.

The doctrine of equitable conversion is a device employed in equity to bring about equitable results, and is invoked to accomplish testator's intent and for benefit of beneficiaries.

7. Conversion 🔑15(1)—Codicil bequeathing California realty to charitable and public institutions held to negative intent to work equitable conversion into personalty on testator's death.

Holographic codicil, bequeathing all moneys derived from sale of California realty coming to testator from estate of prior decedent to a public library, college, and church board, *held* to negative intent to work equitable conversion of such realty into personalty on testator's death, as he must be *held* to have known that benefactions would fail unless codicil were probated in California without such conversion, instead of Pennsylvania in which he resided.

8. Wills 🔑566—Will, bequeathing proceeds of realty received from another estate, held not to blend personalty and realty in manner showing intent to create fund and dispose of it in money.

Will, bequeathing moneys derived from sale of real estate coming to testator from estate of prior decedent to certain eleemosynary institutions, *held* not to work such a blending of personalty and real estate as to show intent to create a fund and make testamentary disposition thereof in money.

9. Wills 🔑466—"Bequeath" in holographic codicil held applicable to both realty and personalty, so as to avoid intestacy as to realty (Civ. Code, § 1327).

Word "bequeath" in holographic codicil, bequeathing half of net amount coming to testator from another estate to public library, etc., *held* used not in its technical sense, but as applying to both real and personal property, so as to avoid intestacy as to realty, in view of Civ. Code, § 1327.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bequeath.]

10. Appeal and error 🔑907(3)—On judgment roll appeal all intendments favor trial court's determinations.

On appeal on the judgment roll alone, all intendments are in favor of trial court's determinations.

11. Wills 🔑439, 448—Will should be interpreted, if reasonably possible, to effectuate intent and avoid intestacy.

Will should be so interpreted as to render it operative, if reasonably susceptible of such interpretation, to end that testator's intention be given effect and intestacy avoided.

12. Appeal and error 🔑907(3)—On judgment roll appeal it must be assumed that evidence warranted finding, implied from apportionment of statutory share of entire estate to charitable beneficiaries under will, that no further costs would accrue in foreign administration (Civ. Code § 1313).

On appeal on judgment roll alone, it must be assumed, in absence of contrary showing, that sufficient evidence was before trial court to warrant finding, implied from apportionment of third of total net value of testator's estate in California and elsewhere to charitable and public beneficiaries, under Civ. Code, § 1313, that administration of estate in another state had progressed to point where no further costs would accrue; burden being on appellants to show insufficiency of evidence to support such finding or some abuse of discretion by trial court.

In Bank.

Appeal from Superior Court, Merced County; J. J. Trabucco, Judge.

Proceeding to settle the final account of James Shields Gracey, as executor of the will of Robert Gracey, deceased, and for distribution of the California estate, in which the executor petitioned the court to turn over the entire California estate to him as executor under the laws of Pennsylvania, and the City of Merced filed objections to the final account and a cross-petition. From a decree of final distribution, the executor and others appeal. Affirmed.

Devlin & Devlin and M. S. Zarick, all of Sacramento, for appellants.

F. W. Henderson, of Merced, for respondent City of Merced.

SHENK, J. Robert Gracey died testate on the 25th day of September, 1913, in the state of Pennsylvania. At the time of his death he was and for many years prior thereto had been a resident of that state and left real and personal property therein. He also left property in California, consisting of money in bank and other personal property and an interest in the estate of Sarah Jane Thursby, then in course of probate in Merced county. Sarah Jane Thursby died testate in Merced county on the 3d day of February, 1913, leaving an estate in said county, consisting of real and personal property. Her will, holographic in form, was admitted to probate in that county. After making provision for the payment of debts, expenses of last illness, and certain legacies, her will set forth the following residuary clause:

> "11th. After the funeral expenses and bequests are paid, should there still remain any money or property of whatsoever nature I die possessed of, I give to Robert Gracey of Pennsylvania."

The will next contained the following provision:

> "12th. I appoint John Olcese of Merced, California, my executor, to carry out the provisions of this last will, and also give him power to sell all or any of my real estate or personal property without any order from court. * * *"

At the time of the death of Sarah Jane Thursby her estate consisted largely of real property, all situated in the state of California. During the course of the administration of her estate in Merced county it was determined that the personal estate, after payment of debts, funeral expenses, costs, and expenses of administration, was insufficient to pay the bequests mentioned in her will, and it was found necessary to sell a portion of the real estate in order to discharge said bequests. Instead of selling a portion of said real property for said purpose, it was deemed for the best interests of the estate to sell the whole of said real property. After such sale a considerable sum of money, being the proceeds of the sale of said real property, remained for the benefit of the residuary legatee and devisee. The proper distribution to be made of this residuum forms the basis of this controversy.

On February 12, 1913, or 9 days after the death of Sarah Jane Thursby, Robert Gracey, the said residuary legatee and devisee, while domiciled in the state of Pennsylvania, appended to his existing holographic will the following codicil, holographic in form:

> "Of all money or money[s] derived from sale of real estate to come to me from the estate of Sarah J. Thursby, decd. of Merced, California, that is of all the net amount that may come to me from said estate, I bequeath one-half thereof to the public library of Merced City, California, and the remaining one-half to be equally divided and distributed to Westminster College, mentioned in sec. 6 above, and the boards of Home and Foreign Missions of the United Presbyterian [Church of North America] mentioned in secs. 2 and 5 above."

The effect to be given to this codicil is the principal subject for determination on this appeal. Upon the death of Robert Gracey his last will was admitted to probate in the state of Pennsylvania, and subsequently said will and codicil were admitted to probate in Merced county. James Shields Gracey was named executor in both jurisdictions. On proceedings to settle the final account and for distribution of the Gracey estate in Merced county the executor petitioned the court to turn over the entire California estate to the executor acting under the Pennsylvania administration. The city of Merced filed objections to said final account and also a cross-petition, in which it prayed that one-half of the amount of the estate in the hands of the California executor be paid to the city of Merced for and on behalf of its public library, pursuant to the provisions of said codicil. After a hearing the court made an order in which the final account was settled and approved. The court found that the moneys on hand in the possession of the California executor were derived from the sale of the real estate in California devised to Robert Gracey, deceased, by the terms of the residuary clause contained in the will of Sarah Jane Thursby, deceased, and that the said moneys must be distributed as real estate in California according to the laws of California, and not as personal property under the laws of Pennsylvania, the domicile of Robert Gracey, deceased. It was further found that the total net value of the estate of Robert Gracey, deceased, in California and elsewhere amounts to the sum of $65,509.59, and that, under and pursuant to section 1313 of the Civil Code, the sum of $21,836.53 is the total aggregate sum that can be bequeathed or devised to the said city of Merced, Westminster College and the Boards of Home and Foreign Missions of the United Presbyterian Church. The court further found that the remainder of said property, to wit, the sum of $16,714.66 and certain other personal property not reduced to cash, should be distributed to the executor under the Pennsylvania administration. The decree of final distribution was duly made and entered pursuant to the foregoing findings and determinations. From this decree the executor under the Pennsylvania administration and the heirs of Robert Gracey, deceased, or their representatives, prosecute this appeal from that portion of the decree which orders distributed to the city of Merced, in trust, for the use and benefit of the public library of said city, the sum of $10,918.27, to Westminster College the sum of $5,459.13, and to the Boards of Home and Foreign Missions of the United Presbyterian Church the sum of $5,459.13. The appeal is presented on the judgment roll alone.

Two notices of appeal were filed, one on behalf of the executor under the Pennsylvania administration, and the other on behalf of the heirs at law of Robert Gracey, deceased. By stipulation one record is presented, and both appeals may be determined by one order. Rights of creditors are not here involved and all taxes and expenses of administration have been paid or provided for.

[1] It is the contention of appellants that the court erred in holding that the assets which were on hand, under the California administration, were, in legal, effect, real estate in the state of California at the time of the death of Robert Gracey, deceased, and in holding that the law of California was applicable to the distribution of the estate. It is their claim that the proceeds distributable under the California administration constituted personal property at the time of the death of Robert Gracey, deceased, by reason of an alleged equitable conversion of realty into personalty in both the wills of Sarah Jane Thursby and Robert Gracey, and that the law of Pennsylvania should be applied to the distribution thereof. The appellants alleged and proved the law of Pennsylvania to the effect that any holographic will or codicil, devising or bequeathing property to charitable or public uses, must be attested by at least two witnesses. The codicil here in question was not so attested and it is not questioned that, tested by the law of Pennsylvania, the said codicil would be invalid. But when the same was offered for probate in California its sufficiency as a valid codicil was governed by the law of this state. Civ. Code, § 1376. When so tested it was sufficiently proved, for in this state witnesses to a holographic will or codicil are unnecessary.

[2-5] The primary question for determination is whether an equitable conversion of the real estate in Merced county to personal property took place upon the death of either Sarah Jane Thursby or of Robert Gracey. It is conceded by the respondents that if it be held, contrary to the determination of the trial court, that the California estate of which Robert Gracey died seized was, in contemplation of law, personal property at the time of his death it would follow that all of said California estate should be delivered to the Pennsylvania executor to be distributed in accordance with the laws of Pennsylvania, with the inevitable declaration there that the said codicil is void. On the other hand, if it be determined that there was no such equitable conversion in either estate it would seem to follow that distribution should be made as ordered by the trial court. It is the claim of the appellants that the will of Sarah Jane Thursby created an equitable conversion of all of her real property into personalty as of the date of her death, pursuant to the provisions of section 1338 of the Civil Code, which provides that:

> "When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death."

It is conceded by the appellants that there is no express direction to the executor of the Thursby will to convert the real property into money, but it is insisted that from the whole scheme of the will it was the intention of the testatrix that the executor should do so. We do not so conclude. As necessarily conceded, there was no such express direction, and we find nothing on the face of the will that imports an intention on the part of the testatrix that such conversion take place. It does not appear therefrom that such conversion was necessary in order that the intentions of the testatrix be carried out. Section 1338 of the Civil Code is simply declaratory of the common law (Estep v. Armstrong, 91 Cal. 659, 27 P. 1091), and the doctrine rests on the principle that equity considers that as done which ought to have been done. In Estate of Pforr, 144 Cal. 121, it was said at page 128 (77 P. 827):

> "Whether such conversion is effected depends upon the intention of the testator as gathered from the entire provisions of his will. If it is apparent from its terms that it was his will that the estate be sold and the proceeds given to his beneficiaries, an equitable conversion results, even if the direction for the sale is not imperative. Dodge v. Pond, 23 N. Y. 69. 'The question of conversion is a question of intention, and the real question is, Did the testator intend his land should be converted into money at all events before distribution?' Wurts v. Page, 19 N. J. Eq. 375. Mr. Pomeroy (Equity Jurisprudence, § 1161) says: 'In fact the whole result depends upon the intention. If by express language, or by a reasonable construction of all its terms, the instrument shows an intention that the original form of the property shall be changed, then a conversion necessarily takes place.'"

The doctrine of equitable conversion was invoked in the case of Janes v. Throckmorton, 57 Cal. 368, 382, and it was there said:

> "But the doctrine of equitable conversion is invoked by the defendant; and, it is said, that as to the beneficiaries, the land, under the agreement, became personal estate, and their interest personal property. Dodge v. Pond, 23 N. Y. 69, Lynn v. Gephart, 27 Md. 547, and 2 Story's Eq. Juris. § 1214, are cited by defendant's counsel in support of this position. In Lynn v. Gephart, the court cites the section from Story, which reads thus: 'The inclination of courts of equity upon this branch of jurisprudence is not generally to change the quality of the property, unless there is some clear intention or act by which a definite character, either as money or as land, has been unequivocally fixed upon it throughout'; and adds, that 'if this intention do not clearly appear, the property retains its original character.'"

The citation of authorities to the same effect could be prolonged. From their consideration it cannot be said that, under the Thursby will, such conversion took place either by direction of the testatrix or by necessary or fair implication from the language used. The mere discretionary power to sell does not produce such result. White v. Howard, 46 N. Y. 162. The language of the residuary clause in the Thursby will unquestionably had the effect of vesting the title to the real property in Robert Gracey at the moment of the death of Mrs. Thursby. Civ. Code, § 1341; Estate of Patterson, 155 Cal. 626, 102 P. 941, 261 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; Estate of Benvenuto, 183 Cal. 382, 191 P. 678.

When it became necessary to sell a portion of said real property to pay specific bequests, and when the whole of said real property was sold, the surplus beyond the amount required for the purposes mentioned retained its character as real estate for purposes of distribution. 2 Woerner on Administration, § 481; 24 C. J. 706.

[6-8] Nor do we think that any equitable conversion took place upon the death of Robert Gracey. As above indicated, the doctrine of equitable conversion is a device employed in equity to bring about equitable results. It is invoked to accomplish the intention of the testator and for the benefit of beneficiaries. 6 Cal. Jur. 525, 526. There is no wording in the codicil appended to the Gracey will expressly directing the executor to convert said real estate into money, and we fail to discover from the language used by the testator any intent on his part by necessary or reasonable implication from the language used to require such conversion. Indeed, the plain intention is to the contrary, for if such conversion were intended and should be effectuated the entire California estate would be transmitted to the executor in the Pennsylvania administration and the benefactions under the codicil would be entirely defeated. We cannot ascribe such an intention to the testator. He must be held to have known that Mrs. Thursby had died before he executed the codicil, and that the title to the real estate in California, or at least so much thereof as was not necessary to pay the funeral expenses and the bequests under the will of Mrs. Thursby, had vested in him, and that the only way in which the beneficiaries under the codicil could receive their bounties would be by the probate of his will, including said codicil, in California, without an equitable conversion thereof into personalty. Otherwise his benefactions under the codicil would fail. Nor do we agree, as contended by appellants, that there was such a blending of personal and real estate by the testator as to show that he intended to create a fund and to make a testamentary disposition thereof in money. We conclude that the trial court did not err in refusing to apply the doctrine of equitable conversion to either the Thursby will or to the codicil of the Gracey will.

[9-11] It is next insisted by the appellants that if there was no equitable conversion under either will and if it be held, as we do hold, that the property in California was and is real estate for purposes of distribution, then Robert Gracey died intestate as to such real estate. The contention is predicated upon the fact that in the codicil the word "devise" is not used, and that the testator used the words, "I bequeath" one-half "of all the net amount that may come to me from said estate" to the "public library of the city of Merced," etc. It is argued that the use of the word "bequeath" was ineffectual to pass the title of said property as real estate. The contention appears to be that, in order to effectuate the passing of title to real estate, the word "devise" or other appropriate term applicable to real estate must be used. Section 1327 of the Civil Code provides:

> "Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense."

In the application of the foregoing section of the Civil Code, this court had under consideration, in Estate of Henderson, 161 Cal. 353, 119 P. 496, a question very similar to the one now presented with reference to the effect of the use of the terms "bequest," "legacies," "legatees," and "residuary legatees" in an holographic will as bearing upon the disposition of real property of the estate, and where it appeared that the terms "devise" and "devisees" were not used. In that case it was said:

> "The primary purpose of all interpretation of wills is, of course, to ascertain the testator's intent, as disclosed by the language he has used. Civ. Code, § 1317. Of this class of questions it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. 'Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike [citing cases]'. * * * The appellant argues, further, that, inasmuch as the estate (and the residue) included both real and personal property, such real property as was contained in the residue could not be covered by a gift over of 'legacies' given to 'legatees.' But, while technical words in a will are ordinarily to be taken in their technical sense, they will not be so taken when it appears that they were used in another sense by a testator who drew his will without an acquaintance with the technical sense. Civ. Code, § 1327; Estate of Peabody, 154 Cal. 173 (97 P. 184). The will before us was, as we have said, holographic, and it is perfectly clear from its provisions that the testator was unfamiliar with the distinctions between terms appropriate to testamentary gifts of personal and those of real estate. Although the estate comprised realty, the will does not contain the word 'devise' or 'devisee.' The testator makes gifts of his interest in real estate, and then speaks of the residue, after paying all the 'bequests herein provided for.' He makes provision for 'residuary legatees,' but says nothing of 'residuary devisees.' It is plain, therefore, that the testator used the terms 'bequests,' 'legacy,' 'legatees,' and 'residu-

ary legatees' loosely, and without regard to their exact technical meaning. In order to give full effect to these expressions they must be read as referring to gifts and takers of realty, as well as of personal property." Estate of Henderson, supra, pages 357, 358 (119 P. 498); Estate of Budd, 166 Cal. 286, 135 P. 1131.

So in the case at bar it appears that the codicil was holographic in form. As the appeal is on the judgment roll alone, the evidence is not before us. All intendments are in favor of the determinations of the trial court, and, in the absence of a contrary showing on this appeal, it must be assumed that it appeared that the codicil was drawn solely by the testator and that he was unacquainted with the technical meaning of the term "bequeath" and intended by its use that it should apply to the takers of real property as well as personal property. A will should be so interpreted as to render it operative, if it be reasonably susceptible of such interpretation, to the end that the intention of the testator be given effect and that intestacy be avoided. Civ. Code, § 1317; Estate of Phelps, 182 Cal. 752, 190 P. 17; Estate of Wilson, 184 Cal. 63, 193 P. 581; Estate of Franck, 190 Cal. 28, 210 P. 417; Estate of McCurdy, 197 Cal. 276, 240 P. 498; 26 Cal. Jur. 899. On the record before us it must therefore be concluded that the word "bequeath" was used by the testator not in its technical sense, but as applying to both real and personal property. Such interpretation is reasonable and intestacy is thereby avoided.

[12] In determining the amount of the Gracey estate which it was competent for the testator to leave to the respondents for charitable and benevolent uses, under section 1313 of the Civil Code, the trial court fixed the net value of the estate in California and elsewhere and apportioned one-third of the total to the beneficiaries under the codicil. In this respect the appellants concede that the court followed the rule laid down in Estate of Dwyer, 159 Cal. 687, 115 P. 242, where it was held that in fixing the amount of the one-third of the estate which might be distributed to charitable uses, under said section 1313, the aggregate estate, wherever situated, is to be taken into consideration. But it is insisted that the court erred in so fixing the aggregate of such estate for the reason that it appears that the administration of the estate of Gracey in Pennsylvania has not been closed and that additional costs of administration in that state may accrue. Here, again, the evidence is not before us, and in the absence of a showing to the contrary it must be assumed that sufficient competent evidence was before the trial court upon which to base its implied finding to the effect that the administration of the Pennsylvania estate had progressed to a point where no further costs would accrue. The burden was upon the appellants to show the insufficiency of the evidence to support the finding of the aggregate amount of said estate or to show some abuse of discretion on the part of the trial court, and such showing has not been made.

We have examined the cases relied upon by the appellants, and we find therein nothing inconsistent with the conclusions herein expressed as applied to the particular facts in this case.

The decree is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

200 Cal. 579

ALASKA PACKERS' ASS'N v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 12180.)★

(Supreme Court of California. Feb. 28, 1927. Rehearing Denied March 29, 1927.)

1. Admiralty 🔑13—Contract of shipment as seaman and fisherman held "maritime" and not severable.

Contract of shipment as seaman and fisherman *held* maritime in nature and not severable, though employee worked at mending nets and loading and unloading lighters carrying cargo to ship and slept on shore part of time.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime.]

2. Admiralty 🔑1—Maritime law may be modified or supplemented as to local matters by state regulation not materially prejudicial thereto.

Generally, parties to maritime contract contemplate system of maritime law, and its rules control their rights and liabilities to exclusion of state statutes, but, as to certain local matters, regulation of which will work no material prejudice to general maritime law, nor interfere with proper harmony or uniformity thereof in its international or interstate relations, rules thereof may be modified or supplemented by state regulation.

3. Admiralty 🔑20—Workmen's Compensation act, superseding state laws respecting liability for damages under common law and state statutes does not conflict with maritime law.

Workmen's Compensation Act (St. 1917, p. 831), superseding other state laws touching liability for damages, which depended on common law and state statutes, does not conflict with any superior maritime law, whether award under act is made as on implied agreement or otherwise.

4. Master and servant 🔑351 — Workmen's Compensation Act abrogates master's common-law liability for injuries to employee and provides exclusive remedy.

Workmen's Compensation Act (St. 1917, p. 831), which provides only means for recovery of compensation by employee from employer for injuries received in course of and arising out of

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★Rehearing denied.

employment, abrogates master's common-law liability for such injuries in cases to which it is applicable, and provides remedy exclusive of all other statutory or common-law remedies.

5. Admiralty 🔑20—Maritime employee, injured while on beach trying to launch fishing boat, held engaged in nonmaritime work within Workmen's Compensation Act.

Employee, injured while on beach trying to launch fishing boat, *held* engaged in nonmaritime work, to which Workmen's Compensation Act (St. 1917, p. 831) may apply, though employed as seaman and fisherman under maritime contract.

6. Admiralty 🔑20—Master's liability for injuries to maritime employee on beach trying to launch fishing boat held to arise from Workmen's Compensation Act.

Employer's liability to compensate maritime employee for injuries while on beach trying to launch fishing boat *held* to arise, not from agreement of parties, but from Workmen's Compensation Act (St. 1917, p. 831), application of which will work no material prejudice to any characteristic feature of general maritime law.

7. Master and servant 🔑361—Seamen and fishermen held "employees" within Workmen's Compensation Act (Workmen's Compensation Act, § 8).

Seamen and fishermen *held* "employees" within Workmen's Compensation Act (St. 1917, p. 835, § 8, though not usually referred to as employees.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employee.]

In Bank.

Proceeding for compensation under the Workmen's Compensation Law by John Peterson, employee, opposed by the Alaska Packers' Association, employer. To review and annul an award of the Industrial Accident Commission of California for the employee, the employer applies for certiorari. Award affirmed.

Chickering & Gregory and Blair S. Shuman, all of San Francisco, for petitioner.

G. C. Faulkner, of San Francisco, for respondent Industrial Accident Commission.

H. W. Hutton, of San Francisco, for respondent Peterson.

WASTE, C. J. Alaska Packers' Association petitions this court to review and annul an award of the respondent Industrial Accident Commission made against it, as self-insurer, and in favor of respondent John Peterson, who was injured while in Alaska. Peterson entered the employ of the petitioner under contract, shipping from San Francisco as a seaman and fisherman. During the voyage to Alaska, he acted as a member of the crew of the bark Star of Iceland, performing the regular duties of a seaman. On arrival in Alaska, he was taken with the rest of the crew to one of petitioner's canneries, and put to work repairing nets and overhauling the fishing boats on the dock, where they had been stored for the winter. When that work was completed, Peterson and another employee were assigned to one of the fishing boats, which they operated for a period of about five weeks. The fishing season at the cannery closed, and the men were directed to bring their boats to the dock, to be hoisted up by a winch and placed in the warehouse for the following winter. Peterson anchored his boat near the beach, with the intention of later taking it to the dock. When he returned for that purpose, the boat, because of low tide, was stranded on the sand and mud of the beach, all but a few feet near the stern, however, being in the water. Standing on the beach, Peterson attempted, with the assistance of others, to lift the boat to float it, and in so doing strained his back and left hip, causing a fracture of the vertebra. He returned to San Francisco on the Star of Iceland as a seaman, and, on arrival, received his discharge. As the contract of employment was made in the state of California, the employer and employee were subject to the provisions of the Workmen's Compensation Law (St. 1917, p. 831). Peterson, therefore, filed an application with the Industrial Accident Commission for an adjustment of claim for compensation for the injury suffered. The commission found that the applicant sustained injury occurring in the course of and arising out of his employment, and made an award in his favor and against the employer, as self-insurer. Application for a rehearing before the commission was denied, and the employer now petitions this court to review and to set aside the award. Its main contention is that the commission was without jurisdiction over this cause, for the reason that the contract of hire was wholly maritime in character, and therefore under the exclusive admiralty jurisdiction of the courts of the United States.

[1, 2] Peterson's contract with the petitioner was undoubtedly maritime in its nature. Domenico v. Alaska Packers Assn. (D. C.) 112 F. 554, 556; North Alaska Salmon Co. v. Larsen (C. C. A.) 220 F. 93, 95; Heino v. Libby, McNeill & Libby, 116 Wash. 148, 157, 205 P. 854. We do not regard the fact that the employee worked at mending nets, performed services in loading and unloading lighters carrying the cargo to the ship, and, part of the time, while the vessel was in Alaska, slept on shore, as qualifying in any way the nature of his contract, or rendering it severable. Generally speaking, parties entering into maritime contracts contemplate the system of maritime law, and its well-known rules control their rights and liabilities, to the exclusion of state statutes. Un-

ion Fish Co. v. Erickson, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261. But, as to certain local matters, regulation of which will work no material prejudice to the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations, the rules of the maritime law may be modified or supplemented by state regulation. Western Fuel Co. v. Garcia, 257 U. S. 233, 242, 42 S. Ct. 89, 66 L. Ed. 210; Grant, Smith-Porter Ship Co. v. Rohde, 257 U. S. 469, 478, 42 S. Ct. 157, 68 L. Ed. 321, 25 A. L. R. 1008; Industrial Comm. of New York v. Nordenholt Corpn., 259 U. S. 263, 274, 275, 42 S. Ct. 473, 66 L. Ed. 933, 25 A. L. R. 1013.

[3] When a compensation act supersedes other state laws touching a liability for damages which depended upon the common law and state statutes, it does not come into conflict with any superior maritime law. And this is true whether the award under the act is made as upon an implied agreement or otherwise. Industrial Comm. v. Nordenholt Corpn., supra, pages 275, 276. In that case a stevedore, engaged in unloading a vessel lying in navigable waters, slipped and fell on the dock. He was awarded compensation under the Workmen's Compensation Law of New York, and the United States Supreme Court held that application of the local law would not work material prejudice to any characteristic feature of the general maritime law. In Grant, Smith-Porter Ship Co. v. Rohde, supra, the court held that, while the general admiralty jurisdiction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying in navigable waters, under the "circumstances stated, the exclusive features of the Oregon Workmen's Compensation Act * * * would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist." In a still more recent case, in which the record disclosed facts said by the court to be sufficient to show a maritime tort, to which the general admiralty jurisdiction would extend, the court sustained an award made under the Texas State Compensation Act (Vernon's Ann. Civ. St. Supp. 1918, arts. 5246—1 to 5246—91), saying:

> "The matter is of mere local concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law." Miller's Indemnity Underwriters v. Braud, 270 U. S. 59, 46 S. Ct. 194, 70 L. Ed. 470.

To the same effect is the decision of this court in City of Oakland v. Industrial Acc. Comm., 198 Cal. 273, 244 P. 353.

[4] The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. Netherlands American Steam Nav. Co. v. Gallagher (C. C. A.) 282 F. 171, 183. The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. Cooper v. Industrial Acc. Comm., 177 Cal. 685, 687, 171 P. 684. It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 692, 151 P. 398. When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies. De Carli v. Associated Oil Co., 57 Cal. App. 310, 207 P. 282.

[5] Peterson was injured while standing on the beach, pushing and lifting on a fishing boat in an endeavor to launch it. The work he was performing at the time of his injury had no more direct relation to navigation or commerce or to his duties either as a seaman or as a fisherman than would the work of a longshoreman loading or unloading a ship. It was essentially "land labor," nonmaritime in its nature. These circumstances serve to bring the case within the category of those relating to dock and port employees working under maritime contracts, but who sustain injuries on land. In such a case the local law may apply.

> "When an employee, working *on board a vessel in navigable waters* [italics ours], sustains personal injuries there, and seeks damages from the employer, the applicable legal principles are very different from those which would control if he had been injured on land while unloading the vessel. In the former situation the liability of employer must be determined under the maritime law; in the latter, no general maritime rule prescribes the liability, and the local law has always been applied. The liability of the employer for damages on account of injuries received on shipboard by an employee under a maritime contract is matter within the admiralty jurisdiction; but not so when the accident occurs on land." State Industrial Comm. v. Nordenholt, supra; Netherlands American Steam Nav. Co. v. Gallagher, supra.

[6] The action here is not one to recover on a contract, maritime or otherwise. The liability of the employer to pay compensation to the injured employee arises from the Workmen's Compensation Act, to which Peterson and the petitioner were subject, rather than from any agreement of the parties. The law operates on the status of the parties, and affixes certain rights and obligations to that status. North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1, 2, 162 P. 93, L. R. A. 1917E, 642. Under the circumstances here

shown to exist, application of the California Workmen's Compensation Act will not work any material prejudice to any characteristic feature of the general maritime law. Grant, Smith-Porter Ship Co. v. Rohde, supra; Industrial Comm. v. Nordenholt, supra; City of Oakland v. Industrial Acc. Comm., supra.

[7] Petitioner makes some objection to the references to Peterson as an "employee," and states: "We know of no cases involving seamen where they are termed employees." "Employee" is defined in Bouvier's Law Dictionary as "a term of rather broad significance for one who is employed; * * *" and "employed" is "the act of doing a thing and the being under contract or orders to do it." United States v. Morris, 39 U. S. (14 Pet.) 464, 475, 10 L. Ed. 543. While seamen and fishermen may not usually be referred to as "employees," there can be no question but that they come within the broad meaning of this word, as used in section 8 of the Workmen's Compensation Act.

The award is affirmed.

We concur: PRESTON, J.; CURTIS, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

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200 Cal. 572

VAUGHAN v. CALDWELL et al. (Sac. 3775.)

(Supreme Court of California. Feb. 28, 1927.)

1. Appeal and error 🔑907(2)—All presumptions favor referee's findings, where evidence on which based is not in transcript.

Where evidence before referee, on which his findings were based, is not before Supreme Court in transcript of appeal, all presumptions are in favor of such findings.

2. Partnership 🔑327(1)—Complaint, alleging violation of partnership agreement but not dissolution, held to justify accounting.

Complaint, alleging violation of partnership agreement by defendant, *held* to justify accounting and dissolution as against contention that cause of action for accounting was not stated because dissolution was not alleged.

3. Partnership 🔑328(3) — Evidence held to warrant finding that partner was entitled to salary during time that partnership was not actively engaged in construction work.

Evidence *held* to show that member of partnership doing general highway and street construction work was entitled to salary between certain dates, though partnership was not actively engaged in construction work for several months of such period.

4. Partnership 🔑328(3) — Evidence held to sustain finding of agreement by two partners to repay two-thirds of advances of third partner.

Evidence *held* to sustain finding that two of three partners agreed to repay to the other two-thirds of his advances for partnership business, in view of agreement to split profits and losses three ways, one-third each.

5. Partnership 🔑74 — Agreement to share profits and losses equally implies contract to repay proportionately advances by one partner.

Where partners agreed to share losses and divide profits equally, and one partner advanced more money than the others, there was implied contract that the others would repay their proportion of money advanced.

6. Partnership 🔑328(3) — Evidence held to warrant finding of agreement by two partners to pay interest on advances by another partner.

Evidence *held* sufficient to support finding that two of three partners agreed to pay interest to the other on moneys advanced by him for partnership business.

7. Partnership 🔑75—Interest on partner's advances held allowable to date of findings and judgment, rather than date partnership ceased to do business.

Interest on advances of one partner *held* allowable to date of findings and judgment in action for accounting and money due, which was date of dissolution of partnership under findings, rather than date when partnership ceased to do business.

8. Partnership 🔑75—Interest on partner's advances did not cease when partnership ceased to do business, where interest was to run on advances "until paid."

Interest on advances of one partner *held* not to cease when partnership ceased to do business, in view of agreement to pay interest on advances "until paid."

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by A. H. Vaughan against J. S. Caldwell and another. Judgment for plaintiff, and the defendant named appeals. Affirmed.

Frank Lamberson, of Visalia, and John G. Covert, of Hanford, for appellant.

J. L. C. Irwin, of Hanford, for respondent.

LANGDON, J. Plaintiff brought this action as a member of a partnership against the other two members of such partnership. It was alleged that the partnership was formed in February, 1918, for the purpose of doing general highway and street construction work, and that it continued to transact business as such partnership until March 1, 1921; that the parties to said partnership were to share the losses and divide the profits of the business equally between them; that it was mutually agreed that defendant Caldwell should devote all his time and attention to the partnership business and that the plaintiff and the defendant Applegarth were to devote all the time and attention that was necessary to the transaction of said partnership business, and that the plaintiff and each of the defendants were to receive a specified monthly salary for such time as was devoted by each of said partners to the partnership business; that the plaintiff gave his entire time and attention to said partnership business from on or about May 1, 1918, to March 1, 1921, and that plaintiff received no salary for said services, although each of the defendants were paid the full amount due them for their services rendered said partnership; that plaintiff has paid out and expended for and on account of said partnership business large sums of money, to wit, $35,372, in excess of the money paid and expended by defendants, and that said defendants promised and agreed to repay two-thirds of said sum of $35,372, to wit, the sum of $23,581.33 on demand, together with interest thereon at the rate of 8 per cent. per annum until paid, and that no part of said sum has ever been paid.

There are further allegations to the effect that defendant Caldwell violated the terms of the partnership agreement by failing to devote all his time and attention to said partnership business and by securing contracts for work in his own name, and specific instances of such failure are set forth.

The prayer was that an account be taken of all the partnership dealings and transactions from the time of the commencement thereof to the date of the action; that the property of said partnership be sold and the partnership debts and liabilities be paid and any surplus divided among the plaintiff and the defendants according to their respective interests and that plaintiff have judgment against defendants for the sum of $23,581.33, together with interest thereon at the rate of 8 per cent. per annum until paid, and for the sum of $4,450 salary, and for general relief.

Defendant Applegarth failed to answer, and his default was entered. Defendant Caldwell answered, admitting the formation of a partnership, but denying that this partnership continued as such later than about February 20, 1921. The answer also alleged that the partnership was wholly and completely dissolved by mutual consent and agreement of plaintiff and defendants on or about February 19, 1921. Denial is made of plaintiff's allegations that he had devoted his entire time to the partnership business between the dates named and of other matters in the complaint relating to advancement of moneys by plaintiff. It is alleged that at the time of the alleged dissolution of said partnership, all the property of said partnership was delivered by defendants to plaintiff in complete settlement, satisfaction, discharge, and adjustment of all the business and accounts of said partnership, and said property was so received by plaintiff; that the partnership has no further property or assets, but that all its property and assets remained in the possession of plaintiff from the time of the dissolution of the partnership until it was disposed of by said plaintiff for his own use and benefit.

[1] When the case came on for trial, the plaintiff asked for the appointment of a referee to take an accounting, which application was opposed by defendant and appellant upon the ground that a complete dissolution, accounting, and settlement had been had on or about February 20, 1921. Testimony was offered on behalf of the parties upon this issue, and the trial court held that no accounting had been had and that an accounting was necessary. A referee was appointed to try the issues in the accounting of the business operations and to report his findings to the court. After taking testimony for weeks, and examining books and accounts, the referee reported his findings to the court. The evidence before the referee upon which his findings are based is not before this court in the transcript of appeal. All presumptions, therefore, are in favor of the findings. The defendant excepted to the findings of the referee, and the court proceeded to take testimony upon the disputed items. Thereafter the trial court modified one paragraph of the findings of the referee so as to include an obligation upon the part of defendants to pay interest to plaintiff at the rate of 8 per cent. per annum on all sums of money advanced by plaintiff to said partnership from the date of advancement, which interest was estimated in the findings at $17,787.13.

[2] It is first contended by the appellant that the complaint does not state a cause of action for an accounting, and that the demurrer thereto should have been sustained. We think this objection is without merit. The particular attack made upon the complaint is that it does not allege a dissolution of the partnership. There were allegations of violations of the partnership agreement by defendant Caldwell, and such an allegation was held, in Bremner v. Leavitt, 109 Cal. 130, 41 P. 859, to justify an accounting and dissolution. In this case it was said:

> "It was, therefore, proper for plaintiff to allege the violation by defendants of their obligation in this regard as one of the grounds of his action, and upon which he desired an accounting; and the fact that the breach of this obligation by the defendants resulted in damage to the plaintiff does not constitute it a separate cause of action at law for damages, as contended by respondents. Such damages are but an incident of the general cause of action assigned. Partners cannot sue one another at law for any breach of the duties or obligations arising from that relation. This can only be done in chancery by asking a dissolution and accounting, and, if damages accrue from any cause in such proceeding, they must be adjusted by some appropriate method in that tribunal."

In the case of Brandt v. Salomonson, 17 Cal. App. 395, 119 P. 946, the action was brought for a dissolution and an accounting.

[3] Appellant objects to the finding of the court that the plaintiff gave his entire time and attention to the partnership business from about May 1, 1918, to March 1, 1921, and has received no salary from said partnership for such services except the sum of $1,200, and that there is now due plaintiff the sum of $4,725, and that each of said defendants is indebted to plaintiff for one-third thereof. It was found—and this finding is not attacked—that the said plaintiff and each of the defendants were to receive a salary of $150 per month for such time as was devoted by each of said copartners to said copartnership business, and that thereafter, on or about the 15th day of November, 1918, it was mutually agreed between the said partners, that each of said copartners should receive for his services the sum of $200 per month thereafter, from said copartnership business.

There is ample testimony in the record to sustain the finding of the referee and of the court that plaintiff was entitled to salary between the dates named. It is true that there was a period of several months when the partnership was not actively engaged in construction work because it had completed all its contracts. During that period plaintiff and defendant Caldwell traveled around, attempting to secure new contracts, and, while the work at that time was perhaps not as regular and constant as at other periods, nevertheless Caldwell drew his full salary for that period, and it does not appear that plaintiff neglected any work which there was for him to do in connection with said business. There appears no reason, therefore, why he should not be remunerated upon the same basis as the other two partners during the interim when the partnership was searching for new work.

[4, 5] It is objected that there is no evidence to sustain the finding that the defendants agreed to repay to plaintiff two-thirds of his advances for the partnership business. It is admitted by the answer that the plaintiff and defendants were to share the losses and divide the profits of the partnership equally between them. Therefore it follows as a matter of course that, since they were to share the losses and divide the profits equally, if the plaintiff advanced more money than the defendants, there was an implied contract that the defendants would repay their proportion of the money advanced. Furthermore, the finding under consideration is sustained by the testimony of defendant Applegarth that the plaintiff and defendants entered into a partnership to build roads, streets, etc., and that they were to "split" the profits or losses three ways, one-third each.

[6] It is contended that the evidence is insufficient to support the finding of the court that the defendants agreed to pay interest to the plaintiff upon moneys advanced by him. There is considerable testimony in the record on this question. It is not all direct and conclusive testimony, but, taken together, we think it amply supports the finding. Plaintiff testified about the meeting between the partners when the terms and conditions of the partnership were discussed, and he stated that the defendants had promised to pay him 8 per cent. on the money he advanced. There was other testimony by this same witness, and also by the defendant Applegarth, to the effect that plaintiff stated he would have to borrow money at 8 per cent. interest, and would have to receive that much upon it, and that this was acquiesced in by the defendants.

[7, 8] Appellant contends that interest upon the advances made by plaintiff should have ceased on February 20, 1921, when the partnership ceased to do any business. Authorities are cited to the effect that, where there is an agreement to pay interest upon capital contributed by one of the partners, such interest ceases with the dissolution of the firm. There are two sufficient answers to the contention made: First, the trial court adopted the finding of the referee that "it is not true that said copartnership was by mutual consent and agreement of the plaintiff and the defendants, on or about the 20th day of February, 1921, at the city of Coalinga, county of Fresno, state of California, wholly and completely or at all dissolved." It was also found that the plaintiff was entitled to a dissolution of the partnership as of the date of the findings. It would appear, therefore, that, by applying the rule relied upon by appellant, interest should be allowed to date of the findings and judgment, the date of the dissolution of the partnership.

The second answer to appellant's contention is that the reasoning of the authorities upon which he relies, and which allow no interest upon advances after dissolution, is based upon the theory that the agreement between the parties was to pay interest during the time when the advances were earning money in the business. This reasoning can have no place where there is an express agreement of the parties to pay interest to a different date, and, in the instant case it was found by the trial court that the defendants promised and agreed to repay to plaintiff two-thirds of the advances which he made for the business, "together with interest on all sums of money advanced from the date of advancement at the rate of 8 per cent. per annum *until paid*." In the face of this express agreement, no general rules governing implied agreements have any application.

The other findings of the trial court respecting the property and assets of the partnership find support in the record, and it is unnecessary to set forth herein the evidence appearing in the transcript.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; RICHARDS, J.; SEAWELL, J.

200 Cal. 505

DWYER v. CITY COUNCIL OF BERKELEY et al. (S. F. 12160.)

(Supreme Court of California. Feb. 23, 1927.)

1. Municipal corporations 🔑108—Only ordinances involving exercise of legislative prerogative are subject to initiative and referendum.

Only municipal ordinances which involve an exercise of the legislative prerogative are subject to the initiative and referendum.

2. Municipal corporations 🔑601—Zoning ordinances are within police power (Const. art. 11, § 11; St. 1917, p. 1419).

Zoning ordinances are police power enactments, designed for promotion and perpetuation of people's moral and material welfare, which cities are authorized to enact by Const. art. 11, § 11, and St. 1917, p. 1419.

3. Municipal corporations 🔑108—All municipal legislation, not excluded expressly or by necessary implication, held subject to referendum under charter (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548; Const. art. 11, § 8).

Under Berkeley City Charter (St. 1909, p. 1208 [adopted pursuant to Const. art. 11, § 8]) art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548, legislation on every municipal subject is subject to reference to people for approval or rejection, unless excluded expressly or by clear and necessary implication.

4. Municipal corporations 🔑108—Initiative and referendum laws merely reserve to people right to exercise inherent legislative power.

Legislative power of municipality resides in people thereof, who simply withdraw from legislative body, and reserve to themselves right to exercise part of their inherent legislative power by enactment of initiative and referendum laws.

5. Municipal corporations 🔑108—Local character of zoning ordinance does not preclude application of referendum (Const. art. 11, § 11; St. 1917, p. 1419; Berkeley City Charter, art. 14, § 93, as amended by St. 1923, p. 1548).

As city council, representing electorate of entire city, had authority, under Const. art. 11, § 11, and St. 1917, p. 1419, to pass zoning ordinance, local character thereof is insufficient to preclude application of referendum under Berkeley City Charter (St. 1909, p. 1208) art. 14, § 93, as amended by St. 1923, p. 1548.

6. Municipal corporations 🔑108—Initiative and referendum held not inapplicable to rezoning ordinance because of more immediate interest of residents of particular locality (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548).

That residents of particular locality rezoned are more immediately and apparently affected than residents of other portions of city does not render broad initiative and referendum provisions of Berkeley City Charter (St. 1909, p. 1208) art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548, inapplicable to such amendment of general zoning ordinance, in view of substantial interest of electors of entire municipality.

7. Municipal corporations 🔑108—Initiative and referendum held not inapplicable to rezoning ordinance as depriving residents of opportunity to present arguments under general zoning ordinance (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548).

Initiative and referendum provisions of Berkeley City Charter (St. 1909, p. 1208), art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548, *held* not inapplicable to ordinance amending general zoning ordinance by reclassifying certain territory, as depriving residents thereof of opportunity to present arguments in manner provided by amended ordinance.

8. Municipal corporations 🔑108—Constitutional right to submit legislative questions to direct vote cannot be abridged by procedural requirements of superseded municipal ordinance (Const. art. 4, § 1).

Constitutional right, reserved by people, to submit legislative questions to direct vote (Const. art. 4, § 1), cannot be abridged by any procedural requirements of a superseded municipal ordinance dealing with same subject of legislation.

9. Municipal corporations 🔑108—Ordinance requiring two-thirds vote of city council to rezone territory held inapplicable to initiative and referendum legislation (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548).

Ordinance requiring two-thirds vote of city council to rezone certain territory, over protest of owners of 20 per cent. of area included, etc., *held* inapplicable to direct legislation under initiative and referendum provisions of Berkeley City Charter (St. 1909, p. 1208) art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548.

10. Constitutional law 🔑70(3)—Wisdom of initiative and referendum in zoning matters, more acutely affecting given district than entire community, is question of political policy for people, not courts (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548).

Wisdom of giving general public right to invoke initiative and referendum in zoning matters under Berkeley City Charter (St. 1909, p. 1208) art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548, when effect may be more acutely felt in given district than by community at large, is question of political policy, to be determined by people, not courts.

11. Municipal corporations ⚷108—Doubt as to application of initiative and referendum to rezoning ordinance must be resolved in favor of constitutional prerogative (Berkeley City Charter, art. 13, § 92; art. 14, § 93, as amended by St. 1923, p. 1548; Const. art. 4, § 1).

Any doubt as to whether people intended to apply initiative and referendum provisions of Berkeley City Charter (St. 1909, p. 1208), art. 13, § 92, and article 14, § 93, as amended by St. 1923, p. 1548, to amendment of general zoning ordinance reclassifying certain territory, must be resolved in favor of giving effect to constitutional prerogative (Const. art. 4, § 1).

In Bank.

Petition by Anthony A. Dwyer for a writ of mandate to the City Council of the City of Berkeley and others. Writ granted.

J. E. Pemberton, of San Francisco, and Albert M. Hardie, of Oakland, for petitioner.

Earl Sinclair, City Atty., of Berkeley, and Calkins, Hagar, Hall & Linforth, of San Francisco, for respondents.

SEAWELL, J. Petition for writ of mandate to compel the city council of the city of Berkeley to either repeal or submit to a referendum vote of the people an ordinance passed by said city council, reclassifying as a business and public use district of class 4 certain property designated in the comprehensive zoning ordinance of said city as a residence district of class 1, wherein only dwellings, flats, clubs, churches, railroad shelter stations, apartment houses without stores, and hotels without stores are permitted. It appears from a stipulation as to facts entered into by the parties, and from the petition for the writ and return to the alternative writ, that petitioner is a resident, taxpayer, and elector of the city of Berkeley, who owns and resides upon property in the vicinity of the property described in the ordinance of reclassification, and who is also one of the signers of the petition by which the referendum is sought to be invoked. The city council of Berkeley, the mayor, the respective members of said council, and the city clerk are named as respondents. The area reclassified comprises approximately a $\frac{1}{550}$ part of the city, and is owned by the University of California, which, it is alleged, desires and intends to conduct a poultry farm and experiment station on said land, which project contemplates the raising of chickens on a large scale in connection with its courses in poultry husbandry. The intention of raising chickens on a large scale on said lands is denied, but it is admitted that it is the purpose of said university to use a portion of said land as "an experiment station in connection with instruction in poultry husbandry." It is alleged in the return to the alternative writ that the property is bounded on the west by a district classified in the general zoning law as an industrial district of class 6, in which factories not obnoxious, warehouses, including any business use, stables, feed and fuel yards, aviation fields, and residences of any kind included in class 1 are permitted; on the north by a district of class 4, in which schools, public, and semipublic buildings, playgrounds, greenhouses, nurseries, and residences of any kind included in class 1 may locate, and on the east and south by a district classified as a residence district of class 1.

The general comprehensive zoning ordinance of the city of Berkeley was adopted by city council on June 1, 1920, and is designated Ordinance No. 666, N. S. Ordinance No. 1190, N. S., which is under consideration in the instant case, was passed by said city council on May 25, 1926, as an amendment to the general zoning ordinance, after proceedings for amendment had been duly and regularly taken in accordance with the provisions of Ordinance No. 1130, N. S., which is also an amendment to Ordinance No. 666, N. S., and provides the procedure to be followed in reclassifying property pursuant to Ordinance No. 666, N. S. Within 30 days after the passage of said Ordinance No. 1190, N. S., Albert M. Hardie, one of the attorneys for petitioner, pursuant to the referendum provisions of the Berkeley charter, appeared at the office of the city clerk for the purpose of filing a referendum petition, and requested said city clerk to compare, examine, and verify the signatures, and certify to the sufficiency of the petition. The city clerk refused to accept, receive, or file the same. Thereafter said Hardie appeared before the council in regular session assembled as the representative of petitioner and others. A resolution was passed at said meeting, wherein it was recited that the council refused to accept the petition, for the reason that it had been advised by its legal adviser, the city attorney, that said Ordinance No. 1190, N. S., was not a proper subject for referendum. The point that the petition was not duly presented will be considered hereafter.

It is the contention of respondents that an ordinance such as No. 1190, N. S., which amended the general zoning law, is neither within the initiative and referendum provisions of the state Constitution nor the statutes of the state, nor the provisions of the charter of the city of Berkeley.

The city of Berkeley operates under a free holder's charter, which went into effect July 1, 1909 (Stats. 1909, p. 1208), and was adopt-

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ed in pursuance of the provisions of article 11, § 8, of the state Constitution. The provisions of said charter relating to the initiative and referendum are articles 13 and 14. Section 92 (article 13) pertaining to the initiative power, is as follows:

> "Direct legislation.
>
> "Sec. 92. (1) *Any* proposed ordinance may be submitted to the council by a petition signed by registered electors of the city equal in number to the percentage hereinafter required." (Italics supplied.)

The subsequent sections provide that, if the petition accompanying the proposed ordinance is signed by electors equal in number to 15 per centum of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, the council shall pass the ordinance without alteration within 20 days after the attachment of the clerk's certificate of sufficiency to the petition, or call a special initiative election within 25 days. If electors equal in number to at least 5 per centum, but less than 15 per centum. have signed the petition, the ordinance is to be passed by the council, or submitted to a vote of the people at the next general election, rather than at a special election. The referendum provision (article 14, § 93), as amended in 1923 (Stats. 1923, p. 1548), is as follows:

> "Mode of protesting against ordinances.
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> "Sec. 93. *No* ordinance passed by the council shall go into effect before thirty days from the time of its final passage *except when otherwise required by the general laws of the state or by the provisions of this charter respecting street improvements, and except the ordinance making the annual tax levy, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency, and is passed by a seven-ninths vote of the council.* * * * If during said thirty days a petition signed by qualified electors of the city equal in number to at least ten per centum of the entire vote cast for all candidates for mayor at the last preceding general municipal election at which a mayor was elected, protesting against the passage of such ordinance, be presented to the council, the same shall thereupon be suspended from going into operation and it shall be the duty of the council to reconsider such ordinance, and if the same be not entirely repealed, the council shall submit the ordinance, as is provided in article 13 of this charter, to the vote of the electors of the city, either at the next general municipal election or at a special election to be called for that purpose, and such ordinance shall not go into effect or become operative unless a majority of the qualified electors voting on the same shall vote in favor thereof. * * *" (Italics supplied.)

It is to be observed that these provisions were embodied in the city charter of Berkeley before the electors of the state had, by constitutional amendment (article, 4, § 1), reserved to themselves "the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature," and also "the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature," and prior to the day they provided for the reservation of the initiative and referendum to the electors of each county, city and county, city and town of the state by the following provision:

> "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the state, to be exercised under such procedure as may be provided by law. * * * Nothing contained in this section shall be construed as affecting or limiting the present or future powers of cities or cities and counties having charters adopted under the provisions of section eight of article 11 of this Constitution. In the submission to the electors of any measure under this section, all officers shall be guided by the general laws of this state, except as is herein otherwise provided. This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." Article 4, § 1, amendment adopted October 10, 1911.

Pursuant to said amendment, the Legislature enacted measures providing for direct legislation in cities other than those having a freeholder's charter containing provisions for direct legislation. Stats. Ex. Sess. 1911, p. 131; amended Stats. 1915, p. 319; amended Stats. 1917, p. 655. These measures prescribe a procedure similar to that outlined by the city of Berkeley charter.

The constitutionality and validity of charter provisions resembling those contained in the Berkeley charter were upheld in the case of In re Pfahler, 150 Cal. 71, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911, in which amendments to the Los Angeles city charter providing for the initiative and referendum were under review. In earlier cases, passing upon the application of the initiative and referendum to other types of municipal legislation, it has been said that, if the right of referendum can be invoked, the corollary right to initiate legislation must be conceded to exist. Chase v. Kalber, 28 Cal. App. 561, 153 P. 397; Starbuck v. City of Fullerton, 34 Cal. App. 683, 168 P. 583.

[1, 2] It is plain that only ordinances of a municipality which involve an exercise of the legislative prerogative are subject to the initiative and referendum. Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 P. 977. Zoning ordinances are police power enactments, designed for the promotion and perpetuation of the moral and material welfare of the people. Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381, 38 A. L. R. 1479, and cases therein cited. The power to enact police regulations is conferred upon cities by section 11 of article 11 of the Constitution, and municipalities are expressly authorized to establish districts or zones within which the use of property may be regulated by an act of the Legislature passed in 1917. Stats. 1917, p. 1419.

[3] Not only have the citizens of Berkeley in their charter failed to expressly exclude from the operation of the initiative and referendum ordinances of the kind in question, but they have phrased the sections pertaining to these powers in such broad, general, and unambiguous language as to impel the conclusion that it was intended that legislation on every municipal subject should, unless expressly or by clear and necessary implication excluded, be subject to a reference to the people for approval or rejection. In the charter provisions concerning the initiative, the people reserved to themselves the right to enact *any* proposed ordinance by initiative proceedings (article 13, § 92), while the corresponding sections authorizing the use of the referendum as a mode of protest against legislative action provide that *no* ordinance, with certain exceptions expressly excluded and not applying in the instant case, shall go into effect for 30 days after its passage, and that during such time referendum proceedings may be instituted. Article 14, § 93.

[4, 5] Respondents contend that, although a zoning ordinance passed as an amendment to a general and comprehensive zoning law is not expressly excluded from the referendum provisions of the charter, it is by necessary implication so excluded. They argue that such an ordinance is local in nature, and directly affects only those within the district rezoned, and, perhaps, in addition, those within the "area of protest," as defined in the zoning ordinance, and, further, that to subject such an ordinance to the referendum would be to render nugatory certain provisions of the zoning law protecting those who own and control property within the district to be reclassified and within the area of protest. From these premises they draw the conclusion that it cannot be presumed that the people intended, in the absence of a clear declaration to that effect, that zoning ordinances of the kind in question should be subject to the referendum. With this argument we cannot agree. To do so would be to disregard the fundamental nature of the initiative and referendum powers, and to ignore the theory underlying the enactment of zoning laws.

If it be conceded that the ordinance in question is local in character, and directly affects only a small proportion of the population, there is nothing theoretically inconsistent in permitting the electorate of the entire city to pass upon it by a referendum election or to enact it by initiative proceedings. It is a fundamental tenet of the American system of representative government that the legislative power of a municipality resides in the people thereof, and that the right to exercise it has been conferred by them upon their duly chosen representatives. By the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body, and reserved to themselves the right to exercise a part of their inherent legislative power. Since the legislative body exercises power derived from the people, and since the city council, the legislative body of Berkeley, representing the electorate of the entire city, admittedly had authority to pass the ordinance in question, no violence is done to principles of statutory construction in holding that the local character of the ordinance, if it be of such character, is not of itself sufficient to preclude an application of the referendum. Ex parte Ellsworth, 165 Cal. 677, 133 P. 272; Crippen v. Farrier, 166 Cal. 69, 134 P. 1139. There may be reasons or considerations of policy why the people might not wish to reserve for themselves powers of direct legislation in regard to certain ordinances affecting one portion of the city more directly than other portions, but that is not a consideration of sufficient moment to overthrow an important legislative prerogative. It is a characteristic of much legislation, especially in this age of intense specialization of occupations and interests, that it operates, to a greater or less degree, more directly upon one group or section of the population than upon another, and the distinction between zoning legislation and many other types of legislation lies, not so much in the fact that a certain proportion of the population which will be less directly affected may be permitted by the operation of the initiative and referendum to establish the rule to be applied to those more vitally and immediately affected, but, rather, that this result becomes more apparent in the case of zoning legislation reclassifying a district, for the reason that the section of the population most directly affected may more easily be segregated, by virtue of ownership or control of land within a certain geographical area, than in the case of other types of legislation.

[6] If the comprehensive zoning law districting all portions of the city were before us, it could not be successfully contended that the ordinance would not be subject to the referendum, for the reason that residents of the city might be more vitally concerned in and affected by the particular regulations relating to the district in which they owned property or resided than in the restrictions applying to other districts. The vice of respondents' argument consists in placing undue stress upon the sectional interest which residents of a particular district may be expected to have in restrictions more immediately affecting their district, and in underemphasizing the interest of the community as a whole in the existence of a compre-

hensive zoning plan. It must be presumed that the electorate will act in the interests of the entire city, and of the part to be affected by the proposed legislation. If the law operates more directly upon only a part of the citizens, evil intent or design cannot be presumed. It is important to those who own property or reside within a certain district, not only that the use to which property may be put in such district be controlled and regulated, but that zoning restrictions embracing the entire city and embodying a well-defined plan be adopted. This proposition is aptly stated in Zahn v. Board of Public Works, 195 Cal. 497, 513, 234 P. 388, 395, in which it is said:

> "The power of the city council to zone is not limited in our opinion to the protection of established districts. To so hold would be to defeat in a large measure the very purpose of zoning which is to control future development in the best interest of the city. Zoning in its best sense looks not only backward to protect districts already established but forward to aid in the development of new districts according to a comprehensive plan having as its basis *the welfare of the city as a whole.*" (Italics supplied.)

The restrictions relating to any portion of the city are an integral part of an entire scheme, and should be the expression of a definite policy. The people in each zone are interested, not only in having a comprehensive zoning law, but in what that law shall be. A zoning ordinance as amended becomes in effect a different ordinance. Even if it be granted that a reclassification of an area as small as that involved in the instant case cannot be said to effect a new scheme, the same rule must necessarily be followed as would be applied if a larger area had been reclassified, and it may be observed that a piecemeal rezoning of small areas may result in a plan differing in vital particulars from that originally contemplated. In view of the substantial interest which the electors of the entire municipality have in its zoning scheme, it cannot be held that, because residents of the particular locality rezoned may be more immediately and apparently affected than are residents of other portions of the city, the broad initiative and referendum provisions of the charter and Constitution do not apply to an amendment to the general zoning law which reclassifies a portion of the city's territory.

[7, 8] It is next contended that an application of the initiative and referendum provisions to a zoning ordinance such as here involved will deprive the residents of the reclassified district and of the area of protest of rights accorded them by the zoning law. Proceedings for the reclassification of property described in the general zoning law may be commenced by written petition of a citizen, by the city planning commission, or by resolution of the city council. Before final action may be taken by the council, two hearings are held, the first before the city planning commission, and the final hearing before the council. Notices of both hearings are posted within the district affected and the area of protest, and those within such districts may file written protests. The area of protest includes the property which is sought to be reclassified, and all frontages within 200 feet of any part of the frontage of the property proposed to be reclassified, or within 300 feet, if the property sought to be reclassified consists of two or more blocks of land. At the hearing before the city planning commission, both petitioners and protestants must be given full opportunity to present their views and to be heard. At the hearing before the council, the written report of the city planning commission, based on the hearing before it and upon its investigations is read, and each side is allowed 15 minutes to present arguments. The council may then proceed to vote upon the matter in the same manner and with the same effect as in the case of other ordinances, except that a two-thirds vote is required in the event that a protest has been filed representing 20 per cent. or more of the area of the property included in the proposed reclassification, or 20 per cent. or more of the frontage of property other than that proposed to be reclassified, but within the area of protest. Section 12, Ordinance 1130, N. S., city of Berkeley.

Complaint is made that, if the referendum be applied to the proposed amendatory zoning ordinance, the persons most directly affected thereby shall have lost the opportunity to present their arguments for and against the proposed measure to the electorate in the manner provided by the ordinance. The answer to this contention is that all persons interested in the measure had to the moment of its adoption an opportunity to appear and oppose or advocate the passage of the proposed ordinance. So far as the adoption of the ordinance was concerned, no right was denied them. By the petition for a referendum the matter has been removed from the forum of the council to the forum of the electorate. The proponents and opponents are given all the privileges and rights to express themselves in an open election that a democracy or republican form of government can afford to its citizens upon any municipal or public affair. The ordinance procedure served its purpose, and, if there had been no referendum, the adoption of the ordinance would have been complete. It is clear that the constitutional right reserved by the people to submit legislative questions to a direct vote cannot be abridged by any procedural requirements of a superseded municipal ordinance dealing with the same subject of legislation.

[9] No weight can be given to respondents' cause by reason of the provisions of section 12, Ordinance No. 1130, N. S., which provide that under ordinary conditions a majority vote of the council is sufficient to effect a reclassification, but which further provide that, in the event of protest filed representing 20 per cent. or more of the area of the property included in the proposed reclassification, or 20 per cent. or more of the frontage of property other than that proposed to be reclassified, but within the area of protest, a reclassification may only be effected by a two-thirds vote of the council. Said provisions affect only legislation by ordinance, and have not the slighest bearing or influence upon direct legislation.

[10] Doubtless amendments to the zoning ordinance will continue to be made by action of the council without the intervention of the initiative or referendum, and we do not hold here that the ordinance may not be amended in the manner proposed by the city council. The policy of giving to the public generally the right to invoke the initiative and referendum in matters of zoning when the effect may be more acutely felt in a given district than by the community at large may be questioned as the wisest exercise of power in such cases. But this is a question of political policy to be determined by the people. We see no dangers sufficiently imminent to warrant this court in holding that it was the intention of the framers of the law to exclude the ordinance in question from the operation of the initiative and referendum.

We have been cited by respondents to three cases upon which they chiefly rely as authorities sustaining their contention. We refer to them in the order in which they were filed: Hopping v. Council of the City of Richmond, 170 Cal. 605, 150 P. 977; Chase v. Kalber, 28 Cal. App. 561, 153 P. 397; Starbuck v. City of Fullerton, 34 Cal. App. 683, 168 P. 583. The opinion in the first case above cited was written by former Justice Shaw. The question before the court in that case was whether a certain resolution adopted by the council of the city of Richmond accepting a proposition of the Harbor Center Land Company offering to donate the sum of $4,000 toward the cost of erection of a new city hall on a block of land given by said company to the city of Richmond, on condition that the city appropriate at least an equal amount for the construction of said city hall on said lot, and that, when completed, it should be occupied and used by the city as such hall, provided the deed was approved by the city attorney, was subject to referendum proceedings. The council held that it was not. The question was tested by the issuance of a writ of mandate. The court held that the resolution was a proper question to be submitted to the voters of the city. In his observations on the power of the referendum, Mr. Justice Shaw, in very guarded language, which is admittedly dicta, said:

> "There may be grounds for excluding from the operation of these powers legislative acts which are special and local in their nature and in which the entire body of citizens who shall exercise the power of referendum and initiative is not interested, such as resolutions to make local improvements and the like. This question is not before us, for the matters determined by the resolution are not local to any particular part of Richmond but apply generally to, and interest all in the entire city. * * * Inasmuch as the question will doubtless be brought before us in the future we desire to state here that we express no opinion on the subject and that what we have said must not be understood as having any bearing thereon."

There is nothing of an authoritative character in the case which aids respondents in the instant case.

[11] The other two cases cited are street improvement cases, which were local in character, and did not arise in cities governed by freeholders' charters. Street improvement laws must from the nature of the results to be attained operate upon districts or fractional parts of cities, and it was not within the contemplation or intention of the framers of the law that they should be treated as general comprehensive schemes. In none of the street improvement cases cited was the question of an amendment affecting an ordinance that operated upon all portions of the municipality and had been adopted in its entirety touched upon. In the instant case the zoning law from the first was treated by the council as a general, comprehensive plan, molded, fashioned, and balanced with reference to the city as a whole. In Chase v. Kalber, supra, Mr. Justice Hart, in a very learned and analytical discussion, points out the impracticable results that would follow if the street improvement acts were made subject to the operation of the initiative and referendum provisions of the law, and the serious hampering of the orderly administration of the public business that would follow. He arrives at the conclusion that, by reason of the chaos and disorder that would follow, it could not have been the intention of the people to apply the referendum and initiative to a law that was essentially local in character. No such argument can be applied to the situation confronting us. If the question was a doubtful one, we would be required by the rules of statutory construction to resolve the doubt in favor of giving effect to the constitutional prerogative. It is interesting to here note that the charter provisions of the city of Berkeley (article 14, § 93) impliedly exempt street improvement ordinances from the operation of the referendum.

There is no merit in the claim that the petition by which the referendum was sought to be invoked was not presented to the clerk and council in the time and manner provided by law. We have examined the stipulation of counsel, which sets forth all that was done by the representative of the petitioners in presenting the referendum petition, and are fully satisfied that respondents have no legal grounds upon which to base the claim that the petition was not properly and legally presented and offered for filing.

A peremptory writ of mandate will issue directing the city clerk of the city of Berkeley to indorse the date upon which the petition was presented to her, and to examine the same to ascertain whether it conforms with the requirements of the charter of the city of Berkeley, and, if found to conform to the provisions of said charter in such cases made and provided, and particularly to the provisions of article 14, § 93, and section 94, and the provisions of article 3 which affect the question, to file the same; and, further, directing the mayor and council of said city, if said petition shall be found to be legal and sufficient in all respects, to either repeal said Ordinance No. 1190, N. S., or submit the same to the vote of the electors of the city of Berkeley, as in section 93, article 14 provided, and to perform all other acts that may be meet and proper in the premises.

It is so ordered.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.

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81 Cal. App. 381

PEOPLE v. BARGALA. (Cr. 961.)

(District Court of Appeal, Third District, California. Feb. 17, 1927.)

1. Larceny 🔑68(1)—Question of guilt of grand larceny for stealing and carrying away telephone toll cable held for jury.

In prosecution for larceny of telephone toll cable, alleged to have been sold to junk dealer by defendant and another, question of defendant's guilt *held* for jury.

2. Criminal law 🔑1159(2)—Law of reasonable doubt does not apply to consideration of evidence on appeal.

Rule that evidence in criminal case must be such as to show guilt beyond reasonable doubt does not apply to consideration of case by appellate court after verdict of guilty.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Harry Bargala was convicted of grand larceny, and he appeals. Affirmed.

Emanuel Hendricksen, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant was convicted in the superior court of Yolo county, upon an information charging him with the crime of grand larceny, and he appeals to this court from the judgment of conviction and the order denying his motion for a new trial.

The only point upon which the defendant relies for a reversal is that the evidence does not support the verdict.

[1] The information states that, on or about the 26th day of August, 1926, in the county of Yolo, the defendant stole and carried away certain personal property, to wit, 150 feet of "telephone toll cable, then and there of the value of $210, * * * and then and there the property of the Pacific Telephone & Telegraph Company." A prior conviction of burglary of the second degree, a felony, in the superior court of Amador county, is also charged in the information. On his arraignment, the accused admitted the prior conviction charged in the information, and pleaded not guilty to the crime likewise charged against him.

As to the facts there is no dispute. It was shown that, in the month of August, 1926, the Pacific Telephone & Telegraph Company, a corporation, was engaged in erecting or installing, as a part of its telegraph and telephone line between the cities of Sacramento and San Francisco, a telegraph and telephone cable at a point known as Mikon Tower, situated in Yolo county, a short distance from the city of Sacramento, and along and near the tracks of the Sacramento Northern Railroad Company. The cable is composed of a large number of wires, and is inclosed in a leather casing. On the 25th day of August, 1926, the cable at the point mentioned above had been put in place on the poles, and in the evening of that day was observed by one of the employees of the company, who was then passing that point on a train of the Sacramento Northern Railroad, to be in place. On the following morning (August 26th), about 9 o'clock, it was discovered by the employees of the telephone company engaged in constructing the cable that approximately 150 feet of the cable at the point above indicated had been removed from the poles and taken away. An investigation followed, with the result that the material composing that part of the cable which had been removed was found at the Acme Junk Company's establishment, at 1916 Twentieth street, Sacramento. The material consisted of 431 pounds of copper wire and 750 pounds of lead. M. Franzoni, buyer for said junk company, testified that, between the hours of 3 and 4 o'clock of the 26th day of August, 1926, the defendant and one Lon Yarnell appeared at the junk shop mentioned in a passenger or touring car; that, while the defendant remained in the car, Yarnell got out of the car, went to where the witness was then standing, and proposed to the latter the sale "of some copper wire and lead." Yarnell asked Franzoni what prices he was paying for such material, and the latter gave the former the prices he was paying. Yarnell agreed to the prices, and the copper wire and lead were then removed from the touring car in which Yarnell and defendant went to the junk shop, and was weighed. It had been cut into small pieces. Yarnell, defendant, and a man employed at the junk shop removed the copper wire and lead from the car. After the material was weighed and so found to weigh something over 1,100 pounds, Franzoni delivered to Yarnell a "ticket" entitling him to be paid at the office of the junk company the aggregate sum of $92.05. Franzoni testified that he had known defendant for some time prior to the date of the transaction in question by the name of Moore. As above intimated, the copper wire and the lead sold by Yarnell to the Acme Junk Company was identified by employees of the telephone company as the wire and the lead taken from the cable above mentioned.

It appears that Yarnell had not been apprehended down to the time of the trial of Bargala.

The defendant did not testify at the trial. After his arrest, however, he was interviewed relative to the larceny by one Lydon, a special agent of the Public Utilities Protective Bureau, whose business is that of investigating crimes committed against the properties of certain public utilities in this state, and in that interview, which was conducted by said agent in the presence of a detective of the Sacramento police department and a constable of Yolo county, the defendant made a statement as to the part he took in the transaction. Lydon testified that Bargala denied having been a party to the asportation of the cable, but admitted that he had been employed by one Jess Golightly on August 26, 1926, to haul, by means of his automobile, the material from a certain point on what is known as the Elkhorn road, in Yolo county, to the place of business of the Acme Junk Company, in Sacramento; that he was to receive from Golightly $25 for the service so performed; that, on the afternoon of the day named, accompanied by Golightly, he did haul the wire and lead from the Elkhorn road to said junk company's establishment in his passenger car; that, arriving at the junk house, Golightly negotiated the sale of the material to said company through Franzoni; that Golightly received from Franzoni a "ticket" for the total proceeds of the sale ($92.05), and that he (Golightly) handed the ticket to defendant, who thereupon went to the cashier's office of the junk company and presented it to the cashier, who delivered to him (defendant) the amount the ticket called for; that he (defendant) thereupon delivered to Golightly all the money but the sum of $25, which the latter agreed to pay defendant for his services in conveying the material to the junk company's place of business. Bargala stated to Lydon that he became acquainted with Golightly, who, it is practically admitted, is none other than the man known to Franzoni as Lon Yarnell, in the "can," meaning a county jail, wherein both were at the same time confined. He further likewise stated that, after the sale of the wire, etc., he went to the town of Broderick, Yolo county, from which place he immediately went to Stockton, where he took a room at the Elmhurst Rooming House. Lydon testified that on August 31, 1926, he went to Stockton and called at the Elmhurst Rooming House and that the register of said house contained the names of Mr. and Mrs. Harry Bargala and J. B. Yarnell, they having registered at the rooming house on August 27, 1926. Bargala and his wife were assigned on the register to Room No. 6 and Yarnell to Room No. 2.

The foregoing involves a synoptical statement of all the testimony received in the case. It is clear from the circumstances, as the evidence revealed them, that we cannot say, as a matter of law, that the verdict is not sufficiently supported. The situation, briefly recapitulated, is this: That the defendant and Yarnell or Golightly, as the defendent referred to him, were prior to the time that the property was stolen, personal acquaintances, they having first met each other when both were at the same time confined in a county jail; that defendant, as the jury were warranted in inferring from the fact that he did not use a truck for the purpose, was not in the trucking business, but, for the purpose of conveying the stolen property to the junk company's place of business, used a passenger or touring car; that to Yarnell was personally delivered the voucher or ticket authorizing the cashier of the junk company to pay the amount for which the property was sold, but, for some reason unaccounted for, he gave the voucher or ticket to defendant to present to the cashier and receive the money thereon, and that defendant did personally receive the cash called for by the voucher; that defendant, according to his own admission, on the day following that of the completion of the transaction, went to the city of Stockton and there took a room at a rooming house; that Yarnell registered at the same rooming house at the same time, from which the jury could well have inferred, and it may be assumed did conclude, that the two men went to Stockton together. All these were significant circumstances, and, unexplained, as they were not so explained, upon some satisfactory hypothesis consistent with the innocence of the accused, may justly be regarded, as probably the jury so regarded them, as of sufficient incriminatory force to persuade to the conviction, beyond a reasonable doubt, that the defendant was a party to the asportation of the property. The jury were not required to accept as verity that part of the defendant's statement to Lydon that he received but $25 of the total sum for which the property was sold. That part of the statement would, of course, be consistent with the defendant's claim that he had nothing to do with and had no knowledge of the act or fact that the property was stolen and that the extent of his connection with the transaction was the fact that he was merely employed to haul the property to the junk house. Naturally (the jury could have reasoned) the defendant, to support his defense, would, even though it were not true, fix the amount received by him at much less than one-half the total amount for which the property was sold, and, from the circumstances showing his acts and conduct with respect to the transaction, the jury could have reached the conclusion, and, without relying upon their imagination or upon suspicion, that the defendant received a greater sum than $25 from the proceeds of the sale. This circumstance we have particularly noticed, because the counsel for the defendant, in his brief as well as in his oral argument, gives and gave it special emphasis as in the establishment of the proposition that the defendant would have received a much larger sum than $25 out of the proceeds of the sale of the property had he really been a particeps criminis in the larceny.

[2] Counsel cites several cases in which the salutary and time-honored rule is repeated that, to justify the conviction of a party charged with the commission of a public offense, the evidence must be such as to show his guilt beyond a reasonable doubt. That rule of law, however, is one which must be addressed to and applied by the jury trying the accused in their consideration of the evidence, and is not pertinent in the consideration of the case by the courts of appeal. The latter courts never apply the rule of reasonable doubt in their consideration of the evidentiary phases of criminal cases on appeal, although they are legally at liberty to hold, where the record justifies or requires it, that, as a matter of law, the evidence in a given case is insufficient to uphold the verdict. As we have declared, we do not feel that we are justified in holding, as a matter of law, that the evidence is insufficient to uphold the verdict in the instant case.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

81 Cal. App. 309

PEOPLE v. COSTA. (Cr. 1329.)

(District Court of Appeal, First District, Division 1, California. Feb. 14, 1927.)

1. Criminal law ⚷1036(1)—Admissibility of confession cannot first be raised on appeal.

Where no objection is made to introduction of confession, nor motion to strike it out, question of its admissibility cannot be raised on appeal.

2. Assault and battery ⚷92—Evidence held to sustain conviction of assault with deadly weapon.

Conviction of assault with a deadly weapon *held* sustained by evidence.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Annibal Costa was convicted of assault with a deadly weapon, and he appeals. Affirmed.

Ernest S. Leslie and Frank W. Creeley, both of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant, Annibal Costa, and one Jack Sanders, were charged jointly with the crime of an assault with a deadly weapon, alleged to have been committed upon the person of James M. Page. Sanders entered a plea of guilty, but Costa stood trial, was found guilty as charged, and has appealed from the judgment of conviction and the order denying his motion for new trial.

Appellant's conviction was based upon evidence showing that he had aided and abetted in the commission of the crime. Part of such evidence consisted of incriminating admissions, amounting to a confession of guilt, made by him to Thomas F. Gallagher, a police inspector, the day following the assault, and related to the jury by Gallagher, after preliminary proof had been adduced to the effect that the same were made freely and voluntarily, without previous inducement, promise of leniency, and not by reason of duress, intimidation, or threats. As grounds for reversal, appellant contends that, despite the preliminary proof mentioned, other evidence was adduced showing that said admissions were obtained from him while he was suffering from the effects of corporal punishment inflicted upon him the day before by J. G. Garbutt, the assistant superintendent of the institution wherein the assault occurred, and that therefore said admissions were not freely and voluntarily made, and should have been excluded.

The crime was committed in the Alameda County Detention Home, appellant and Sanders, with other juvenile offenders, being at the time confined therein. Page was superintendent of the home, and was assaulted when he entered the corridor of the institution preparatory to giving the inmates thereof their noonday meal, being severely beaten on the head and hands by Sanders with an iron strap hinge which had been wrenched from a bunk in appellant's cell. Before entering the corridor, Page requested the inmates to go to their cells, which adjoined the corridor. Believing they had done so, he sought to lock the cells from without by working a lever, and thereupon entered the corridor. As he passed through the entrance gate, Sanders, who was concealed near by, struck Page repeatedly with said iron strap hinge, exclaiming, "Lay down, or I will murder you." Although bleeding profusely, Page called for help, and Garbutt came to his rescue. Sanders at that time was working the lever to open the cells, and appellant was just coming out of his cell, but was ordered back by Garbutt.

Thereupon Garbutt, after removing the iron strap hinge with which the assault was made from Sanders' hip pocket, assisted Page into the visitors' room, where first aid was rendered. Shortly afterwards Page and Garbutt returned to the corridor for the purpose, apparently, of locking Sanders in his cell and of searching the place for dangerous weapons. Garbutt testified that, while the search was being made, violence was used on both Sanders and appellant; but he further testified, in justification of the use of such violence on appellant (and his testimony in this regard was not disputed by appellant), that appellant was at the time attempting to injure himself by slashing his wrist with a piece of broken glass; that after calling upon him to desist, which he refused to do, and having attempted unsuccessfully to restrain him physically from carrying out his purpose, he struck appellant on the chin with his fist, rendering him unconscious, and thereupon took the piece of glass away from him.

The next day, the evidence shows, appellant, in the presence of Sanders, Page, and one Flynn, admitted to Inspector Gallagher, in answer to questions propounded by the latter, that he had planned the assault with Sanders the day before it was executed, after having heard some of the other boys discuss a plan to escape; that in pursuance of said plan they forced the two iron bars from the bunk in his cell, and it was agreed that the next day Sanders should strike Page with one of said bars, and that, if Page fell near appellant's cell, appellant would strike him with the other bar; but that appellant was unable to carry out his part of the plan, because Page did not fall when struck by Sanders, and Sanders was unable to get the keys to release appellant.

Further evidence was offered to the effect that Sanders, while being placed in his cell after the assault, and within the hearing of appellant, exclaimed, "If it hadn't been for Costa, this never would have happened; he egged me on to it;" also, "He is the cause of getting me into all this trouble;" and at said interview with Inspector Gallagher the day following, and in the presence of appellant, Sanders substantiated most of appellant's inculpatory statements, and in addition declared that while, concealed over the door leading into the corridor, waiting for Page to enter, he said to appellant that he (Sanders) did not have the nerve to hit Page, and that appellant replied, "Go ahead and bean him;" at the same time urging Sanders to strike Page with one of the larger iron hinges, which had a bolt in it; but Sanders feared that by doing so he might kill Page. Appellant made no reply to any of these accusatory statements at the time the same were made.

Appellant, testifying in his own behalf, denied having planned with Sanders the attempted escape, but admitted having made most of the incriminating statements attributed to him by Inspector Gallagher, claiming, however, that he merely answered Gallagher's questions with a convenient "yes" or "no," because, as he explained it, he was afraid of being beaten up more.

[1] Even assuming that it could be held as a matter of law that, despite the undisputed testimony of Garbutt as to his justification for striking appellant, the incriminating admissions mentioned were made under circumstances indicating intimidation, the record discloses that appellant made no objections whatever to the introduction of any part of the testimony now complained of, nor was any motion made in his behalf to strike it out. It must therefore be held, in accordance with the well-established rule, that in the absence of such objection the trial court was not called upon to rule upon the admissibility of said admissions, and the same having been received without objection, the admissibility thereof cannot now be questioned. People v. Matthew, 194 Cal. 273, 228 P. 424; People v. Haines, 64 Cal. App. 628, 222 P. 183; People v. Brown, 71 Cal. App. 181, 235 P. 72; People v. Baird, 105 Cal. 126, 38 P. 633. The cases cited by appellant in support of his contention are not in point, for the reason that in each of them objections were made to the introduction of the evidence sought to be excluded.

[2] The foregoing evidence being sufficient in our opinion to support the verdict, and finding no error in the record, the judgment and order appealed from are affirmed.

We concur: TYLER, P. J.; CAMPBELL, Justice pro tem.

HUTTON v. CHAPMAN et al. (Civ. 3138.)★

(District Court of Appeal, Third District, California. Feb. 14, 1927. Rehearing Denied March 16, 1927. Hearing Granted by Supreme Court April 3, 1927.)

1. Quieting title 🔑47(2)—Finding as to plaintiff's title is qualified by specific finding setting forth her source and chain of title.

In action to quiet title, finding that plaintiff was owner of property at time action was commenced is controlled and qualified by the specific findings setting forth her source and chain of title.

2. Execution 🔑291, 298—Right and procedure to redeem property sold under execution are statutory.

Right and procedure to redeem property sold under execution are statutory.

3. Mortgages 🔑605—Payment of redemption money to county clerk instead of purchaser or elisor held ineffective under statute (Code Civ. Proc. §§ 702, 704; Civ. Code, § 1489).

Payment of redemption money to county clerk in lieu of payment to purchaser at foreclosure sale or elisor who made sale pursuant to direction of court *held* ineffective under Code Civ. Proc. §§ 702, 704, particularly where there was no finding that any effort was made to find either purchaser or elisor; Civ. Code, § 1489, being inapplicable.

4. Quieting title 🔑43—Where plaintiff relied on ineffective redemption from foreclosure sale, evidence showing tender of redemption money to attorney for purchaser held unavailing, in absence of allegation or finding of such tender.

Where plaintiff, in suit to quiet title to land, relied on redemption of property from mortgage foreclosure sale, which was ineffectual for want of proper payment of redemption money to purchaser or elisor, *held* evidence tending to show a tender to attorney in fact for purchaser could not avail plaintiff, in absence of any allegation or finding that such tender was made.

5. Quieting title 🔑43—Allegation and finding that plaintiff, relying on ineffective redemption from foreclosure sale, did not know who elisor was, held immaterial.

In action to quiet title, wherein plaintiff relied on redemption from mortgage foreclosure sale, which was ineffective for want of proper payment to purchaser or elisor, allegation and finding to effect that plaintiff did not know who was elisor *held* wholly immaterial, where it was a matter of record in foreclosure proceedings.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action to quiet title by Kathryn W. Hutton against William Chapman and others. Judgment for plaintiff, and defendants appeal. Reversed.

See, also, 197 Cal. 288, 240 P. 764.

Chas. Lantz, W. P. Hyatt, and F. C. Huber, all of Los Angeles, for appellants.

Chas. S. Conner, of Los Angeles, for respondent.

FINCH, P. J. The plaintiff brought this action to quiet her title to certain real estate. The complaint contains the usual allegations in such an action, and the answer denies the same. The court found such allegations to be true. The complaint further alleges that the property in dispute was sold under a decree foreclosing a mortgage thereon given by plaintiff's grantor, the judgment debtor in the foreclosure suit, and that, during the period allowed by law for the redemption of the property, "the plaintiff herein became seized and possessed of the title to said real estate." The remaining parts of the complaint material to the questions presented by this appeal, also denied by the answer, are substantially in the language of the following findings made by the court:

"The court finds that it is true that, prior to the expiration of the time for redemption, the plaintiff herein became seized and possessed of the title to said real estate, and was desirous of redeeming said real estate from the lien of said mortgage and the said judgment and decree and the said sale. That she was ignorant of, and not informed of, the appointment of said Garroway as elisor, and did not know that a sale had been made by him as elisor, and did, on the 25th day of November, 1922, apply to Messrs. Charles Lantz, W. P. Hyatt, and F. C. Huber, attorneys for said William Chapman, at their office at 314 Wilcox building, city of Los Angeles, to make the said redemption. That for the purpose of such redemption, and that the plaintiff herein might receive a certificate of redemption, it was agreed by and between Charles S. Conner, attorney for the plaintiff herein, and the attorneys for said William Chapman, aforesaid, at their office aforesaid, that the attorney for the plaintiff, Kathryn W. Hutton, and the defendant William Chapman should meet on the 27th day of November, 1922, at the office of the sheriff of said Los Angeles county in the city of Los Angeles, and perfect said redemption, and the plaintiff, by and through her said attorney, Charles S. Conner, at the time agreed upon, and at the office of said sheriff, as agreed upon, appeared for the purpose of said redemption, but the attorney for the said defendant William Chapman did not appear as agreed or at all, and the plaintiff, acting by and through her attorney, duly authorized thereunto the said Charles S. Conner, and being ignorant as to the whereabouts of the said Garroway, applied to this honorable court, to wit, Frank R. Willis, judge thereof, as to how and in what manner such redemption might be made, and the said court, on the 27th day of November, 1922, made and entered its order of redemption in said cause No. B44611 in the words and figures, following, to wit:

" 'Good cause being shown, it is ordered that the entered amount of money in the case necessary for the redemption be paid by Kathryn W. Hutton as successor in interest to certain defendants herein, and be paid to the county clerk

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★Superseded by opinion of Supreme Court 261 P. 708.

of this county in lieu of the payment to the purchaser or the elisor who made the said sale.

"'[Signed] Frank R. Willis, Judge.'

"That, pursuant to the said order and the provisions thereof, the plaintiff herein did deposit and paid to the clerk of said court the sum of $2,000 for the use and benefit of said William Chapman in the redemption of said real estate and the whole thereof sold as aforesaid. That the sum of $2,000 was sufficient and more than sufficient, to redeem the said property from said sale, and that, by reason of such payment, the plaintiff herein claims the right to have the title of said real estate and the whole thereof quieted in her favor and against the defendants."

[1] The 27th day of November, 1922, was the last day of the period allowed for redemption. The deposit with the clerk was made in the early afternoon of that day. The court found that it is by reason of the payment to the clerk that "the plaintiff herein claims the right to have the title of said real estate and the whole thereof quieted in her favor." It follows that, unless such payment constituted a redemption of the property the judgment cannot be affirmed. The finding to the effect that the plaintiff was the owner of the property at the time the action was commenced is controlled and qualified by the specific findings setting forth her source and chain of title. Robinson v. City of Glendale, 182 Cal. 211, 214, 187 P. 741; Kidwell v. Ketler, 146 Cal. 12, 17, 79 P. 514; Gruwell v. Seybolt, 82 Cal. 7, 9, 22 P. 938; Turner v. White, 73 Cal. 299, 300, 14 P. 794.

[2, 3] The right and the procedure to redeem property sold under execution are statutory. Bangham v. Michael, 179 Cal. 390, 177 P. 161. Section 702 of the Code of Civil Procedure provides that a judgment debtor may redeem property sold under execution at any time within twelve months after the sale "on paying the purchaser the amount of his purchase," with interest, etc. Section 704 provides:

> "The payments mentioned in the last two sections may be made to the purchaser or redemptioner, or for him, to the officer who made the sale. * * * A tender of the money is equivalent to payment."

[4, 5] There is evidence tending to show that a tender of the amount due was made to the attorney in fact of the purchaser, but the complaint does not allege, and the court did not find, that such a tender was made, and the evidence bearing upon the question is sharply conflicting. No consideration, therefore, can be given to such evidence on this appeal. There was neither allegation nor proof of fraud, mistake, or other circumstance of equitable cognizance. The allegation and the finding to the effect that the plaintiff did not know of the appointment of Garroway as elisor is wholly immaterial, because it was readily ascertainable, being a matter of record in the foreclosure proceedings, as was also the fact that the property had been sold. The evidence shows without conflict that plaintiff's attorney knew that the property had been sold. This is shown by the finding that plaintiff applied to the purchaser's attorneys on the 25th of November, 1922, "to make the said redemption." The court did not find that any tender of payment or offer to redeem was made to such attorneys. There is no finding that the plaintiff made any effort to find either the purchaser or the elisor in order to redeem the property. Of course, circumstances may be such in a given case as to permit the redemption of property by tendering or making payment in a manner other than that provided by section 704. Bunting v. Haskell, 152 Cal. 426, 430, 93 P. 110. Under proper circumstances the rule prescribed by section 1489 of the Civil Code may be controlling. That section provides:

> "In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor: 1. At any place appointed by the creditor; or, 2. Wherever the person to whom the offer ought to be made can be found; or, 3. If such person cannot, with reasonable diligence, be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the state; or, 4. If this cannot be done, then at any place within this state."

It is clear, however, that the facts alleged and found by the court do not bring this case under such rule.

The judgment is reversed.

We concur: BUCK, Justice pro tem.; PLUMMER, J.

81 Cal. App. 283

OLYMPIC AUDITORIUM, Inc., et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5499.)

(District Court of Appeal, Second District, Division 2, California. Feb. 10, 1927.)

1. Landlord and tenant 🔑108(1)—Court has discretion to grant or deny relief against forfeiture of lease (Code Civ. Proc. § 1179).

Granting of application, under Code Civ. Proc. § 1179, for relief against forfeiture of lease is discretionary with court.

2. Landlord and tenant 🔑108(1)—Finding that forfeiture of lease would cause hardship does not necessarily require granting of relief (Code Civ. Proc. § 1179).

In application, under Code Civ. Proc. § 1179, for relief against forfeiture of lease, finding that forfeiture would result in hardship does not necessarily require granting of relief within court's discretion.

3. Prohibition 🔑10(2)—Court, erroneously imposing improper conditions in granting relief against forfeiture of lease, does not exceed jurisdiction so as to warrant interference by prohibition (Code Civ. Proc. § 1179).

Court, in exercising discretion, under Code Civ. Proc. § 1179, and imposing conditions in granting relief against forfeiture of lease, may measure equities of parties and erroneous listing by chancellor of equities determining exercise of his discretion is mere error, not exercise of forbidden jurisdiction, to control which writ of prohibition will not issue.

4. Prohibition 🔑3(3)—Propriety of court's exercise of discretion in granting relief against forfeiture of lease on conditions may be reviewed on appeal, not by prohibition (Code Civ. Proc. § 1179).

Where application, under Code Civ. Proc. § 1179, for relief against forfeiture of lease was granted on conditions which were improper, question may be reviewed on appeal, and not by prohibition.

5. Landlord and tenant 🔑108(1)—Performance of obligations mentioned in statute must be required for granting relief against forfeiture of lease, but relief is not limited to such conditions (Code Civ. Proc. § 1179).

Under Code Civ. Proc. § 1179, authorizing relief against forfeiture of lease, chancellor may impose such conditions as he deems proper in exercising discretion, but may never grant relief without requiring performance of obligations enumerated in statute as payment of rent and performance of covenants, as far as practical.

6. Prohibition 🔑10(1), 11—Writ of prohibition issues only to halt proceedings in excess of jurisdiction, not to correct error.

Writ of prohibition will not issue to correct error, but only to halt proceedings involved in excessive exercise of jurisdiction.

Application by the Olympic Auditorium, Inc., and another for a writ of prohibition to be directed against the Superior Court of Los Angeles County, Hon. Hartley Shaw, Judge thereof, and others. Writ denied.

Montgomery, Stick, Moerdyke & Gibson, of Los Angeles, for petitioners.

Hunsaker, Britt & Cosgrove and Robert B. Murphey, all of Los Angeles, for respondents.

WORKS, P. J. Olympic Auditorium, a corporation, was defendant in an action of unlawful detainer, the relief demanded by the plaintiff therein being based solely upon the failure of the defendant to pay installments of rent. Judgment went for plaintiffs, whereupon the defendant, acting under the terms of section 1179 of the Code of Civil Procedure, instituted a proceeding for relief from the forfeiture of lease declared in the judgment. Such steps were taken in the proceeding that respondent court made its order granting the application upon the performance of certain conditions by the applicant. The order recited that if the conditions were not performed within a certain time a further order of the court would deny the application. The conditions imposed were many. Specifically, they were not limited to requirements that the applicant should pay the installments of rent due upon the property involved in the application and that it should perform other covenants or conditions named in the lease. The applicant and its receiver, deeming the imposition of the conditions to be beyond the jurisdiction of respondent court, applied to this court for the writ of prohibition, praying that respondent court be prevented from making its further order as threatened, and we issued the alternative writ. The return of respondents is by general demurrer to the petition for the writ.

Section 1179 of the Code of Civil Procedure, after providing for the relief contemplated thereby "in case of hardship," and after prescribing the procedure to be followed whenever the relief is asked for, reads:

> "In no case shall the application be granted except on condition that full payment of rent due, or full performance of conditions or covenants stipulated, so far as the same is practicable, be made."

[1, 2] Undoubtedly, the granting of relief, under section 1179, is discretionary in the court to which an application for the relief is made (Matthews v. Digges, 45 Cal. App. 561, 188 P. 283), and, of course, the court has discretion either to grant or to deny. This is necessarily so upon the very assertion that the court possesses a discretion under the section. It seems manifest, too, that the power of a court to exercise its discretion, either in favor of the applicant or against him, cannot terminate with a finding that in a given instance there is presented "a case of hardship" as to the applicant. After it has been determined that a forfeiture would operate

as a hardship upon an applicant—and such a finding naturally will be made in a large percentage of cases—there would seem in the very nature of things to remain in many instances a variety of reasons why the relief should not be granted in the exercise of a sound discretion. To say that the relief must be granted upon a finding that there is a "case of hardship" as to the applicant would seem, upon just principles to strangle the discretionary power at the very inception of its exercise. The cases, in effect, so decide. See Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933. The doctrine of this case is approved, practically, in Knight v. Black, 19 Cal. App. 518, 126 P. 512, an adjudication which, it is true did not spring from an application for relief, under section 1179, but which goes upon the theory that the action of unlawful detainer, involving the possible declaration of a forfeiture, as it does, is to proceed and is to be determined upon equitable considerations. This theory is established by many cases, only one more of which (Schubert v. Lowe, 193 Cal. 291, 223 P. 550) need be cited.

[3] It is manifest, then, that a court to which application is made for relief, under section 1179, may measure equity against equity—may, for example, consider, even if a forfeiture will work a hardship upon the applicant for relief, whether a refusal to permit the declaration of forfeiture to stand will not operate as a greater hardship upon the opposing party. And upon these warring considerations the court will exercise its discretion and will either grant or refuse the application, as a just balancing of the opposing equities may seem to require. If the chancellor shall go wrong in listing the equities which he deems to be proper aids to the final exercise of his discretion to grant or refuse, what is the nature of his misdeed? Does he commit mere error, or does he exercise a forbidden jurisdiction? It must be the former. He exercises jurisdiction in granting or refusing relief. In taking into consideration the various equities which are to impel him to grant or refuse, he proceeds with the same effect as the trier of fact who rules out or rules in evidence offered for the purpose of aiding him to arrive at judgment or decree. The judge who excludes proper evidence or admits improper evidence is in a sea of error, but he is guilty of no excess of jurisdiction.

[4] Doubtless, in the present instance, the respondent judge might have refused the application for relief, under section 1179, in the light of the very considerations upon which he determined to grant it upon condition—this with complete immunity from the charge that he had exceeded his jurisdiction in measuring the equities between the parties or in resolving upon them to decree a refusal. If he had refused the application he might possibly have abused his discretion—might, in effect, have committed what would be the equivalent of reversible error—but nothing more. Can the situation be different because he saw fit to resolve his discretion toward a grant of the application, but upon condition? It is obvious to us that it cannot. If he has imposed conditions which are improper, has considered equities which were not a proper aid to the exercise of the discretion reposed in him, these matters may be dealt with upon appeal and the propriety or impropriety of his exercise of discretion be determined accordingly.

[5] It is contended by petitioners that the only conditions which respondent court could impose in granting their application for relief are those mentioned in section 1179. Upon what we have said above, in truth, from the language of the section itself, we are bound to remark that the enactment does not operate to limit the conditions which may be imposed in granting relief under it. The chancellor may impose such conditions as in equity are proper aids to the exercise of his discretion, but he may never grant relief without requiring the performance of the obligations mentioned in the section. We need not pause to inquire whether a failure to impose these specified conditions would be mere error or whether it would be an excess of jurisdiction.

[6] It is too well settled to require a citation of authority for the statement that the writ of prohibition will not issue to correct error, but only to halt proceedings involved in the excessive exercise of jurisdiction.

Demurrer sustained. The alternative writ of prohibition is vacated and a peremptory writ is refused.

We concur: CRAIG, J.; THOMPSON, J.

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81 Cal. App. 406

SHERMAN v. SHERMAN. (Civ. 5061.)

(District Court of Appeal, Second District, Division 1, California. Feb. 18, 1927.)

1. Appeal and error 🔑1078(1)—Point may be considered abandoned on appeal, where appellant presents no argument and cites no authority.

Where no argument is presented and no authority cited by appellant to sustain position in respect to particular question raised by him, it may be assumed that point is abandoned.

2. Divorce 🔑111—In divorce suit for desertion, judgment roll in former suit for maintenance held prima facie admissible to fix date of original desertion.

In suit for divorce for willful desertion, judgment roll in former suit for maintenance between same parties *held* prima facie admissible to fix date of original desertion, under rule as to conclusiveness of judgment in such action as affecting identical issues in divorce suit.

3. **Divorce** ⚿133(1)—**Evidence held to entitle plaintiff to divorce for willful desertion.**

Evidence *held* sufficient to show that desertion of plaintiff by defendant was continuous for one year, entitling plaintiff to divorce for willful desertion.

4. **Divorce** ⚿184(1)—**Insufficiency of evidence of one ground of divorce becomes immaterial, where evidence on another ground requires affirmance.**

Insufficiency of evidence to warrant divorce decree on ground of husband's willful neglect becomes immaterial, where evidence requires affirmance on ground of desertion.

5. **Divorce** ⚿184(10)—**Trial court's findings on conflicting evidence in divorce suit are conclusive.**

Where evidence in divorce suit was conflicting, it was exclusive province of trial court to determine where truth lay, and his findings of fact are conclusive.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Hannah T. Sherman against George W. Sherman. Judgment for plaintiff, and defendant appeals. Affirmed.

Duke Stone, of Los Angeles, for appellant.

C. N. Carns, of Lankershim, and Turnbull, Heffron & Kelley and Rupert B. Turnbull, all of Los Angeles, for respondent.

HOUSER, J. This is an appeal by defendant from a judgment in favor of plaintiff in a suit for a divorce. Two grounds for divorce were alleged in the complaint against defendant—one for the willful desertion of plaintiff by defendant, and the other for his willful neglect of plaintiff.

[1, 2] It is contended by appellant that the trial court erred in admitting a judgment roll in a former suit for maintenance between the same parties by which the original desertion by defendant of plaintiff was fixed as of date June 14, 1922, and in holding "that said judgment roll was res adjudicata on the question of defendant's alleged desertion."

No argument is presented, nor are authorities cited by appellant to sustain his position in respect to such question raised by him; consequently it may be assumed that the point is abandoned. However, the maintenance action was between the same parties as were litigants in the instant case; was apparently before a court of competent jurisdiction, and which court decided a matter or point which was directly in controversy in the divorce suit, and which facts, prima facie at least, are sufficient to bring the matter within the rule as to the conclusiveness of the judgment in the maintenance action as affecting the identical issue in the divorce suit. In addition thereto, the record shows that the only point decided by the trial court in the divorce suit, with reference to the maintenance action, was that the desertion by defendant of plaintiff was established as beginning on the same date as theretofore had been determined by the court and set forth in the judgment in the maintenance action.

[3] Appellant also complains that the evidence was insufficient to sustain the finding that the desertion of plaintiff by defendant was continuous for one year next after the date of the original desertion as determined by the judgment in the maintenance action. Although the evidence was conflicting, it sufficiently established the facts that on a stated date defendant left the home occupied by the parties, at which time he said that he was "done with the whole family"; that thereupon he remained away from his home and plaintiff for a period of at least a week, during which time plaintiff, who was a woman of upwards of 71 years of age and in ill health, had to eat only that which was supplied by her son; that the home of the parties was on a chicken ranch, and plaintiff was unable to care either for herself, her home, or the chickens; that in such circumstances she sold the chickens and went to live with her daughter, with whom she resided continuously for more than one year next ensuing and thereafter and until the date of the trial, without in the meantime ever having heard from defendant; that, from the time plaintiff left the home theretofore occupied by herself and defendant until the date of the trial, no offer in good faith on the part of defendant was ever made by him, or by any one in his behalf, to provide for plaintiff a home of any kind or description. If, as must be assumed from the judgment rendered in the maintenance action, the desertion of plaintiff by defendant was established as of a certain date, the additional facts heretofore stated, taken in connection with the original desertion, would, we think, constitute sufficient grounds for the conclusion of law that the desertion of plaintiff by defendant was complete within the terms of the statute and warranted the judgment by the trial court from which the appeal is taken.

[4] Prejudicial error is also specified by appellant in that he contends that the evidence was insufficient to sustain the finding by the trial court that defendant had willfully neglected to provide for plaintiff the common necessities of life for one year prior to the filing of her action. But, in view of the conclusion by this court that the judgment should be affirmed on the ground of the willful desertion of plaintiff by defendant, it becomes unnecessary to devote attention to the count on willful neglect.

[5] Appellant presents the further points that defendant should have been granted a decree of divorce on his cross-complaint, or at any rate that the evidence "shows recrimi-

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⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes nation in bar of plaintiff's cause." With reference to such matters, it need only be said that the entire evidence in this action was before the judge of the trial court, and that it was his exclusive province to determine where lay the truth. His findings of fact on the evidence were entirely against the contention of defendant. They are conclusive on this court.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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81 Cal. App. 347

EMIGH v. WOOD. (Civ. 5590.)

(District Court of Appeal, First District, Division 2, California. Feb. 15, 1927.)

1. Appeal and error 🔑1050(2)—Admission of correspondence wholly irrelevant to issues held harmless.

Admission, in action for car which plaintiff had left with defendant for repairs, of correspondence which had passed between officers in locating car after it had been stolen from defendant's garage, if error, *held* without prejudice, subject-matter of correspondence being so irrelevant to issues tried that it could not have affected rights of parties.

2. Trial 🔑397(3)—Findings which would have been outside the issues held properly not made.

Where the pleadings, in action of claim and delivery for a car left by plaintiff with defendant for repairs and stolen from his garage, contained no allegations on the subjects of repossession of the car by plaintiff and the terms of the bailment, *held* that findings thereon, which, if made, would have been outside the issues, were properly not made.

3. Appeal and error 🔑1011(1) — Finding on conflicting evidence is conclusive on appeal.

Trial court's finding, being on conflicting evidence, cannot be disturbed on appeal.

4. Appeal and error 🔑1071(6)—Omission to find one demand was immaterial, where another, all that was necessary, was found.

Omission to find a demand by plaintiff on a certain day was immaterial, a demand by him on the next day, all that was necessary, being found.

5. Bailment 🔑14(1) — Bailee of automobile for repairs was not liable, where stolen without negligence on his part (Civ. Code, § 1852).

That an automobile, which was left by plaintiff with defendant for repairs, was stolen from defendant's possession without any negligence on his part is complete defense to action for its recovery in view of Civ. Code, § 1852.

6. Bailment 🔑23—In absence of special contract, bailee of automobile for repairs need not redeliver, when located, after being stolen without negligence.

Unless there be special contract for redelivery, one with whom automobile was left for repairs is under no duty to send for it or otherwise bring it to owner's possession, where it is located after being stolen from bailee's possession without negligence on his part.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Harry A. Emigh against Vincent E. Wood, doing business under name of the Cadillac Motor Sales Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Coleman E. Stewart, of Santa Barbara, for appellant.

Griffith & Thornburgh and Wm. G. Griffith, all of Santa Barbara, for respondent.

STURTEVANT, J. The plaintiff commenced an action in claim and delivery against the defendant. The defendant answered, and a trial was had before the court sitting without a jury. The trial court made findings in favor of the defendant, and the plaintiff has appealed under section 953a of the Code of Civil Procedure.

On the morning of the 10th day of August, 1923, the plaintiff took his automobile to the defendant's garage and left it there for the purpose of having some minor repairs made. He testified that during the afternoon of that day he called for his car and was told that the work was not completed. During the night intervening between August 10th and August 11th the garage was burglarized and the car was stolen. On the 11th day of August the plaintiff was promptly informed that the car had been stolen and the circumstances surrounding the theft. The other facts will appear as we proceed.

[1] The trial court, over the objection of the appellant, received in evidence the correspondence that had passed between the peace officers in locating the automobile after it had been stolen. The appellant earnestly contends that the ruling was error. Conceding that it was, the error was without prejudice as the subject-matter of the correspondence was so irrelevant to the issues being tried that it could not in any way have affected the rights of the parties.

[2] The appellant contends that the trial court erred in failing to make a finding on the subject of the repossession of said automobile by the plaintiff, and that it failed to make a finding regarding the terms of the bailment between the plaintiff and the defendant. The pleadings contained no allegations on those subjects, and, if such findings had been made, they would have been outside of the issues.

[3, 4] The appellant contends that the trial court should have found that the plaintiff demanded of the defendant the return of the car on August 10, 1923. Some of the witnesses for the defendant testified that the plaintiff did not do so, although the plaintiff

supported his allegation by his own testimony. In the face of that conflict, this court has no power to disturb the finding which the trial court made. Furthermore, the point is immaterial when considered in connection with other facts. The plaintiff testified that he made another demand on August 11, 1923. The trial court found that fact in favor of the plaintiff. That finding was sufficient for all of the purposes of the case. The plaintiff was not bound to make two demands.

[5] Finally, the appellant contends that the trial court erred in making any findings respecting the negligence of the defendant. The point is without merit. We appreciate that, according to the appellant's theory of the case, the point is of the utmost importance, but we are unable to adopt that theory. To justify his failure to deliver, the defendant in his answer pleaded facts showing that the automobile had been stolen from his possession, and that it was so stolen without any negligence on his part. If true, such facts constituted a complete defense. Civ. Code, § 1852; 4 Cal. Jur. 24, § 14; Elliott on Bailments, §§ 40 and 80; Tatro v. Baker-Fisk-Hugill Co., 215 Mich. 623, 184 N. W. 449; Galowitz v. Magner, 208 App. Div. 6, 203 N. Y. S. 421. Furthermore, the contention which appellant now makes was never presented to the trial court. The plaintiff did not file any demurrer to or make any motion to strike out any parts of the defendant's answer. On the trial of the case all of the evidence regarding the care exercised by the defendant came in, without any objection being interposed thereto. In passing, it should be stated that the appellant in his opening brief and in his closing brief states that he is not attacking the finding as being unsupported by the evidence, but that he is contending that the subject-matter of the finding is irrelevant and immaterial.

[6] The appellant's theory was to the effect that the defendant was, in all events, bound to redeliver the car. In this behalf the appellant relies on the statement:

> "*Where the manner of redelivery or delivery over is specified*, the bailee must comply strictly therewith or be liable in the event of any loss." (Italics ours.) 6 C. J. 1142, note 59.

The vice of appellant's position is in the assumption that in this case there was any *special contract* between the parties regarding the redelivery. The record is wholly silent. It is not to be controverted but what the defendant could have made a contract in which he would have been responsible in all events. 4 Cal. Jur. 24, § 14. But the record does not disclose that he did so, and his liability therefore is the liability imposed by law—no less and no more. When it transpired that the car had been stolen, it remained to be ascertained whether it was stolen through the negligence of the defendant. If, under the facts as pleaded, he had exercised ordinary care, he was not liable. When thereafter the car was located, no new liability arose which imposed on the defendant the duty of sending for the car or otherwise bringing it to the possession of the appellant.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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81 Cal. App. 287

Ex parte TASSEY. (Cr. 1380.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1927.)

1. Infants 🔑68—Superior court must suspend criminal proceeding against minor on being notified he is under 18 and certify minor to juvenile court (Juvenile Court Act, §§ 4[d], 6).

Under Juvenile Court Act (St. 1915, pp. 1228, 1229), §§ 4(d), 6, where age of minor defendant is raised for first time in superior court, court is required to suspend proceeding and certify minor who is under 18 years to juvenile court; statute not being limited to any particular court, and therefore including superior as well as other courts.

2. Habeas corpus 🔑92(1)—Question in habeas corpus is whether court exceeded jurisdiction in rendering judgment under which petitioner is detained.

In hearing on writ of habeas corpus, court of appeals considers whether petitioner is illegally detained, and, where held under judgment of superior court, question is whether court exceeded jurisdiction in giving judgment.

3. Criminal law 🔑1144(5)—Proceedings in superior court are presumed regular and within court's jurisdiction unless record affirmatively shows contrary.

Proceedings in superior court, which is court of general jurisdiction, are presumed to have been regular and within court's jurisdiction unless record affirmatively shows that proceedings were not regular.

4. Courts 🔑39—Court may determine existence of jurisdictional facts, though ousting itself from further jurisdiction, and determination for jurisdiction, though erroneous, is binding against collateral attack.

Where jurisdiction of court depends on existence of certain facts, court has jurisdiction to determine those facts, though it may oust itself of further jurisdiction to proceed in case, and, where facts are determined in favor of existence of jurisdiction, determination, though erroneous, is binding against collateral attack.

5. Infants 🔑68—Statutory right of minor under 18 to have prosecution first submitted to juvenile court relates to jurisdiction of person and may be waived (Juvenile Court Act, §§ 4[d], 6).

Right of minor under 18 years to have prosecution first submitted to juvenile court, as provided by Juvenile Court Act (St. 1915, pp. 1228, 1229), §§ 4(d), 6, relates to jurisdiction of person and not subject-matter and may be waived.

6. Habeas corpus ⚷27—Infants ⚷68—Failure of superior court, knowing defendant was under 18, to submit case to juvenile court held jurisdictional defect, entitling minor to discharge on habeas corpus (Juvenile Court Act, §§ 4[d], 6).

Where defendant under 18 years, prosecuted in superior court, asserted right to have case first submitted to juvenile court by suggestion to superior court as to his age, violation of Juvenile Court Act (St. 1915, pp. 1228, 1229), §§ 4(d), 6, by conviction, without first determining whether case should be sent to juvenile court, was jurisdictional error and entitled minor to writ of habeas corpus discharging him from custody of prison warden.

Habeas corpus by Joseph Tassey, alias James Troutman, against the Warden of San Quentin Prison. Writ granted.

Valla E. Parkinson, of Sacramento, for petitioner.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

KOFORD, P. J. Petitioner was sentenced to confinement in the state prison at San Quentin upon plea of guilty to the crime of robbery committed October 11, 1926. Petitioner is a minor of the age of 15 years and under 16 years. At the time he appeared before the superior court he made known to the court his age, but the court nevertheless proceeded with the case as though he were an adult, without determining the defendant's age and without the defendant's offense having been previously submitted to the juvenile court.

[1] Apparently the petitioner passed through the justice's court without the provisions of section 6 of the Juvenile Court Law (St. 1915, p. 1229) being invoked. This section would require the magistrate to suspend the proceedings and certify the minor, being under 18 years, to the juvenile court. There is no similar section of the act prescribing what the procedure shall be in case the question of age is first raised in the superior court instead of the justice's court, but in such case it would seem to us proper that the superior court follow substantially the same procedure as provided for justices' courts in section 6. It is provided in section 4(d) of this act as follows:

> "No person under the age of eighteen years * * * shall be prosecuted for crime until the matter has first been submitted to the juvenile court by petition as hereinbefore provided, or by certificate of the lower court as hereinafter provided."

This section is not limited to a prosecution for crime in any particular court, and therefore includes the superior court as well as other courts.

[2, 3] The conviction in this case is therefore in violation of the provisions of section 4(d). The defendant did not appeal, however, from the judgment and sentence. The matter is brought to our attention only on a writ of habeas corpus. Upon this hearing the court considers whether the petitioner is illegally detained, and it appearing that he is held under a judgment of the superior court, the question is substantially whether the court exceeded its jurisdiction in giving that judgment. The superior court being a court of general jurisdiction, the presumption is that the proceedings had before that court were regular and that the court acted within its jurisdiction. This presumption, however, is available only where the record is silent upon the question. In re Eichhoff, 101 Cal. 600, 603, 36 P. 11. Where it affirmatively appears in the record that the proceedings were not regular, the presumption will not be indulged in. Ex parte Bull, 42 Cal. 196.

[4] There is some confusion in discussing jurisdiction on account of the fact that there are cases in which the jurisdiction of the court depends upon the existence of certain facts. In that case the court has jurisdiction to determine those facts, even though the determination of those facts in a certain manner ousts it of further jurisdiction to proceed in the case. Where the court has determined those facts in favor of the existence of jurisdiction, its determination, even though erroneous, is binding against a collateral attack. Ex parte Spencer, 83 Cal. 460, 23 P. 395, 17 Am. St. Rep. 266; Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248; Matter of Maginnis, 162 Cal. 200, 121 P. 723.

Respondent claims that the violation of section 4(d) was not jurisdictional, and relies upon People v. Oxnam, 170 Cal. 211, 149 P. 165. In that case one of the grounds urged for a reversal was that the defendant was under 18 years. The point was raised for the first time on appeal. The court, in connection with this point, considered a part of section 19 of the Juvenile Court Act as it then existed (Stats. 1913, p. 1285), which part was substantially the same as section 4(d) of the present act, and also considered provisions corresponding to section 6 of the present act. In stating the the opinion of the court expressions are used to the effect that these provisions are not jurisdictional. These expressions are to be taken in the light of the whole decision, which is to the effect that the mere fact the defendant happens to be, or afterwards turns out to be, under 18 years, does not mean that the court did not have jurisdiction. In one place, for example, it is said:

> "There is nothing in the language used in this section to suggest the idea that in the absence of any suggestion, inquiry, and determination by such judge, there is any want of jurisdiction to proceed under the general law relating to crimes, simply because it may subsequently be developed that the delinquent was in fact under 18 years of age. In fact, the language expressly requires the judge himself to be satisfied on the question of age before he certifies the matter to the juvenile court at all, and unquestionably it was contemplated that in the absence of any such determination by such judge and any proceeding in the juvenile court, the case should proceed in the ordinary way and that the order or judgment of the judge should be valid and immune from any collateral attack based on the Juvenile Court Act."

In another place following one of these expressions, it is said:

> "It is certainly clear that no claim based on this provision of the act can be maintained in an appellate court after conviction and judgment under the general law, where no claim under the act was made prior to the appeal, and there has never been any investigation and determination as to the age of the offender. Such is the situation here, according to the record, if we assume in accord with defendant's theory that his case was never presented to the juvenile court. The age of defendant was not an issue tried and determined in the superior court by either the judge presiding or by the jury, was not even suggested to the trial judge for trial and determination, and we have no finding thereon. In other words, we have no judicial determination at all that the defendant was, in fact, under 18 years of age, and the proceedings in the superior court did not call for any determination on that question. In the absence of such a trial and determination on the question of age we have no warrant for dealing with this case as subject to the provisions of the Juvenile Court Act upon the assumption that defendant was in fact under 18 years of age, however much evidence as to that matter elicited on the trial from defendant's witnesses may indicate such to be the situation."

In another place, at page 218 (149 P. 168), it is stated:

> "Apparently no suggestion of the age of appellant as a basis for arresting the prosecution was ever made in the superior court, the evidence on that subject being elicited in the ordinary course of the trial as evidence bearing on the issues being tried by the jury."

In other words, the case proceeded like any other trial where the defendant is of adult age. The expressions in the decision concerning jurisdiction, so far as they may be said to refer to jurisdiction of the person, are to be limited to a case where no suggestion is made to the court for the purpose of arresting the prosecution of the minor and asserting the minor's right to be tried in the juvenile court.

The reasoning of that decision suggests to us an analogy between the right of a minor under 18 years to have his case submitted to the juvenile court first under section 4 (d), and the right of an adult defendant to have certain actions tried in the court of the county of his residence, under Code of Civil Procedure, section 395. It is uniformly held that when the defendant demands this right the court has no power to hear and determine any issue in the case until it has first determined the residence of defendant and his claimed right to a certain place of trial. If the right is not demanded, however, or the facts adversely determined, then the court has full jurisdiction. It is true that such waiver is provided for by Code of Civil Procedure, section 396, but such an objection to jurisdiction may be waived without statutory authority, it going to the jurisdiction of the person rather than to the jurisdiction of the subject-matter of the suit. Childs v. Lanterman, 103 Cal. 387, 392, 37 P. 382, 42 Am. St. Rep. 121.

Another case relied on by respondent is In re Northon, 35 Cal. App. 369, 169 P. 1051. The court there holds it error for the justice of the peace to refuse to hear testimony of the age of the defendant. The reference in this case to jurisdiction is based, first, upon the proposition that the justice's court had jurisdiction to determine the question of age of defendant and must be satisfied on that point before certifying to the juvenile court; and, secondly, that the superior court is not prohibited at all events from proceeding with the prosecution of a defendant under 18 years because he may have been certified back from the juvenile court. The decision is also made that the petitioner, being then before the superior court, could avail himself of all his legal rights there, as shown in People v. Oxnam, supra.

In re Wolff, 183 Cal. 602, 192 P. 33. Here the case was certified to the juvenile court by the justice of the peace and by the juvenile court sent back for prosecution under the general law. This is all a defendant under 18 years is entitled to; i. e., that the matter be first submitted to the juvenile court.

[5, 6] We conclude that, while it is true that the superior court has full jurisdiction to try any minor, it having full jurisdiction of the subject-matter, nevertheless, a defendant under 18 years has a statutory right that he shall not be prosecuted for crime until the matter has first been submitted to the juvenile court. So far as this relates to the jurisdiction of the court, it relates to jurisdiction of the person and not of the subject-matter, and may be therefore waived. But where the defendant asserts his right by suggestion to the court, the court's first duty is then to hear and determine in what court the defendant is entitled to be tried.

The judgment, under which petitioner is held, having been given in violation of defendant's asserted rights, under section 4 (d) of the Juvenile Court Act, it is ordered that said defendant be discharged from the custody of the warden at San Quentin prison, and that said minor be delivered into the custody of the sheriff of the county of Sacramento, and that he be there dealt with as provided by law.

We concur: NOURSE, J.; STURTEVANT, J.

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81 Cal. App. 294

Ex parte BASTIANI. (Cr. 1378.)

(District Court of Appeal, First District, Division 2, California. Feb. 11, 1927.)

Infants 🔑68—Conviction of accused, not disclosing age as under 18, but representing himself as 20, was valid without submitting case to juvenile court (Juvenile Court Act, 1915, § 4[d]; Juvenile Court Act 1913, § 19).

Conviction of grand larceny of accused, who did not disclose that he was under 18 years at hearing in justice court or in superior court, but represented himself as 20 years old to judge of superior court, is valid, though case was not referred to juvenile court, under Juvenile Court Act (St. 1915, p. 1228), § 4(d), and St. 1913, p. 1298, § 19, and accused is not entitled to discharge on habeas corpus.

Habeas corpus by Gino Bastiani against the warden of San Quentin Prison. Writ denied.

Geo. F. Owens, of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

KOFORD, P. J. The petitioner pleaded guilty to the charge of grand larceny and was sentenced to imprisonment at San Quentin. He offered proof upon this proceeding showing his age to have been under 18 years at the time of the crime and sentence. The petitioner made no claim nor disclosure concerning this fact at the time of his hearing either in the justice's court or in the superior court. The judge of the superior court asked the petitioner his age before sentencing him, and the petitioner replied that he was 20 years old. Nothing else was said upon the subject, but the court proceeded as though the defendant was over the age of 18 years.

Upon the authority of People v. Oxnam, 170 Cal. 211, 149 P. 165, the judgment is valid, and the writ should be discharged. Petitioner calls attention to the fact that at the time the cited case was decided section 4 (d) of the Juvenile Court Law (St. 1915, p. 1228), had not been enacted. This is true, but nevertheless practically the same provision then existed as a part of section 19 of the Juvenile Court Act (Stats. 1913, p. 1285), and was expressly referred to and considered in that case at page 217.

We have fully considered People v. Oxnam in the opinion in Ex parte Tassey, 253 P. 948, this day decided, but we are unable to see any distinction between the case of petitioner here and the case of the defendant in People v. Oxnam.

The writ is discharged and petitioner is remanded to the warden of the state prison at San Quentin.

We concur: NOURSE, J.; STURTEVANT, J.

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81 Cal. App. 351

MAZURAN et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5468.)

(District Court of Appeal, Second District, Division 2, California. Feb. 15, 1927.)

1. Courts 🔑190(6)—Appellant may review decision of municipal court on demurrer on transmitting pleadings without statement (Code Civ. Proc. §§ 975–977, 983, 984, added by St. 1925, p. 942).

On appeal from municipal court to superior court, appealing party was entitled to have questions of law raised by demurrer passed on by superior court on transmitting pleadings, though no statement was served or filed, as required by Code Civ. Proc. §§ 975, 976, providing for statement on appeal on questions of law alone; questions of law only being appealable, under sections 983, 984, added by St. 1925, p. 942, as section 977 allows appeals from municipal court on questions of law and fact on transmitting docket, notices, motions, pleadings, and other papers.

2. Courts 🔑190(6)—On appeal from municipal court on questions of law and fact, either pleadings or judgment roll should be transmitted (Code Civ. Proc. §§ 975, 977).

On appeal from municipal court to superior court, stated by notice to be on questions of fact and law, either pleadings or judgment roll should be transmitted, under Code Civ. Proc. § 975, requiring filing of statement on appeal on questions of law alone, and section 977, requiring certified copy of docket, pleadings, notices, motions, and other papers; statutes being liberally construed to provide record on appeal, and judgment roll being nearest equivalent in municipal court to docket provided for.

Application by Marion J. Mazuran and another for a writ of certiorari to be directed to the Superior Court in and for Los Angeles County and C. W. Miller, Judge, to review an order of the court dismissing an appeal from municipal court, in an action in which petitioners were defendants. Order annulled.

D. A. Knapp, of San Francisco, for petitioners.

Robert E. Austin and John N. Helmick, both of Los Angeles, for respondents.

THOMPSON, J. By this application it is sought to annul an order dismissing an appeal from the municipal court of Los Angeles. An action was commenced in the justices' court of Los Angeles township, but before trial the justices' court had been superseded by the municipal court and the trial was had in the last-named court. Also, it appears from the return to the writ that a demurrer to the complaint was heard in the municipal court. Two of the defendants in the action (the petitioners here), being dissatisfied with the judgment, filed their notice of appeal on June 1, 1926, and within the time allowed by law. The notice of appeal states that:

> "The appeal is taken on questions of both law and fact."

By the provisions of section 976 of the Code of Civil Procedure no statement of the case is necessary, in appeals from the justices' court, on questions of both law and fact. Under the provisions of section 975 of the same Code, however, when the appeal is taken on questions of law alone, it is necessary to prepare, serve, and file a statement of the case, which shall "contain the grounds upon which the party intends to rely upon the appeal and so much of the evidence, as may be necessary to explain the grounds and no more." By section 984 of the Code of Civil Procedure section 975 is made applicable to appeals from the municipal court, while section 976 of the Code of Civil Procedure is not, the Legislature having also provided by section 983 of the same Code that appeals from the municipal court shall be on questions of law alone. The petitioners here did not prepare a statement of the case, and on August 16, 1926, the plaintiff in the action made a motion to dismiss the appeal on the ground that the statement had not been served and filed. The respondent court made its order dismissing the appeal.

In brief, the petitioners' contention is that a statement of the case is not essential to the appeal and that, if a statement be necessary, the requirement is unconstitutional because it is discriminatory, special, and does not have a uniform operation. The foundation of their argument that it is unconstitutional is that appeals are allowed to the superior court from the justices' court on questions of fact with a trial de novo in the superior court, in which case no statement of the case is required.

Sections 983 and 984 of the Code of Civil Procedure were adopted in 1925 (St. 1925, p. 942) as a part of the legislation designed to govern the practice in and appeals from the municipal court. As stated above, section 983 provides for appeals on questions of law only, which provision is supplemented by a sentence found in another new section (section 985, Code Civ. Proc.) as follows:

> "If there be a new trial, it must be in the municipal court."

Section 984 of the Code of Civil Procedure makes applicable to such appeals, however, sections 975 and 977 of the Code of Civil Procedure. These are sections which originally applied to appeals from the justices' court, the first providing for a statement of the case in appeals on questions of law, as heretofore pointed out, the second providing for the transmission of the papers to the superior court, including the "statement, if any." The petitioners argue that the words "if any" indicate that a statement may not be essential. In this connection it should also be observed that section 975 of the Code of Civil Procedure, in addition to prescribing the method of preparing a statement, says:

> "The statement thus adopted, or as settled by the justice or judge, with a copy of the docket of the justice or judge, and all motions filed with him by the parties during the trial and the notice of appeal may be used on the hearing of the appeal before the superior court."

The question may well be asked, in view of the authorized use on appeal of the docket and motions and the language indicating that no more of the evidence shall be incorporated in the statement than is necessary to explain the grounds, What necessitates a statement, if the error complained of is manifest without the statement? It is not the policy of the law nor can we say that the Legislature intended to require a useless act. A similar question relating to appeals of criminal causes was considered by this court in the case of Garrett v. Superior Court, 249 P. 871, and there it was determined that, although the literal effect of section 1468 of the Penal Code is to require a statement, nevertheless if the error complained of may be determined from an inspection of the other papers transmitted, the statement is not essential. See, also, Maxson v. Superior Court, 124 Cal. 468, 471, 57 P. 379.

[1] We then have to inquire whether the respondent court could, in this action, have determined the appeal from the papers which should have been transmitted. From the sections of the Code of Civil Procedure heretofore cited it is apparent that the Legislature intended to give to litigants in the municipal court the right of appeal on questions of law alone. The notice of appeal here states that the appeal is on questions of both law and fact. A portion of section 977 of the Code of Civil Procedure made applicable to appeals from the municipal court says:

> "If the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions, and all other papers filed in the cause,"

—shall be transmitted to the superior court. Under the notice here in question, was it necessary that "the pleadings" or the equivalent of the judgment roll be transmitted? This question is not free of difficulty. If we adhere to the rule announced in Maxson v. Superior Court, supra, so far as appeals from the municipal court are concerned, we are bound to say that the language last quoted from section 977 of the Code of Civil Procedure has no application to appeals from the municipal court, and that the only method of preparing a record of the pleadings in appeals from the municipal court is by the preparation of a statement. It is there said:

> "Moreover, upon an appeal on questions of law alone the justice is not required to send to the appellate court anything more than 'a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed.' There is no provision for sending to the appellate court the pleadings or other papers in the case. * * *"

Unless we can say that stating in the notice that the appeal is on questions of fact and law is equivalent to a notice requiring the transmission of the pleadings, it can make no difference how desirable it may be that litigants should have the right to appeal on the judgment roll alone. In this connection it must be remembered that the docket of the justices' court and the contents thereof, as provided by section 911 of the Code of Civil Procedure, is essentially different from the docket of the municipal court, which is the same as the superior court, and the contents thereof provided for by section 672 of the Code of Civil Procedure. The justices' docket is a synopsis of the action. The docket of the municipal court is a judgment docket and does not include proceedings prior to the judgment so that the transmission by the municipal court to the superior court of the docket and motions made would be of little, if any, value to the appellate court. In practice, the docket of the justices' court is the nearest possible equivalent to the judgment roll of the superior court, or, as now constituted, the municipal court.

[2] Inasmuch, therefore, as the term "docket" cannot be applied literally to appeals from the municipal court, it would seem to us that, in order to make sections 975 and 977 of the Code of Civil Procedure applicable at all to appeals from the municipal court, it is necessary to adopt a liberal construction, consonant we think with the manifest intent of the Legislature to provide a record on appeal in such cases. To do this we should say that, at least where, as here, the notice states that it is on questions of fact and law, it is necessary that the pleadings or the judgment roll be transmitted to the appellate court. If we adopt a literal construction, the quoted language of section 977 has no meaning, and no practical provision is made for a record on appeal. From the return which is before us it appears that a demurrer was interposed to the complaint, and with the pleadings before the superior court the petitioners were entitled to have the questions of law raised by that demurrer passed upon by the superior court.

It cannot be seriously contended that the order here made was made on the ground of an unreasonable delay in prosecuting the appeal, first, because the notice of the motion to dismiss was not based on that ground, and, second, because there was no apparent delay.

Having arrived at the conclusion that the order sought to be reviewed in this proceeding is void, it would serve no useful purpose and would be premature for us to enter upon a discussion of the constitutional question raised by the petitioner.

It may not be amiss, however, to quote the language in Cohen v. City of Alameda, 168 Cal. 267, 142 P. 886, that:

> "The legislative discretion as to the different modes of procedure or rules of practice to be prescribed for the numerous and various actions and proceedings allowed in courts of justice is very wide, and that its judgment on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with except for very grave causes and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists."

The order is annulled.

We concur: WORKS, P. J.; CRAIG, J.

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81 Cal. App. 499

Ex parte HARRIS. (Cr. 1458.)

(District Court of Appeal, Second District, Division 2, California. Feb. 25, 1927.)

Divorce 🔑269(9)—Husband could not be committed for contempt in failing to pay temporary alimony, where unable to make payments.

Court could not order commitment of husband for contempt in failing to pay temporary alimony under uncontradicted evidence showing husband was unable to make payments.

Application by Jay Butler Harris for writ of habeas corpus, to be directed to the Sheriff of Los Angeles County, to secure petitioner's release from custody for a commitment for contempt for failure to pay temporary alimony. Petitioner discharged.

Haas & Dunnigan and Harold C. Johnston, all of Los Angeles, for petitioner.

WORKS, P. J. Petitioner was a party to a divorce suit. He was ordered by the court in which the action was pending to pay to his wife, monthly, a certain sum of money as temporary alimony. Having failed to make some of the required payments when they were due, he was cited for contempt of court because of his dereliction, was adjudged guilty, and was sent to jail as a punishment for his alleged offense. He then petitioned this court for the writ of habeas corpus, and the writ issued.

On the hearing in the contempt proceeding it was not shown that petitioner had the ability to make the defaulted payments. In fact, the evidence showed without contradiction that he was unable to pay. The order adjudging petitioner in contempt of court was without evidence to support it.

Petitioner is discharged from custody.

We concur: CRAIG, J.; THOMPSON, J.

81 Cal. App. 367

CHAPLIN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

(Civ. 5583.)

(District Court of Appeal, Second District, Division 1, California. Feb. 17, 1927.)

1. Divorce 🔑201—Order that defendant, who was not served in divorce suit, pay counsel fees and alimony, pending outcome of suit, held void (Code Civ. Proc. §§ 416, 1917).

Where service was not obtained on defendant in divorce suit, as required by Code Civ. Proc. § 416, order that he pay stipulated sums for support and maintenance of wife and minor children, pending final determination of suit, and for attorney's fees, costs, and expenses to enable wife to prosecute suit is void, in view of section 1917.

2. Appearance 🔑8(1)—Presence of attorney as spectator or to represent another defendant, when orders were made affecting defendant not served, does not constitute "appearance" (Code Civ. Proc. § 1014).

Presence of attorney representing defendant, who was not served in divorce suit, in trial court when order was made for payment of counsel fees and alimony, pending outcome of suit, does not constitute "appearance" of defendant, under Code Civ. Proc. § 1014, where such attorney was there merely as spectator or to appear for another defendant.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Appearance.]

3. Process 🔑77—Publicity as to divorce suit through press, radio, and private correspondence does not constitute "service" on defendant outside state (Code Civ. Proc. § 412).

Publicity as to divorce suit through medium of press, radio, and probability of receipt by defendant of private letters and telegrams concerning pendency of suit does not constitute "service" on defendant, who had left state, in view of Code Civ. Proc. § 412.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Service (In Practice).]

4. Equity 🔑65(1)—Defendant, not served in divorce suit, is not precluded from seeking relief by prohibition from orders entered therein on theory that he comes with unclean hands.

Defendant, who was not served in divorce suit, made no appearance, and ignored orders of court, is not precluded from seeking relief from such orders by prohibition on theory that he comes with unclean hands, since from legal standpoint he had no notice of pendency of action.

5. Prohibition 🔑3(5)—Prohibition will issue, notwithstanding remedy by appeal, where latter will not afford relief to which petitioner is entitled (Code Civ. Proc. §§ 1102, 1103).

Where circumstances of given case show that remedy by appeal will not properly subserve ends of justice by affording relief to which petitioner may be entitled, fact that, ordinarily speaking, such remedy is "plain, speedy, and adequate" will not prevent issuance of writ of prohibition, notwithstanding Code Civ. Proc. §§ 1102, 1103.

6. Prohibition 🔑3(5)—Relief from appealable orders may be had by prohibition, based on lack of jurisdiction over defendant, since appeal operates as general appearance.

Defendant, who was not served in divorce suit, made no appearance, and ignored orders of court therein, may seek relief from appealable orders by prohibition on ground of court's lack of jurisdiction, in view of rule that appeal operates as general appearance.

7. Prohibition 🔑17—Defendant, who was not served and did not appear, may bring prohibition to obtain relief from court's order without making objection in lower court.

Defendant, who was not served and did not appear in divorce suit, may bring prohibition to obtain relief from order for payment of counsel fees and alimony, pending outcome, without making objection in court issuing order, since no preliminary objection is necessary where want of jurisdiction is apparent on face of proceeding.

8. Prohibition 🔑17—Defendant may bring original prohibition in appellate court, without objection in trial court, where it conclusively appears that application there would be denied.

Defendant in divorce suit may bring original prohibition in appellate court to obtain relief from order for payment of counsel fees and alimony, pending outcome, without making objection in court issuing order, where it conclusively appears that any application made to such court to vacate orders would have been denied.

Original application by Charles Spencer Chaplin for a writ of prohibition, prayed to be directed to the Superior Court in and for the County of Los Angeles, Walter Guerin, Judge, and others. Writ granted.

Gavin McNab, of San Francisco, Lloyd Wright, of Los Angeles, Nat Schmulowitz, of San Francisco, and Charles E. Millikan, of Los Angeles, for petitioner.

Edwin T. McMurray, of San Francisco, and Young & Young, Milton K. Young, Lyndol L. Young, William K. Young, and L. R. Brigham, all of Los Angeles, for respondents.

HOUSER, J. Petitioner prays for an order of this court, directing and commanding each of the respondents herein to desist and refrain from further proceedings under three several orders, as set forth in the petition and heretofore issued out of the superior court in and for the county of Los Angeles, in a suit for divorce then pending therein between Lillita Louise Chaplin and Charles Spencer Chaplin, wherein and whereby, in effect, W. I. Gilbert and Herman Spitzel, as receivers theretofore appointed in said action, and Charles Spencer Chaplin, the defendant therein, were ordered to pay for the support and maintenance of Lillita Louise Chaplin (the wife of said Charles Spencer Chaplin) and the two minor children of said parties the sum of $8,000 forthwith, the further sum of $4,000 on the 17th day of February, 1927, and a like sum of money on the 15th day of each and every month thereafter, pending the final determination of said suit for divorce; and in addition thereto, that said Charles Spencer Chaplin pay forthwith to said Lillita Louise Chaplin the sum of $6,400 on account of attorney's fees, costs, and expenses to enable said Lillita Louise Chaplin to prosecute such divorce suit.

It is the contention of petitioner that neither prior to the issuance of either or any of said orders, nor since said time or times, had the trial court jurisdiction of the person of the defendant in said suit for divorce, and consequently that each of said orders is void.

Section 1917 of the Code of Civil Procedure provides that:

> "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment."

No question is here raised regarding the jurisdiction of the superior court, excepting as to the jurisdiction over the person of the defendant in the suit for divorce between the parties thereto.

Generally speaking, as provided by statute, the writ of prohibition will lie for the purpose of arresting the proceedings of any tribunal exercising judicial functions when such proceedings are without or in excess of the jurisdiction of such tribunal, where no plain, speedy and adequate remedy exists in the ordinary course of law. Sections 1102, 1103, Code Civ. Proc.

The first question, then, to be here considered is whether the superior court was acting without or in excess of its jurisdiction in making each of the several orders to which reference has been had.

By section 416 of the Code of Civil Procedure it is provided that:

> "From the time of the service of the summons and of a copy of the complaint in a civil action, where service of a copy of the complaint is required, or of the completion of the publication when service by publication is ordered, the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings. * * *"

And:

> "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. * * *" Section 1014, Code Civ. Proc.

[1] So far as any of the statutory requirements for obtaining jurisdiction over the person of the defendant in the suit for divorce are concerned, it is admitted by respondents that none of them was complied with in either form or substance. In the absence of obtaining service upon the defendant in any or either of the modes prescribed by statute, the ordinary rule appears to be that an order, made by the court, of the nature of those here under consideration is unauthorized and void. Baker v. Baker, 136 Cal. 302, 68 P. 971; Reed v. Reed, 40 Cal. App. 102, 180 P. 43; De la Montanya v. De la Montanya, 112 Cal. 101, 117, 44 P. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165; Williams v. Williams, 60 Cal. App. 675, 213 P. 508; Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237, 28 A. L. R. 1079.

[2] But it is urged by respondents upon facts which appear by affidavit, as well as by the return to the writ herein, that because one of the attorneys now representing petitioner herein was present in the trial court at the time such orders, or some of them, were made, such appearance by said attorney constituted an appearance for and in behalf of said defendant. The facts, however, in connection with the presence in court of said attorney at said time are that he was there merely as a spectator, and that he took no part whatsoever in the proceedings before the trial court; or, at most, that, at the time when one of such orders was made, he appeared only for a defendant in the action other than Charles Spencer Chaplin, the petitioner herein. No record is shown of any appearance having been made by any attorney in behalf of defendant; in fact, each of such orders recites, in effect, that the defendant was not represented at either of such hearings.

Respondents further contend, on alleged facts likewise appearing, that said defendant, Chaplin, left the state of California for the express purpose of avoiding service upon him of the summons and a copy of the complaint in said action, and that because of said fact, together with the further alleged fact that there have been various communications to defendant (including letters, telegrams, newspaper articles, and the radio), defendant has been, and at the time of the making of each of said orders was, as fully notified of the pendency of said action as though he had been personally served with the summons and a copy of the complaint therein.

With reference to the proposition advanced by respondents, in effect, that because of the mere presence of one of defendant's attorneys in the trial court, whether as a spectator or as representing some other party defendant, at the time one of the orders under consideration was made, the appearance of defendant in the action was thereby legally indicated, the authorities are not in exact harmony. The cases of Roth v. Superior Court, 147 Cal. 604, 82 P. 246, Cooper v. Gordon, 125 Cal. 296, 57 P. 1006, and California Pine Box & Lumber Co. v. Superior Court, 13 Cal. App. 65, 108 P. 882, are examples of conditions other than those specified in section 1014 of the Code of Civil Procedure, under which a defendant was held to have appeared in an action. The attendant circumstances in each of such cases were as follows: In the Roth Case, on the day following service of summons on the defendant, a stipulation was entered into between opposing counsel extending the defendant's time to plead. In Cooper v. Gordon, in consideration of a stay of execution granted to defendant, the plaintiff was given the right to enter judgment in his favor. In California Pine Box & Lumber Co. v. Superior Court, a stipulation was entered into extending time to answer, following a written request therefor by defendant's attorneys, in order to avoid the filing of a demurrer, and thereafter on application to the court, based on an affidavit showing good cause therefor, the defendant was granted a further extension of time to file his answer in the action.

While from the several rulings made in such cases it is apparent that the means for adjudging the appearance of a defendant in an action, as specified in section 1014 of the Code of Civil Procedure, is not exclusive, it is equally plain that none of such cases is authority for holding that the appearance of a defendant is shown by the mere fact that, on the hearing of a motion in which several defendants are interested, an attorney thereafter representing the defendant was present in court, either as a spectator or as representing one of such defendants other than the defendant whose appearance is in question. On the other hand, authorities are not lacking in this state which indicate that such conditions are insufficient.

In the case of Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470, it was held, apparently contrary to the rulings in the foregoing authorities, that in consideration of certain payments to be made by the defendant, the taking and filing of a stipulation extending his time to answer, and by his acting upon such agreement, did not constitute an appearance. The court said:

> "But it is contended by respondent that by taking and filing the stipulation extending the time to answer, and by accepting and acting upon the agreement to grant successive extensions in consideration of certain payments made, defendant appeared in the action. Section 1014 of the Code of Civil Procedure defines what shall constitute an appearance. A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notices of an appearance for him, *and he can appear in no other way. This statute was intended to settle all disputes upon the subject.* There can be no chance for argument about equivocal acts. State v. McCullough, 3 Nev. 202, seems to be the other way, but the reasoning is far from satisfactory. There was no need of a statute to tell us that the acts specified would constitute appearance. The occasion for a rule was to dispose of questions upon which there might be dispute. There was no such appearance in this case.
>
> "The defendant entered into no stipulation in regard to the case. Plaintiff granted him certain privileges, reserving the right to enter default and judgment in case defendant failed to comply with the conditions."

The case of Davenport v. Superior Court, 183 Cal. 506, 191 P. 911, goes still further in holding that the securing of an order from the judge of the trial court extending the time within which the defendants might plead to the complaint in the action was not a general appearance of such defendants. The court reviews many of the authorities and criticizes as "too broad" the statement appearing in the Vrooman Case that a defendant "can appear in no other way," than as is prescribed by section 1014 of the Code of Civil Procedure, and then declares that:

> "An act of a defendant by which he intentionally submits himself to the jurisdiction of the court in that action for the purpose of obtaining any ruling or order of the court *going to the merits of the case*, as, for example, a motion to strike out part of the complaint, or the making of stipulations, as in the cases above mentioned which may reasonably be construed to imply that the court has, in that action, acquired jurisdiction of the person of the defendant, will be equivalent to an appearance, although not strictly in accordance with the terms of section 1014. But the securing of the order extending time to plead *was not an act of that character*, and the rule of section 1014 should be applied to this case."

See, also, Steinbach v. Leese, 27 Cal. 299; Powers v. Braly, 75 Cal. 238, 17 P. 197;

Anderson v. Nawa, 25 Cal. App. 153, 143 P. 555.

If, according to the latest expression on the subject by the court of last resort of this state, the obtaining by a defendant of an order from the judge of the trial court, extending the time within which he might plead to the action, did not amount to an appearance by such defendant, it should follow that the mere presence in court of an attorney (who afterward represented the defendant), either as a spectator or in the capacity as counsel for other defendants in the action, would not constitute an appearance. The decision in any case should depend upon the solution of the question of what was the legal intention of the defendant in the premises, and the answer to which can be determined only from the circumstances surrounding each given case. It is clear enough that if a defendant "intentionally submits himself to the jurisdiction of the court * * * for the purpose of obtaining any ruling or order of the court *going to the merits of the case,*" he has made an appearance in the action. Surely the presence in court of an attorney, who at that time was acting only for another party to the litigation, under a most strained construction, could not be taken as an act "going to the merits of the action" so far as any other defendant was concerned, or one by which the defendant intentionally submitted himself to the jurisdiction of the court; much less could the fact that such attorney was but a curious spectator of the proceedings in any manner affect the merits of the controversy so as to amount to such intentional submission to jurisdiction.

The case of Honeycutt v. Nyquist, Peterson & Co., 12 Wyo. 183, 74 P. 90, 109 Am. St. Rep. 975, was an action to recover a money judgment on an account stated and for goods sold and delivered, in which a writ of attachment was issued and levied. No service of process was had on the defendant. Thereafter a notice of motion for an order to sell the attached property was served on an attorney, who accepted service thereof for the defendant. In connection with the point that such circumstances amounted to an appearance for the defendant, the court said, in part:

> "We are not inclined to regard the acceptance of service of the motion to sell the attached property as in itself amounting to a general appearance in the action. * * * But the paper referred to was not the summons nor petition. It ought not to be held, we think, that a mere acknowledgment of service upon the defendant of such a motion operates as a submission of his person to the jurisdiction of the court for all purposes of the case. It cannot be said that the fact that a defendant has engaged an attorney to look after his interests either generally or in a particular cause amounts to a voluntary general appearance, for it may occur that the attorney shall conclude that his client's interests will be better subserved by not appearing, or he may be engaged merely to enter a special appearance and contest the question of jurisdiction. The same reasoning might apply in respect to the mere presence of the defendant and his attorney in court at the time fixed for the hearing of the motion, although it is unnecessary to decide that question. Certainly they would have had a right to be in court as spectators, without submitting the person of the defendant to the jurisdiction of the court in a particular case pending therein, if they did not participate in any of the proceedings in the case. * * *"

In Fulton v. Ramsey, 67 W. Va. 321, 68 S. E. 381, 140 Am. St. Rep. 969, the rule is laid down (syllabus) that:

> "A general appearance must be express or arise by implication from the defendant's seeking, taking or agreeing to some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than one contesting the jurisdiction only."

[3] The second suggestion of respondents, that is to say, that because of the alleged evasion of service of process upon him and the publicity through the medium of the press and the radio, and the probability of the receipt by defendant of private letters and telegrams concerning the pendency of the action against him, he must have had notice of the pendency of the action, would seem equally unavailing to establish either the equivalent of service of process on the defendant or his voluntary appearance in the action. In support of such contention the attention of this court has been directed to the case of Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am. St. Rep. 147, in which it appears that, in a contempt proceeding arising out of the failure of the defendant to obey an order of the court in that regard, it was shown that the respondent therein had concealed himself to avoid a compliance with such order and the service of process. In such circumstances it was held that the order of the court, which directed that the order to show cause be served upon the attorneys of record of the defendant, was authorized and constituted a valid service on the defendant. However, in answer to the order to show cause, the defendant appeared by his counsel and, without interposing any objection to the want of personal service on the defendant, submitted evidence upon the merits of the matter then before the court. In the earlier cases of Golden Gate, etc., Co. v. Superior Court, 65 Cal. 187, 3 P. 628, and Eureka Lake, etc., Co. v. Superior Court, 66 Cal. 311, 5 P. 490, each of which likewise involved a contempt proceeding, the same principle was invoked as in the Foley Case. It will be noted that the only parallel in the facts of the Foley Case with those in the instant case is that in each of them the probable concealment of the defendant to avoid service of process inferentially appeared;

and, contrary to the facts in the instant case, that in each of the cases to which reference has been had, prior to the institution of the contempt proceeding, the defendant had appeared generally in the action.

Section 412 of the Code of Civil Procedure provides for the manner of procuring service of summons in an action—

> "where the person on whom service is to be made * * * has departed from the state; * * * or conceals himself to avoid the service of summons. * * *"

No authority is suggested by respondents which, in its effect or in principle, would authorize this court to decide that any method of obtaining service of summons other than that prescribed by statute would be sufficient.

With reference to the necessity of actual service or the constructive service in proper cases, the Supreme Court, through Mr. Justice Field, in Peabody v. Phelps, 9 Cal. 213, 226, said, in part:

> "Of the action the defendant received no legal notice, and the judgment cannot, therefore, be evidence against him of a paramount title in Larkin. Mere cognizance of the existence of the action is not notice in the legal sense. To be available, the notice must apprise the party whose rights are to be affected, of what is required of him, and the consequences which may follow if he neglect to defend the action. Miner v. Clark, 15 Wend. [N. Y.] 425; Clark v. Baird, 7 Barb. [N. Y.] 65."

In Matthews v. Matthews, 240 N. Y. 28, 147 N. E. 237, 38 A. L. R. 1079, which affected a matter similar in many respects to the instant case, it is said:

> "It must be conceded that no judgment could be obtained for the disposition of the sequestered property without personal or constructive service upon the defendant. We have no such thing in our practice; in fact, there is no such thing in existence in the law as a personal judgment without service or notice of some kind, and the only kind of notice that we recognize in this state for the obtaining of a judgment is personal service, substituted service, or the service by publication of the summons in the action. It necessarily follows that when the word 'order' is thus linked up to the word 'judgment,' so that the disposition of the sequestered property is to be 'by order or judgment,' the order also to be legal and effective must be on notice to the defendant, either given personally or in some form recognized by our practice [citing cases].
>
> "An abandoned wife where, as in this case, her husband is a nonresident, may sequester his property; but the service of the summons by publication must be commenced as herein stated. After he has been served by publication and is in default of appearance or pleading, the court can enter judgment and dispose of the sequestered property as it deems best for the interest of the wife and children. If the defendant appears, of course there is no difficulty."

This court is disinclined to accept a construction which, in its nature, would have the effect of so broadening the apparent intent of the language of the present statute as to make it of no consequence as a legal requirement before service of process may be obtained. The natural expansion of the principle suggested by respondents would include hearsay and rumor of every description and practically prevent or forbid at his peril any person who had been sued in an action from reading a newspaper or holding any communication whatsoever with his fellow man. The results of such a rule would be far reaching, and if not disastrous, would at least be intolerable.

Other objections interposed by respondents to the issuance of the writ are that petitioner comes into this court with unclean hands; and, in any event, that each of the several orders, which together constitute the subject-matter here under consideration, is appealable; also, that the forum within which the remedy to which defendant was entitled, if any, should be administered, was that in which the objectionable orders were issued; for all of which reasons it is contended by respondents that the writ of prohibition should not issue.

[4] With reference to the alleged "unclean hands" of the petitioner, it is urged that because the suit for divorce is equitable in its nature, and because the court in which such action is pending has made the several orders here in question—all of which the defendant therein has seen fit to ignore—he should not now be heard in this court in a prayer for relief therefrom. But at least one of the difficulties with the position thus assumed by respondents is that it fails to take cognizance of the foundational fact that the defendant has never been served with summons, nor has he made an appearance in the action in the lower court, and consequently, that from a legal standpoint, he has never had notice of the pendency of the action. If the order issued by the superior court was in excess of the jurisdiction of such court, it is plain that the defendant was under no compulsion to obey it (Maier v. Luce, 61 Cal. App. 552, 558, 215 P. 399), or that no restriction or limitation existed on his conduct with reference to taking legal steps necessary to have its invalidity judicially declared.

[5] Regarding the remedy open to defendant by appeal from the several orders, as suggested by respondents, it is a general rule that prohibition will not lie where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. Section 1103, Code Civ. Proc. The exception to the rule also is well established that, although the order or the judgment to which exception is taken by the person, upon whom it operates, may be appealable and thus come within the general rule which forbids the

issuance of a writ of prohibition, nevertheless, if in the circumstances of a given case it may be clearly discernible that such a remedy will not properly subserve the ends of justice by affording the relief to which the petitioner may be entitled, the fact that, ordinarily speaking, the remedy is "plain, speedy, and adequate" will present no obstacle to the issuance of the writ. Lieberman v. Superior Court, 72 Cal. App. 18, 236 P. 570; Consolidated, etc., Co. v. Superior Court, 189 Cal. 92, 207 P. 552; Hammons v. Superior Court, 63 Cal. App. 700, 219 P. 1037; Quatman v. Superior Court, 64 Cal. App. 203, 221 P. 666; Elliott v. Superior Court, 168 Cal. 727, 734, 145 P. 101; Koerber v. Superior Court, 57 Cal. App. 31, 206 P. 496; Northcutt v. Superior Court, 66 Cal. App. 350, 356, 226 P. 25; Davis v. Superior Court, 184 Cal. 691, 195 P. 390; A. G. Col Co. v. Superior Court, 196 Cal. 604, 238 P. 926; Dept. of Public Works v. Superior Court, 197 Cal. 215, 224, 239 P. 1076. The cases of Simpson v. Police Court of Riverside, 160 Cal. 530, 117 P. 553, and Gardner v. Superior Court, 19 Cal. App. 548, 126 P. 501, are to the effect that, even if the question be one of jurisdiction in the court making the order, the writ of prohibition will not lie, provided that the petitioner have a plain, speedy, and adequate remedy in the ordinary course of law. However, as is pointed out in the dissenting opinion in the Simpson Case, whether the writ shall issue is largely a question of discretion in the court to which the application is made. It should also be noted that in both the Simpson Case and in the Gardner Case no question of the jurisdiction of the party defendant was involved, and that the question of jurisdiction was confined to the subject-matter of the action.

[6] As is stated in volume 2 of Ruling Case Law, § 14, p. 333:

> "It is a well-settled general rule that an appeal from or a writ of error to judgment of a court of general jurisdiction operates as a general appearance in the case."

It is therefore apparent that, if by appealing from all or any of the several orders under consideration a general appearance of the defendant in the instant case would result, the appeal would be useless, and effective relief from the several orders made without or in excess of the jurisdiction of the trial court would be entirely denied to the defendant.

[7] Assuming, without deciding, that the filing of a notice of motion to vacate the orders in question would likewise constitute a general appearance by the defendant (Grinbaum v. Superior Court, 192 Cal. 528, 556, 221 P. 635; Shriver v. Superior Court, 48 Cal. App. 576, 192 P. 124), it is manifest that by such act he would destroy the very purpose of his motion. On the question of the necessity on the part of an aggrieved party to make application before the court making such order for relief by way of a motion to vacate, the language used by Mr. Justice Richards in the case of Grinbaum v. Superior Court, 192 Cal. 528, 556, 221 P. 635, 647, is appropriate. In part, he said:

> "As to the petitioner's second suggested remedy, viz., that of a motion to set aside such void order in the court making the same; in response to this suggestion it may be stated that it has never been the practice to require a party injuriously affected by a judgment or order of a court, which court had never acquired jurisdiction over either his person or property to make the same, to first apply to the court making said order to have the same vacated; nor should it be so in reason, since to apply such a rule would be to require such a party to submit himself to the jurisdiction of the court making such void order and thus commit himself thenceforward to the tender mercy of the court making the same. We are cited to no authority which goes so far as to hold that a person having a clear right to make a direct attack by certiorari upon a judgment or order of a judicial tribunal upon the ground of lack of jurisdiction must first seek relief from such judgment or order in the court which was without jurisdiction to make or enter the same. * * * On the other hand, in the case of Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L. R. A. 627, 18 Am. St. Rep. 192, which arose on application for a writ of prohibition, this court, after an exhaustive consideration of the subject, said (page 405 [24 P. 141]): 'If a want of jurisdiction is apparent on the face of the proceeding in the lower court, no plea or preliminary objection is necessary before suing out the writ of prohibition.' This we think to be the true and reasonable rule applicable to cases of this character."

[8] The return to the writ herein shows conclusively that any application which might be made to the superior court to vacate all or any of the orders made by it would be denied.

In the case of Keeley v. Superior Court, 26 Cal. App. 213, 146 P. 526, the rule is laid down that an application for the writ of prohibition will be granted in a proper case where from the return of the respondent it appears that the trial judge does not agree with the petitioner and that an application to him for an order vacating the order to which exception was taken would be unavailing. To the same effect are Nissen v. Elliott, 145 Ark. 540, 224 S. W. 958; City of Charleston v. Littlepage, 73 W. Va. 156, 80 S. E. 131, 51 L. R. A. (N. S.) 353; State v. Kelley, 32 S. D. 526, 143 N. W. 953; State v. Williams, 221 Mo. 227, 120 S. W. 740; Foley v. Ham, 102 Kan. 66, 169 P. 183, L. R. A. 1918C, 204.

As a conclusion from the foregoing, it will appear that in the absence of service of process on the defendant, or of his legal appearance in the action, each of the orders to which reference has been had was void, and that for the reasons heretofore expressed herein the defendant is entitled to the writ directing and commanding the respondents, and each of them, to desist and refrain from further proceedings under the orders, and each of them, referred to in the petition herein. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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81 Cal. App. 476

STRANSKY v. CALLAN. (Civ. 5653.)

(District Court of Appeal, First District, Division 1, California. Feb. 24, 1927.)

1. **Appeal and error ⚷1011(1)—Where evidence was conflicting as to procurement of able and willing purchaser by holder and defendant's notification thereof, trial court's finding thereon was conclusive.**

In action to recover commission for sale of real property, where evidence was conflicting as to whether ready, able, and willing purchaser was procured and defendant notified thereof, trial court's finding thereon was conclusive.

2. **Appeal and error ⚷987(1)—Appellate court has jurisdiction to consider evidence only where it does not sustain finding or is insufficient, as matter of law.**

It is only where there is no evidence to sustain finding, or where, as matter of law, evidence is insufficient to sustain it, that appellate court has jurisdiction to consider evidence.

3. **Appeal and error ⚷994(3), 1011(1)—Trial court determines credibility of witnesses and disputed facts.**

It is exclusive province of trial court to determine credibility of witnesses and disputed questions of fact.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by M. Stransky against M. C. Callan to recover a broker's commission. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugh K. McKevitt, of San Francisco, for appellant.

Franklin Swart, of Redwood City, for respondent.

TYLER, P. J. Action to recover a broker's commissions for the sale of real property. The complaint alleges, in substance, that on the 14th day of October, 1924, defendant entered into a contract in writing with plaintiff's assignor, one James W. Doherty, by the terms of which Doherty was given an exclusive contract for a period of three months to sell and enter into and sign a written contract in defendant's name for the sale and conveyance of certain real property, owned by defendant, which is situated partly in San Francisco and partly in San Mateo county. The price at which the property was to be sold was the sum of $14,000, and defendant, under the terms of the agreement, agreed to pay as a commission for such sale a sum equal to 5 per cent. on the first $5,000 and 2½ per cent. on the balance of such sum.

Thereafter, on the 10th day of January, 1925, and while said authorization was in full force and effect, so it is alleged, Doherty found a purchaser ready, able, and willing to purchase such property at the price fixed, and such purchaser and Doherty, on behalf of defendant, made and executed an agreement, in writing, by the terms of which said purchaser agreed to purchase and Doherty, on behalf of defendant, agreed to sell the property for the sum named; that thereafter defendant refused to comply with his agreement, by reason of which refusal defendant became indebted to Doherty for the agreed commissions, amounting to the sum of $475, for which amount judgment was prayed. Defendant by answer admitted entering into an agreement to sell the property, but denied on information and belief that by said agreement he ever authorized Doherty to enter into or sign a contract in his name for such sale. He also denied that Doherty at any time found a purchaser ready, willing, and able to purchase the property, or that Doherty had ever entered into any agreement with any person or purchaser, as alleged in the complaint. At the trial, plaintiff presented evidence to show that he had obtained a purchaser who was ready, able, and willing to make the purchase, if the title to the property to which objection had been made could be perfected. No claim was made that the purchaser was ever personally presented to defendant, but evidence was introduced by plaintiff to show that a letter had been written by Doherty and mailed by him advising defendant of the sale. Defendant, on the other hand, testified positively that he never had received any notice or any communication from Doherty concerning the matter, and that no claim for any commission was made upon him until the filing of the suit.

[1] The trial court found, in substance, that Doherty did not, within the life of the contract or at any time thereafter, procure a purchaser ready, able, and willing to make the purchase under the terms of the authorization, and that no purchaser had been presented by Doherty to defendant. It further found that Doherty did not, within the life of the contract or at any time, notify defendant that he had entered into a contract of sale concerning the property and that no such agreement was ever brought to the attention of defendant. The case is one which presents a conflict in the evidence. The finding of the trial court is, therefore, conclusive here.

[2] It is only in cases where there is no

evidence to sustain a finding, or where it can be said, as a matter of law, that the evidence is insufficient to sustain it, that this court has jurisdiction to consider the evidence.

[3] It is the exclusive province of the trial court to determine the credibility of the witnesses, and from the conflicting evidence determine the disputed fact. Those principles have been so often reiterated that they have become trite.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

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81 Cal. App. 422

PEOPLE v. MAY. (Cr. 954.)

(District Court of Appeal, Third District, California. Feb. 19, 1927.)

Criminal law 🔑1071—Statutory provision for dismissal of appeal for failure to file application for transcript within required time is mandatory (Pen. Code, § 1247).

Provision of Pen. Code, § 1247, for dismissal of appeal, if application for transcript of reporter's notes is not filed within five days after notice of appeal, is mandatory, and failure to comply therewith is fatal.

Appeal from Superior Court, Yuba County; H. D. Gregory, Judge.

Aldus May was convicted of second degree robbery, and he appeals. Appeal dismissed.

Frank A. Duryea, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of robbery of the second degree. He moved for a new trial, which was denied. He was thereupon sentenced to imprisonment in the state prison. He duly gave notice of appeal, but failed, within five days thereafter, or at any time, to file with the clerk or present to the court an application for a transcript of the phonographic reporter's notes of the trial, as required by the provisions of section 1247 of the Penal Code. One of the provisions of that section reads as follows:

> "If such application is not filed within said time, the appeal is wholly ineffectual and shall be deemed dismissed and the judgment or order may be enforced as if no appeal had been taken."

That provision is mandatory, and failure to comply therewith is fatal. People v. Hill (Cal. App.) 248 P. 714, and cases there cited.

It may be stated further that the facts set forth in appellant's opening brief as constituting the defendant's testimony given at the trial conclusively show that he is guilty of the crime of which he was convicted.

The appeal is dismissed.

We concur: HART, J.; PLUMMER, J.

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81 Cal. App. 396

GIBBON v. JUSTICES' COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5704.)

(District Court of Appeal, First District, Division 1. California. Feb. 18, 1927.)

Justices of the peace 🔑106—Defendant is not entitled to dismissal, where issue of law was tried, though not decided, in justices' court within two years (Code Civ. Proc. §§ 588, 890a).

Where issue of law, presented by demurrer, was tried in justices' court within two years after demurrer was filed, defendant is not entitled to dismissal under Code Civ. Proc. § 890a, providing for dismissal where plaintiff fails to bring action to trial within two years after case is brought to issue of law or fact, notwithstanding that such issue was not decided till after expiration of two-year period, in view of section 588.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Petition in superior court by F. B. Gibbon for a writ of mandate to the Justices' Court of the City and County of Francisco and Thomas F. Prendergast, Justice, directing dismissal of an action therein pending. From a judgment denying the petition, plaintiff appeals. Affirmed.

Matthew A. McCullough, of San Francisco, for appellant.

McKinstry, Haber & Firebaugh and Peirce Coombes, all of San Francisco, for respondents.

CASHIN, J. Appeal from a judgment denying a petition for a writ of mandate, directing the dismissal of an action pending in justices' court of the city and county of San Francisco.

It was sought by the action mentioned to recover from appellant as a stockholder a proportionate part of a debt of a corporation. The action was filed in the justices' court, and summons issued on July 28, 1921. Appellant appeared therein on April 2, 1923, by filing a written demurrer to the complaint, which was submitted for decision on the issue of law presented on February 19, 1924. When this issue was decided does not appear from the record, but it is stated in appellant's brief that an order overruling the demurrer was made on April 8, 1926, notice of which was given appellant on the same day. A motion was then made by appellant to dismiss the action under the provisions of section

890a of the Code of Civil Procedure, which motion was denied.

It is contended that, it appearing that the action was not brought to trial on issues of fact within two years after the finding of the demurrer, it was the duty of the court under the provisions of the section to dismiss. The material part of this section provides as follows:

> "Judgment of dismissal must be entered whenever the plaintiff fails to bring the action to trial within two years after the case is brought to an issue of law or fact, except where the parties have stipulated in writing that the time may be extended. * * *"

As provided by section 588, Code of Civil Procedure, issues arise upon pleadings when a fact or a conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds, (1) of law, and (2) of fact; and it has been held that a trial is the examination before a competent tribunal of the facts or law put in issue in a cause for the purpose of determining such issue; and, when a court hears or determines any issue of fact or law for the purpose of determining the rights of the parties, it may be considered a trial. Goldtree v. Spreckels, 135 Cal. 666, 67 P. 1091; Tregambo v. Comanche Milling & Mining Co., 57 Cal. 501; 24 Cal. Jur. "Trial," p. 716.

It is clear from the language of section 890a of the Code of Civil Procedure that it was the legislative intention to provide for dismissals when the plaintiff has failed after issues of law or fact have been tendered by proper pleadings to bring the action to trial upon the issue presented, and where it appears, as here, that no issues of fact were presented, but that the issue of law was tried, although not decided, within the two-year period the requirements of the section were met, and the motion was properly denied.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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81 Cal. App. 440

FIFIELD v. BULLWINKEL. (Civ. 4862.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1927.)

Executors and administrators ⚷437(4)—3-months period for bringing action against executor on rejected claim runs from time written notice of rejection is given (Code Civ. Proc. §§ 1490, 1491a, 1492, 1498).

Period of 3 months within which claimant must bring action against executor on rejected claim under Code of Civ. Proc. § 1498, begins to run when executor first gives claimant written notice of rejection, without regard to time of publication of notice to creditors under sections 1490, 1491a, and 1492, since claimant is entitled to anticipate publication of notice and present claim prior thereto.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Annie Fifield against William H. Bullwinkel as executor of the estate of Henry William Hedemann, deceased. From judgment dismissing the action, plaintiff appeals. Affirmed.

R. A. McKay and Allen Brant, both of San Diego, for appellant.

Richardson & Johnson, of San Diego, for respondent.

CONREY, P. J. The action is brought by plaintiff against the executor of the last will and testament of Henry William Hedemann, deceased, to recover the amount of a claim on a debt owing by decedent to claimant, which was rejected and disallowed by the executor. The original complaint in the action was filed on the 8th day of September, 1923. The case came on for trial upon the issues presented by the amended complaint and the answer thereto. Upon the facts established by the evidence produced at that time, the court dismissed the action upon the ground that the action was barred by the provisions of section 1498 of the Code of Civil Procedure.

Sections 1490, 1491a, and 1492 of the Code of Civil Procedure are likewise pertinent to the discussion of the stated grounds of the present appeal. It is required (section 1490) that the executor publish a notice to creditors requiring presentation of their claims. This publication must be made not less than once a week for four weeks. Section 1491a reads as follows:

> "Within thirty days after the first publication of notice to creditors, the executor or administrator must file or cause to be filed in the court a printed copy of said notice to creditors accompanied by a statement setting forth the date of the first publication thereof and the name of the newspaper in which the same is printed."

It is further required (section 1492) that, after the notice is given, a copy thereof, with the affidavit of due publication, be filed; and that upon such affidavit or other testimony an order be made showing that due notice to creditors has been given, and directing that such order be entered in the minutes. After some further regulations concerning the presentation of claims and the allowance or rejection thereof, the Code, at section 1498, provides that, when a claim is rejected by an executor or administrator, or by the judge, "written notice of such rejection shall be given by the executor or administrator to the holder of such claim or to the person filing or presenting the same, and the holder must bring suit in the proper court against the executor or administrator within three months after the date of service of such notice if the claim be then due, * * * otherwise the claim shall be forever barred."

Counsel for appellant state that the only question involved on this appeal is whether this action, commenced on September 8, 1923, was barred by said provisions of section 1498. The record shows that the executor, having been duly appointed and qualified, published a notice to creditors beginning on April 16, 1923, but failed to file any copy of such notice and a statement of publication thereof, within 30 days after April 16th. On April 26th, the plaintiff presented her claim, which was rejected on May 4th, and notice of rejection was served on the plaintiff May 5, 1923. Thereafter the executor caused a second notice to creditors to be published, and the first publication of said notice was on June 9, 1923. Thereafter, and within 30 days, the executor caused a copy of said notice, and a statement of publication, to be filed as required by section 1491a of the Code of Civil Procedure. On June 27, 1923, the plaintiff again presented her claim, which was rejected in like manner as before. Notice of this rejection was given to the holder on July 10, 1923. Thereafter, on July 13, 1923, a decree establishing notice to creditors was duly entered.

If the 3 months time allowed plaintiff for bringing her action as provided by section 1498 of the Code of Civil Procedure began to run on May 5, 1923, the action came too late. But if, as she contends, such time did not begin to run until July 10, 1923, her right of action was not barred at the time when the action was commenced. The merits of the appeal depend upon the answer to the question thus presented.

It has been held that the provisions of section 1491a of the Code of Civil Procedure, requiring that a copy of the notice to creditors, together with a statement of the date of first publication thereof, be filed within 30 days after such first publication, is mandatory, and not merely directory. Hawkins v. Superior Court, 165 Cal. 743, 134 P. 327. From this is may be argued that, when said requirement has not been fulfilled, the publication of notice is wholly ineffectual, and that a subsequent publication must be made, and that such subsequent publication must be deemed the original publication of notice to creditors in such estate. We are not aware of any decisions directly to this point. But the question becomes immaterial, if the claimant is entitled to anticipate publication of notice to creditors and present his claim prior thereto. And it appears that this may be done. McCann v. Pennie, 100 Cal. 547, 552, 35 P. 158. This being so, it follows that, without regard to the time of publication of notice to creditors, the period of 3 months, as limited by section 1498 of the Code of Civil Procedure, within which the claimant must bring his action upon a rejected claim, begins to run on the date when the executor first gives to the claimant written notice of such rejection.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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81 Cal. App. 447

LANCEL v. JOHN L. BENWELL, Inc., et al.
(Civ. 5556.)

(District Court of Appeal, First District, Division 2, California. Feb. 23, 1927.)

1. Venue 🔑52(4)—Where pleadings presented hardly single issue, motion to change place of trial to promote convenience of witnesses and ends of justice was properly denied (Code Civ. Proc. § 397, subd. 3).

Where nearly every allegation in plaintiff's complaint was admitted because defendants had failed to interpose proper denials, and there was hardly a single issue presented, motion to change place of trial to promote convenience of witnesses and ends of justice, under Code Civ. Proc. § 397, subd. 3, was properly denied.

2. Venue 🔑52(4)—Motion to change place of trial for convenience of witnesses who were unnecessary was properly denied (Code Civ. Proc. § 397, subd. 3).

Where it appeared that many of witnesses designated were cumulative and not necessary, motion to change place of trial to promote convenience of witnesses and ends of justice, under Code Civ. Proc. § 397, subd. 3, was properly denied.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action by E. P. Lancel against John L. Benwell, Incorporated, and others. From an order denying defendants' motion to change place of trial, defendants appeal. Affirmed.

Dunn, White & Aiken, of Oakland, for appellants.

O. G. Foelker and E. C. Miles, both of Oakland, for respondent.

STURTEVANT, J. This is an appeal from an order refusing to change the place of trial. The defendants made two motions. The first motion was made under section 395 of the Code of Civil Procedure. That motion was denied, the defendants answered, and thereafter the defendants made a motion to change the place of trial from Alameda county to Los Angeles county to promote the convenience of witnesses and the ends of justice. Code Civ. Proc. § 397, subd. 3. That motion was also denied, and from that order the defendants have appealed under section 953a of the Code of Civil Procedure.

[1] In passing on such a motion it is of primary importance to ascertain what the is-

sues are, and, having done so, it will then readily appear what witnesses will be necessary for the parties to present their respective cases. An examination of the pleadings discloses that there was hardly a single issue presented. Nearly every allegation in the plaintiff's amended complaint was admitted because the defendants had failed to interpose any proper denials. Fogarty v. Fogarty, 129 Cal. 46, 50, 61 P. 570; Nolan v. Hentig, 138 Cal. 281, 283, 71 P. 440; Scott v. Superior Sunset Oil Co., 144 Cal. 140, 142, 77 P. 817. If the trial judge made no further examination of the record and for the above reasons denied the motion, his ruling would not have been erroneous.

[2] When we go further into the record we find additional support for the ruling made by the trial court. The appellants produced as a part of their showing on the motion the affidavit of John L. Benwell. He enumerates a large number of witnesses, perhaps 100, whom the defendants intend to call. He then proceeds to segregate of that number 30 or thereabouts by whom the defendants expect to prove that the "John L. Benwell No. 3 oil well was owned in fee simple by the John L. Benwell, Inc., a corporation; that more than $50,000 was expended by the defendants in drilling said well; that all of the money received from the sale of certificates for royalty assignments, together with approximately $40,000 additional, was expended on said well in the development thereof; and that all of said witnesses are familiar with the actual working conditions, work performed, and money expended on said property." In another place in the affidavit it is averred that all title papers are of record in the recorder's office in Los Angeles and said records will be introduced in evidence. In another place it is averred that H. E. Foster had complete charge of the drilling operations and of the amount of money expended in drilling. If such latter statements are true, it is patent that the 40 witnesses designated were cumulative and not necessary.

The defendants designate about 30 witnesses by whom they intend to prove that such witnesses "are fully acquainted with the title to said property and the situation of the same with reference to a producing well; that all of said witnesses can testify to the statements made to them at the time certain certificates for royalty assignments were made and offered for sale; that a majority of said witnesses above named are holders of certificates for royalty assignments issued by the defendant corporation." A comparison will disclose that this latter group of witnesses are in part cumulative of the first group on the subject of title, and that the best evidence on that subject was the records of Los Angeles county, copies of which the defendants alleged they intended to produce. It will further appear from such examination that the additional facts to which the latter group will testify are facts that were utterly immaterial to the case on trial.

It will serve no purpose to further extend this opinion in showing the defects in the showing made by the appellants.

The order appealed from is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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81 Cal. App. 417

PEOPLE v. BLACKWELL. (Cr. 947.)

(District Court of Appeal, Third District, California. Feb. 19, 1927.)

1. Witnesses ⚿363(1)—Evidence that criminal charge against state's witness was pending in same court held admissible to show witness' desire to gain district attorney's favor.

In prosecution for unlawfully selling intoxicating liquor, evidence that charge of sale of liquor was pending against state's witness in same court *held* admissible, not to show truth thereof, but to show that witness was influenced by desire to gain the favor of the district attorney.

2. Criminal law ⚿865(1)—Court's statement that he thought jury should agree held error, as intimating that jury should convict.

Where jury reported that nine jurors were for conviction and three for acquittal, the difference of opinion being due to fact that certain jurors gave credit to witnesses for one side and rest to witnesses for other, *held* that court's statement, "I think the jury ought to agree on a verdict," was prejudicial error, as plain intimation that court thought that jury should return verdict of guilty.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

L. T. Blackwell was convicted of unlawfully selling intoxicating liquor, and he appeals. Reversed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant Blackwell and one E. N. Weed, were jointly charged with the offense of unlawfully selling intoxicating liquor. Blackwell was tried separately and convicted. He has appealed from the judgment and the order denying a new trial.

The defendant was the proprietor of a drug store at the time of the alleged offense, and Weed was one of the employees in the same store. He became one of the principal witnesses for the prosecution under a promise made by the district attorney to dismiss the case against him if he "would testify against Mr. Blackwell." Weed testified that Mr. and Mrs. Pierce, two informers of the district attorney's office, entered the store, and asked for wine, and that the witness spoke to the defendant about the matter and, "I told him they were in there and asked for it, and he asked me if I knew them, and I told him that they were—must be friends of his brother, and he said it was all right"; that thereafter the witness sold Mr. and Mrs. Pierce a gallon of wine for $6, and immediately informed the defendant of the sale, and that the defendant said, "All right." Mrs. Pierce testified that, subsequent to the time at which she and her husband had first sought to purchase wine from Weed—

> "We went in there; we asked if Mr. Weed was in, and he (defendant) said, 'No, Mr. Weed wasn't there, he was out to supper.' I said, 'He promised to get us some wine.' * * * He said, 'You will get it, all right.' I said, 'How much for the fees?' He said, '$6. Come around tomorrow night, and you will get it.' And we called him up, and the next night Mr. Weed spoke to us, and he told us to come in the following night, and Mr. Blackwell was there again, and Mr. Weed was out to supper again. And so finally we went back the next night and got the liquor for $6, which we gave to Mr. Weed."

Mr. Pierce's testimony is substantially the same as that of his wife. The defendant contradicted the foregoing testimony, and testified that he did not know of the sale or have any part therein.

[1] On cross-examination of Mrs. Pierce the following occurred:

> "Q. Isn't it a fact, Mrs. Pierce, that your arrangement with the district attorney of Sacramento County in reference to securing liquor in Wright Act cases was a certain salary, and the further fact that you, yourself, would not be prosecuted for a sale of intoxicating liquor, a charge that is now pending against you in department No. 4 of the superior court of Sacramento County? * * *
>
> "Mr. Green (deputy district attorney): I object on the * * * ground it is incompetent, irrelevant, and immaterial, has no bearing on the case; I object on the further ground it is prejudicial to the witness' character, and Mr. Foote knows he can't do that.
>
> "The Court: The objection will be overruled. * * * It is admissible to show motive or interest of the witness. * * * A. Why, not that I know of. I went to work for a salary, as far as I know.
>
> "Q. That was after you had been indicted, though, for the sale of intoxicating liquor, was it not?
>
> "Mr. Green: Just a minute. Mr. Foote knows he can't prove it, and he is dragging it in by the ears. * * *
>
> "The Court: The objection will be sustained. * * * The jury will be instructed to disregard the question."

The ruling was erroneous. The fact that a criminal charge against the witness was then pending in the same court was competent evidence, not of the truth thereof, but as tending to show that the testimony of the witness was influenced by a desire to gain the favor of the district attorney by aiding in the conviction of the defendant, and thereby escaping prosecution in her own case. People v. Dillwood, 4 Cal. Unrep. 973, 975, 39 P. 438; People v. Hoffman, 195 Cal. 295, 309, 232 P. 974; People v. Bennett (Cal. App.) 249 P. 20, 27. The cross-examination proceeded further as follows:

> "Q. You yourself have been indicted, have you not, Mrs. Pierce, for a sale of intoxicating liquor in Sacramento county?
>
> "Mr. Green: I object to it on the ground it is not the best evidence; on the further ground it is incompetent, irrelevant, and immaterial; and on the further ground it tends to prejudice the witness.
>
> "The Court: The objection will be sustained, and the court will admonish counsel to refrain from asking similar questions when the court has already sustained objections to a question, and will admonish you not to ask it. You know, of course, that question is not admissible."

The court's reference to having already sustained an objection (which was not made upon the ground that the best evidence was not offered) to a similar question, and the admonition to refrain from asking similar questions, may well have convinced counsel for defendant that no proof of a pending charge against the witness would be permitted. However, under similar circumstances it has been said:

> "These charges should * * * be proved by the record if objection is made to oral evidence of them." People v. Dillwood, supra.

[2] The record contains the following:

> "The jury retired at 3:45 o'clock p. m., to deliberate upon their verdict, and at 6:30 o'clock p. m. returned into the courtroom, whereupon the following proceedings were had: * * *
>
> "Foreman H. K. Olmstead: Your honor, after taking three ballots, with the result nine for conviction and three for acquittal, we feel that there is no chance for a settlement or agreement.
>
> "The Court: What seems to be the difficulty. * * * Any difference about the evidence? * * *
>
> "Foreman Olmstead: No, the principal difficulty seems to be * * * in the way that the testimony of the different witnesses is believed by the different ones of the jurors. Certain of the jurors give credit to the witnesses for one side, and the rest give credit to the witnesses for the other side, and there seems to be very little chance of reconciling the views of the different members.
>
> "The Court: Well, I think if the jury has the evidence before them, they are just as competent to determine and agree upon a verdict as any other jury would be. * * * Any of the jurors want any of the evidence to be read?
>
> "Juror Olmstead: No, there doesn't seem to be any question as to the evidence, although

some members of the jury refuse to believe certain witnesses.

"The Court: * * * You have heard the evidence here, and you all understand all of the evidence. I think the jury ought to agree on a verdict. I think you better retire and deliberate further."

Under all the circumstances, there is merit in appellant's contention that the statement of the court, "I think the jury ought to agree on a verdict," amounted to "a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find." The foreman had just announced that the jury stood nine to three for conviction, and that some of the jurors "refused to believe certain witnesses." The defendant was the only witness for the defense who gave testimony in denial of his participation in the alleged offense. Three witnesses for the prosecution testified to the defendant's connection with the offense. From the foreman's statement that "some members of the jury refuse to believe certain witnesses," the natural inference is that the three jurors voting for acquittal refused to believe the witnesses for the prosecution rather than that the nine others refused to believe the defendant's testimony. As was said in People v. Kindleberger, 100 Cal. 367, 369, 34 P. 852, 853:

> "We think the jury understood, or at least may have understood, from these unguarded remarks that in the opinion of the judge the defendant was guilty."

And, as said in People v. Conboy, 15 Cal. App. 97, 98, 113 P. 703:

> "These remarks amounted to a plain intimation that the court thought the evidence in the case warranted a verdict of guilty, and that the jury should so find."

The evidence of the defendant's guilt is not of such character as to enable this court to say that the error of the trial court was not prejudicial. The case had been tried twice before. Each trial had resulted in a disagreement of the jury. Weed was not only an accomplice, but he had been promised that the case against him would be dismissed if he "would testify against Mr. Blackwell." If, as the defendant sought to prove, and as may be implied from one of the foregoing questions put to Mrs. Pierce and her answer thereto, she was under indictment for unlawfully selling intoxicating liquor, that fact, together with her employment by the district attorney to gather evidence against like offenders, would greatly affect her and her husband's credibility as witnesses. The other errors of which complaint is made are not likely to be repeated on the retrial of the case, and need not be specifically considered. From an examination of the whole record it appears that justice requires a retrial of the case.

The judgment and the order are reversed.

We concur: HART, J.; PLUMMER, J.

81 Cal. App. 449

PEOPLE v. FORD. (Cr. 1405.)

(District Court of Appeal, Second District, Division 1, California. Feb. 23, 1927.)

1. Criminal law ⚷622(1)—Separate trial of defendant charged jointly with another rests in discretion of trial court (Pen. Code, § 1098).

Under Pen. Code, § 1098, decision of whether motion by one of defendants, jointly charged with another, for a separate trial, shall be granted, rests in sound discretion of trial court.

2. Criminal law ⚷1144(9)—Motion for separate trial will be assumed to have been properly denied, in absence of showing abuse of discretion (Pen. Code, § 1098).

In absence of showing that discretion rested in trial court under Pen. Code, § 1098, for determining motion of one of defendants, jointly charged, for a separate trial, was abused, it will be assumed that motion was properly denied.

3. Poisons ⚷9—Failure to find narcotics on defendant's person held not to require directed verdict in prosecution for offering narcotics for sale.

In prosecution for unlawfully offering narcotics for sale, failure to find narcotics on defendant's person at time of his arrest *held* not to require directed verdict, since question of possession was not necessarily involved.

4. Criminal law ⚷427(3) — Incriminating statements by either of defendants before offense are admissible after relationship between them is established.

After relationship between two defendants has been established, any incriminating statements made by either of them before offense was committed are admissible in evidence.

5. Criminal law ⚷424(1)—Officer's testimony regarding conversation with one defendant, referring to other defendant as partner, held admissible as narration of conversation.

In prosecution for unlawfully offering narcotics for sale, evidence by arresting officer regarding conversation between him and one of defendants before arrest, wherein one defendant was referred to as the other's partner, *held* admissible, where officer was only narrating alleged conversation between him and one of defendants, and did not state as a fact that partnership existed between them.

6. Criminal law ⚷404(4) — Bottles and vials containing narcotics found in defendant's place of business after arrest held admissible as corroboration in prosecution for offering narcotics for sale.

In prosecution for unlawfully offering narcotics for sale, bottles and vials containing drugs which were found by officers in defendant's

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

place of business three hours after arrest *held* admissible as tending to corroborate testimony as to defendant's offer of sale.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Wallie D. Ford was convicted of unlawfully offering to sell narcotics, and he appeals. Affirmed.

M. H. Broyles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Dep. Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

HOUSER, J. Defendant was convicted of the offense of unlawfully offering to sell narcotics. He appeals from the judgment and the order denying his motion for a new trial.

On the hearing of the action the following facts appeared in evidence: A man by the name of Donaldson, who was a codefendant of this appellant, negotiated with a police officer (without knowledge of the latter's official position) for the sale to him of certain narcotics. At that time Donaldson stated to the police officer that the narcotics which he proposed to sell were in the possession of Ford. Thereafter Donaldson and Ford met the police officer for the purpose of concluding the proposed sale, at which time, after the arrangements for the sale had been fully discussed between the parties, Ford discovered that his prospective customer was a police officer, who then arrested both Ford and Donaldson. About three hours later the police officer and two others visited a certain restaurant owned and operated by Ford. In the rear of the place a package rolled in newspaper which contained numerous bottles and vials of narcotics was found. Before the package was opened Ford stated that it was "a bundle of old laundry"; afterward he admitted to the officers that it was the "stuff" that he wished to sell, and stated in detail his connection with the narcotics, how the several articles came into his possession, and his reasons for wishing to sell the same. His codefendant, Donaldson, also made many admissions in the presence of Ford regarding the transaction, including the amount of money which, in accordance with the terms of an arrangement between him and Ford, each of them was to receive from the sale of the drugs—which statements were not denied by Ford.

In the information, which resulted in the conviction of the defendants, Ford and Donaldson were jointly charged with the offense of unlawfully offering to sell narcotics, and in a separate information, on which the defendant was not tried, Ford alone was accused of the offense of unlawful possession of narcotics. Appellant specifies as prejudicial error the denial by the trial court of his motion "for a severance and separate trial" from his codefendant.

[1, 2] Under the provisions of section 1098 of the Penal Code, where two or more defendants are jointly charged with any public offense, the decision of whether a motion made by one of such defendants for a separate trial shall be granted rests in the sound discretion of the trial court. People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Erno, 195 Cal. 272, 232 P. 710; People v. Booth, 72 Cal. App. 160, 236 P. 987; People v. Anderson, 59 Cal. App. 408, 211 P. 254; People v. Rogers, 60 Cal. App. 177, 212 P. 412; People v. Swoape (Cal. App.) 242 P. 1067; People v. Walden (Cal. App.) 243 P. 25; People v. Walsh (Cal. App.) 243 P. 31; People v. Smith (Cal. App.) 243 P. 882. No reasons are assigned nor authorities cited by appellant which would tend to show that the discretion thus vested in the trial court on the hearing of the instant action was abused. In such circumstances it must be assumed that the motion was properly denied.

[3] It is next urged by appellant that the trial court erred to the prejudice of defendant, Ford, in denying his motion for a "directed verdict" for the reason, first, that at the time of his arrest no narcotics were found on his person. Reliance for such position by appellant is placed in the case of People v. Herbert, 59 Cal. App. 158, 210 P. 276. In that case the defendant was charged with unlawful possession of morphine. The evidence showed that at the time of his arrest the arresting officer felt the defendant "make a motion as if throwing something away, and an object was heard to drop upon the street pavement." Upon investigation several packages of morphine and cocaine were found from 8 to 15 feet from where the defendant and the officer were standing. The defendant was convicted; and on appeal he urged that the evidence was insufficient to show possession in the defendant of the drugs in question, for the alleged reason that it must have been shown that possession by the defendant was personal and not constructive. The court said that an instruction given by the trial court to the effect that "possession must have been an immediate and exclusive possession and one under the dominion and control of defendant," fully and correctly stated the law on the subject. However, the judgment was affirmed, which in its effect was an indication that the court regarded the defendant as having been in the immediate and exclusive possession of narcotics which were not on his person, and which, although from 8 to 15 feet away from him at the time of his arrest, were nevertheless under his dominion and control. Furthermore, that case is distinguishable from the instant case in that the charge in the case relied upon by appellant was that of possession, while in the instant case the accusation against defendant is that he did unlawfully and feloniously "offer to sell." The question, therefore, of possession, is not necessarily here involved.

Appellant assigns as a second reason why error was committed by the trial court in denying defendant's motion for a "directed verdict" the fact that all negotiations for the sale of the narcotics in question had been carried on by the arresting officer with defendant Donaldson before the arresting officer had met Ford; that the trial court instructed the jury "that any statements made by Donaldson to the officer in the absence of Ford should not be received as evidence against appellant, Ford"; and that "but for the statements of defendant Donaldson the corpus delicti had not been established against appellant."

[4] On examination of the record herein it appears that the instruction of the trial court to which appellant refers in substance was that the statement made by one defendant in the absence of the other defendant and subsequent to the alleged offense was not admissible as evidence against the defendant who was not present. The attention of this court is not directed to any statements alleged to have been made by Donaldson after the offense was committed which were not in the presence of defendant Ford. It is made clear by a host of authorities that after the relationship between the two defendants had been established, any incriminating statements made by either of them before the offense was committed were admissible in evidence. It therefore follows that the motion made by defendant on the ground stated for a "directed verdict" was properly denied by the trial court.

[5] Appellant also contends that the trial court erred in denying defendant's motion to strike out all testimony having reference to a "partnership" between Donaldson and Ford. The testimony to which appellant refers is that given by the arresting officer regarding conversations between him and Donaldson before the arrest was made, as well as what took place and what was said by him, Donaldson, and Ford at the time the arrest was made. It appears that during such alleged conversations the arresting officer and Donaldson frequently referred to Donaldson as being Ford's "partner." If the evidence offered by the prosecution was believed by the jury (and the result of the trial would indicate that such was the case), a relationship approximating a partnership (especially in the sense in which such term is used outside of the legal profession) actually existed between Donaldson and Ford; hence no harm resulted. But in any event the evidence was admissible and the motion was properly denied, for the reason that the officer was only narrating alleged conversation which had occurred between him and the defendants or one of them; the officer did not pretend to state as a fact that a partnership existed between the two defendants.

[6] Appellant also contends that error was committed by the trial court in that in the course of the trial, over defendant's objection, the several bottles and vials containing the drugs, together with their newspaper covering, which were found by the officers in the rear of the place of business of defendant, Ford, were admitted in evidence. The reason suggested by appellant for his objection to such evidence is that the discovery of the said articles was too remote in time and that no connection was ascertainable between such articles and the offense for which defendant was on trial. It should be remembered that defendant was charged with the crime of unlawfully offering to sell narcotics. The time elapsing between his alleged offer to sell and the discovery of the drugs at his place of business was about three hours. In such circumstances we see no merit in the suggestion that the time was too remote; and the materiality of the unlawful possession of the narcotics by defendant is apparent in that such possession of the forbidden drugs tended to corroborate the testimony of the police officer as to defendant's offer to sell the same.

Appellant also specifies further alleged error committed by the trial court with reference to the refusal to admit in evidence certain testimony given by defendant, Ford, at his preliminary examination. Nothing other than the bare specification of error is submitted by appellant which would in any way tend to show the materiality of the proffered evidence, nor why or in what manner defendant suffered any prejudice by reason of its rejection. It must therefore be concluded that the appellant has no confidence in this point and that it has been abandoned by him.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

81 Cal. App. 414

BAUER v. BAUER. (Civ. 5547.)★

(District Court of Appeal, First District, Division 2, California. Feb. 19, 1927. Hearing Denied by Supreme Court April 18, 1927.)

1. Divorce 🔑184(1)—Interlocutory divorce decree, not appealed from, may not be reviewed on appeal from final judgment (Civ. Code, § 132, Code Civ. Proc. § 956).

In action for divorce, where interlocutory decree was rendered, and defendant failed to appeal therefrom under Civ. Code, § 132, that order cannot be reviewed on appeal from final judgment under Code Civ. Proc. § 956.

2. Divorce 🔑184(1)—In divorce action, appellate court cannot review any other part of judgment, except that appealed from.

Where defendant in divorce action appealed from only part of judgment, appellate court cannot review any other part.

3. Divorce 🔑203—Divorce complaint stated facts sufficient to support award of alimony.

In action for divorce complaint *held* to state facts sufficient to support an award of alimony.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action for divorce by Hattie Heinkel Bauer against Jeffrey L. Bauer. Judgment for plaintiff, and the defendant appeals. Affirmed.

Cooley & Gallagher and Lasher B. Gallagher, all of San Francisco, for appellant.

Myron Harris and John Jewett Earle, both of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a divorce based on the alleged cruelty of the defendant. The summons and complaint were served on the defendant, and, as he failed to appear, his default was entered. The plaintiff's evidence was taken before a commissioner, and thereafter, on June 21, 1923, an interlocutory decree was rendered, in which it was recited that a divorce ought to be granted to the plaintiff, and that she was entitled to a divorce on the ground of defendant's extreme cruelty to her, and "that defendant pay to plaintiff as a suitable allowance for her support and maintenance the sum of $150 on the 1st day of July, 1923, and the sum of $150 on the first day of each and every month thereafter, for the term of six years, and the sum of $100 on the first day of each and every month thereafter." Thereafter no other proceedings were had until the 23d day of June, 1924. At that time, without taking any other testimony, and basing its action solely upon the testimony theretofore taken, the trial court, on the motion of the plaintiff, entered a final decree, among other things, as follows:

"And it is further ordered, adjudged and decreed that defendant pay to plaintiff as a suitable allowance for her support and maintenance the sum of $150 on the first day of July, 1924, and the sum of $150 on the first day of each and every month thereafter for the term of five years, and the sum of $100 on the first day of each and every month thereafter."

[1-3] Thereafter, on the 15th day of July, 1924, the defendant filed a notice of appeal, quoting the paragraph which we have just quoted, and stating that he appealed from that portion of the judgment. Thereafter, on the 24th day of September, 1924, the defendant filed a bill of exceptions, which purports to contain the proceedings from the 4th day of June, 1923, down to and including the final decree hereinabove referred to. At this time the appellant contends: (a) The complaint does not state facts sufficient to constitute a cause of action against the defendant; (b) the complaint does not state facts sufficient to warrant the making of any allowance to plaintiff for support; (c) the proof was and is insufficient to authorize the granting of a decree for any offense of defendant; and (d) there is no basis in the record upon which a provision for support can be predicated. The foregoing contentions, as shown by the record before us, were all contained within the record in so far as it purports to be an attack on the interlocutory decree. However, the interlocutory decree was itself an appealable order. Civ. Code, § 132. Having failed to appeal from that order, the defendant may not review that order on an appeal from the final judgment. Code Civ. Proc. § 956; Deyoe v. Superior Court, 140 Cal. 476, 486, 74 P. 28, 98 Am. St. Rep. 73; 2 Cal. Jur. p. 826. But, on the other hand, the scope of the review on such appeal will be confined to such matters as have intervened since the rendition of the interlocutory decree. Gutierrez v. Hebberd, 106 Cal. 167, 168, 39 P. 529, 935. Moreover, as the appeal was not from the whole judgment, but was from only a part of the judgment, this court has no power "to review any part of the judgment, except the part to which the appeal is directed. * * *" G. Ganahl Lumber Co. v. Weinsveig, 168 Cal. 664, 667, 143 P. 1025, 1027. Conceding without deciding, that the appellant is entitled on such an appeal to contend that the complaint does not state facts sufficient to support an award of alimony, this appellant does not show that he is entitled to that relief. He does not appeal from the judgment, but appeals merely from the property award. Evidently he so framed his notice of appeal through an abundance of precaution. In other words, he wants the divorce decree to stand, but he is attacking solely the property award. As to the property rights of the parties the complaint is not insufficient. It contains the al-

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★Hearing denied by Supreme Court.

legations "that defendant is in receipt of a monthly salary of $300 per month; that the sum of $150 is a reasonable sum per month to be allowed her for alimony and for her support for the next six years; and the sum of $100 is a reasonable sum per month to be allowed her thereafter as alimony for her support."

Assuming, solely for the purposes of this case, that we have the right to examine the evidence taken before the referee, as well as the other facts contained in the bill of exceptions, it appears that on the trial the plaintiff introduced evidence supporting all the allegations concerning the property rights of the parties. It further appears that the terms of the interlocutory decree and of the final decree on the subject of the property rights were agreed to by the parties, and that the trial court merely adopted the provisions of such agreement, and made it a part of the decree. In the oral argument the appellant claimed that the trial court did not examine into "the circumstances of the parties respectively." The record wholly fails to sustain the claim.

We find no error in the record. The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

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81 Cal. App. 443

HORNEY v. DILLINGHAM et al.★

(Civ. 5300.)

(District Court of Appeal, First District, Division 1, California. Feb. 23, 1927. Hearing Denied by Supreme Court April 21, 1927.)

1. Carriers ⟹320(15), 347(6)—Due care of driver in operating bus after failing of headlights, and of passenger continuing therein without protest, held for jury.

Whether due care was exercised by bus driver in operating stage and by plaintiff in continuing as passenger therein without protest, after failing of headlights, *held* for jury.

2. Carriers ⟹321(21)—Res ipsa loquitur instruction was proper, where it was doubtful whether defendant's negligence caused injury, and negligence was alleged generally.

In action by bus passenger for injuries received as result of stage running into ditch, where negligence was alleged generally and it was doubtful whether cause of injury was defendant's negligence, instruction as to res ipsa loquitur doctrine was proper.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Mary Horney against E. B. Dillingham and another, copartners doing business as the Long Beach Whittier Stage Line. Defendants appeal from the judgment for plaintiff. Affirmed.

B. P. Gibbs and W. I. Gilbert, both of Los Angeles, for appellants.

Swaffield & Swaffield and Russell H. Pray, all of Long Beach, for respondent.

CASHIN, J. An appeal by defendants from a judgment entered on a verdict for the plaintiff in an action to recover damages for personal injuries. The appeal is presented on the judgment roll and a bill of exceptions.

Defendants were common carriers operating automobile stages between the cities of Whittier and Long Beach. The plaintiff, on the night of the accident, was a passenger for hire on one of the stages mentioned, and was being transported from the town of Bellflower to the city of Long Beach.

The complaint alleged that, while the stage was passing along the route mentioned, and while plaintiff was in the exercise of due care, the defendants "so carelessly and negligently managed said stage or automobile bus that, as a result of such negligence and carelessness, said automobile bus was run off the road into a ditch at the side of the main highway," causing the physical injuries of which plaintiff complains, to her damage in the sum alleged. These allegations were denied by defendants, who, as a special defense, alleged that, the night of the accident "being dark and rainy, the plaintiff, knowing the lights on the stage to be poor, was guilty of negligence proximately contributing to her injuries by continuing as a passenger therein."

As grounds for reversal it is urged that the court erred in instructing the jury as to the doctrine of res ipsa loquitur, which defendants contend was inapplicable in view of the allegations of the complaint and the facts shown by the evidence; and, further, that the only conclusion reasonably to be drawn from the evidence supports the defense of contributory negligence.

In addition to the instructions mentioned, the jury was instructed that the burden of proving negligence by a preponderance of the evidence rests upon the party alleging it.

The accident occurred between 8 and 9 p. m. of January 1, 1922. It was shown that the stage left Bellflower at about 8 p. m. and that the night was dark and stormy. The plaintiff testified that when she boarded the stage the headlights were burning, and that she noticed nothing unusual in their condition; that, after the stage started, the driver mentioned that the lights were failing; that the stage was stopped at a filling station about three-quarters of a mile beyond Bellflower for the purpose of procuring new batteries, but, the station being closed, the stage then proceeded at a speed of between 15 and 18 miles per hour to a point 2 miles further on, where the accident happened, causing her injuries. The plaintiff further testified that she was unable to see the road ahead by means of the lights of the stage, and, though she believed there

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★Hearing denied by Supreme Court.

was risk in proceeding, she made no protest. The driver, who was called as a witness for the plaintiff, testified that, while the lights were failing, he was able by that means to see the road ahead for a distance of 20 feet, which condition continued to the point of the accident; that in approaching that point he found the paved roadway to be covered with water to a depth of three or four inches for a distance of about 200 feet, further testifying that he had previously passed over the submerged portion of the roadway and knew that the water was there; that shortly before reaching the point where the accident occurred the right front wheel of the stage left the pavement, and later, as the stage proceeded, sank into a recently filled ditch about 2 feet to the right, causing the stage to partially overturn. This witness further testified that one of the springs of the automobile broke before the point of the accident was reached, and that for this reason he was unable to turn the stage back on the pavement.

[1] In view of this testimony the questions whether due care was used in the operation of the stage and by plaintiff in continuing as a passenger therein without protest, the lights being in the condition as testified by the driver, were for the jury, and their verdict thereon was reasonably supported.

[2] Appellants offered no evidence as to the cause of the accident other than testimony as to the condition in which the stage was later found; nor is it contended by them that the evidence adduced by plaintiff was insufficient to support the inference that the accident was due to the negligence of the driver. It is the rule that, where the complaint alleges specifically the negligent acts or omissions complained of, the doctrine of res ipsa loquitur does not apply, and this for the reason that in such case the plaintiff can recover only upon proof of one or more of the specific acts or omissions alleged (Marovich v. Central Cal. T. Co., 191 Cal. 295, 216 P. 595), and, as impliedly held in Connor v. Atchison, etc., Ry. Co., 189 Cal. 1, 207 P. 378, 26 A. L. R. 1462, when the evidence adduced by the plaintiff shows the cause of the accident the question of negligence is one to be determined by the jury, without reference to the prima facie case resulting from the mere happening of the accident. In the instant case negligence was alleged generally (Champagne v Hamburger & Sons, 169 Cal. 683, 147 P. 954; Sharpless v. Pantages, 178 Cal. 122, 172 P. 384; Carnahan v. Motor Transit Co., 65 Cal. App. 402, 408, 224 P. 143); and, while certain facts connected with the accident appear from the testimony, the cause—whether a want of due care on the part of the driver, defects in the construction or mechanism of the stage which led to a loss of control, or the physical condition of the roadway—was not clearly or directly shown. In Connor v. Atchison, etc., Ry. Co., supra, the court said:

"Where the explanation leaves it doubtful as to whether or not the ultimate cause of the injury is the negligence of the party charged, it is proper to instruct the jury as to the res ipsa loquitur doctrine."

And such is the rule as stated in effect in the following cases: Lippert et al. v. Pacific Sugar Corporation, 33 Cal. App. 198, 208, 164 P. 810; Soto v. Spring Valley Water Co., 39 Cal. App. 187, 178 P. 305—it being further held in the cases last cited and in Atkinson v. United Railroads, 71 Cal. App. 82, 234 P. 863, that the plaintiff, by charging specific acts of negligence, is not as to the particular acts alleged thereby deprived of the benefit of the doctrine.

We are satisfied, in view of the pleadings and the evidence, that the instructions complained of were proper.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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81 Cal. App. 502

STITZINGER v. TRUITT et al. (Civ. 5575.)★

(District Court of Appeal, First District, Division 2, California. Feb. 26, 1927. Hearing Denied by Supreme Court April 25, 1927.)

1. Mines and minerals 🔑101—Members of oil syndicate held estopped by conduct from setting up manager's limitation of authority as defense to action on contract to erect derrick.

Members of oil syndicate *held* estopped from setting up limitation of authority of manager stipulated in articles of syndicate as defense to action for money due on contract to erect derrick, where they used its progressing construction as selling point in sale of units.

2. Mines and minerals 🔑101—Members of oil syndicate, alleged to be joint-stock company, are liable as partners.

Where oil syndicate, alleged to be joint-stock company, did not comply with any statute providing for joint-stock companies or any kind of special partnership, its members were liable as partners, since joint-stock companies are regarded as commercial partnerships, in absence of statute.

3. Mines and minerals 🔑101—Liability of members of oil syndicate doing business under associate name is same as that of partners (Code Civ. Proc. § 388).

Liability of members of association doing business under associate name is same as that of general copartners, in view of Code Civ. Proc. § 388.

4. Mines and minerals 🔑101—Articles of oil syndicate limiting manager's expenditure held not binding on creditors without notice.

Provision in articles of oil syndicate, prohibiting manager's expenditure of more than $500 without previous consent of trustees, *held* not binding on third parties or creditors without notice.

★Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by B. L. Stitzinger against Clayton G. Truitt and others. Judgment for plaintiff, and defendants Harry Miller and another appeal. Affirmed.

Anderson & Anderson and Victor T. Watkins, all of Los Angeles, for appellants.

McWhinney & Clock, of Long Beach, for respondent.

KOFORD, P. J. Plaintiff recovered judgment for $5,750 for the construction of an oil well derrick. Two only of the defendants appeal—Miller and Ragos. They were personally served with sommons. The points raised by these appellants are, in general, that the facts surrounding the making of the contract for the erection of the derrick were such, and the nature of the written articles forming the syndicate was such that no personal judgment should have been given against them.

The amended complaint alleges that the syndicate is a business trust. The joint answer of these appellants and the syndicate is equivocal, denying that the syndicate is other than the articles constitute it. The court finds that defendants Truitt, Miller, and Ragos organized the syndicate "which was purported to be a trust, but which was in truth and in fact a copartnership, of which the said three named defendants were the copartners."

Other findings of the court follow: That the articles provided that the business and property of the syndicate should be managed by a board of three trustees. That Miller, Ragos, and Truitt, each owner and holder of two units or shares in the syndicate, were elected trustees, and they were respectively chairman, secretary-treasurer and manager. That the articles provided that no expenditure over $500 should be allowed or approved without the previous consent of the trustees. Articles 12 and 17. "That contrary to said provision, but for and on behalf of said copartnership, and within the scope of his authority as the manager and a copartner, defendant Truitt made * * * the contract with plaintiff, which contract was necessary for the copartnership to carry out the terms of the oil and gas lease taken by the copartnership * * * (the syndicate)." That said contract was made by Truitt as member and manager of said copartnership, for its best interests, in its name, and on its behalf, but without the knowledge or consent of Miller or Ragos. That plaintiff had no knowledge of this provision of the articles, nor of any agreement or understanding whereby the authority of Truitt was limited; but that plaintiff was informed by Truitt that Miller and Ragos had authorized him to contract for and to go ahead with the construction of the derrick. That plaintiff relied on these statements, made the contract, and constructed and completed the derrick in good faith and without knowledge that such was without the knowledge or consent of appellants. That appellants, after knowing of the beginning of the erection of the derrick, advertised publicly for the sale of units, and in doing so put forward the statement that the lumber was on the ground and that a derrick was going up. That in an application to the corporation commissioner and to various prospective purchasers of units at the leased premises, at different times between February 18th and April 1st, appellants represented that the derrick had been paid for and was the property of the syndicate.

[1] The appellants claim they are not liable, because the manager exceeded his power as defined in the articles respecting expenditures in excess of $500. Whatever protection against debts there may or may not have been to the unit owners in general by virtue of this provision, we think that, as far as these two appellants are concerned, they are estopped from setting up this defense to the plaintiff's claim by their conduct in accepting the benefits of the contract and allowing the derrick to go up on the leased land. Erecting the derrick was the only possible thing for the syndicate to do, if it was to accomplish anything at all. The conduct of these appellants in standing on the leased premises, in sight of the derrick and using the fact of its progressing construction as a selling point, would be sufficient to lead plaintiff to believe the contract was fully authorized by them.

[2, 3] Respondent cites numerous authorities to the effect that the articles in question created a partnership and not a trust. It is pointed out that, when the members of a so-called business trust reserve to themselves such a large measure of power and control over the trustees as is done in this case, then the trustees are merely agents of the members and the members are personally liable for debts as general partners. Appellants have not replied to these authorities, having filed no closing brief; but in their opening brief appellants claim the articles constitute a joint-stock company. "At common law joint-stock companies were regarded as commercial partnerships, and in the absence of express provisions, statutory or otherwise, the rights and liabilities of their members are to be determined by substantially the same rules." 33 C. J. 880, citing Bullard v. Kinney, 10 Cal. 60; Flint v. Cadman, 247 Mass. 463, 142 N. E. 256. "Except in so far as such liability may be limited by statute, or by special agreement with those dealing with the association, the stockholders of a joint-stock company are personally liable for the debts and obligations of the company, precisely as general partners are liable for the debts of the firm, and liability to creditors is not

changed by the fact that the form of the association was intended to give the association the attributes of a corporation." 33 C. J. 889.

There is no claim or pretense here that the syndicate complied with any statute providing for a joint-stock company or for any kind of a special partnership. For this reason, then, the appellants would be liable as general copartners under the general rule; also their liability in such case is of the same nature whether they be regarded as general copartners or merely as members of an association doing business under an associate name. Leake v. City of Venice, 50 Cal. App. 462, 465, 195 P. 440; Code Civ. Proc. § 388.

[4] The question here is not so much what the association is as whether the appellants are liable on any of the several theories of the court's findings. There is also the court's finding, which is supported by the evidence, that the plaintiff had no notice of the asserted limitation on the manager's power. Whatever force the provision might have amongst the members as between themselves in any of the considered organizations, it would not be binding on third parties or creditors having no notice. 33 C. J. 889; Neville v. Gifford, 242 Mass. 124, 136 N. E. 160; Webster v. Utopia Confectionery (Tex. Civ. App.) 254 S. W. 123; Graham Hotel Corp. v. Leader (Tex. Civ. App.) 241 S. W. 700.

For the foregoing reasons the judgment is affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

STANTON et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (two cases). (Civ. 5491, 5492). ★

(District Court of Appeal, Second District, Division 2, California. Feb. 19, 1927. Hearing Granted by Supreme Court April 18, 1927.)

1. Judgment 🔑360—Statute relating to vacating judgment based on findings of fact by court, or special verdict, does not authorize vacating on ground of inadvertence (Code Civ. Proc. § 663).

Code Civ. Proc. § 663, providing that judgment, when based on findings of fact made by court, or special verdict by jury, may be set aside and vacated for erroneous conclusion of law and judgment inconsistent with verdict, does not authorize setting aside of judgment upon ground of inadvertence.

2. Judgment 🔑397—Where orders vacating judgments were made, and new judgments were not then rendered, vacating orders were null (Code Civ. Proc. § 663; § 663a, as added by St. 1915, p. 203).

Where orders vacating judgments were made July 30th, and new judgments were not made nor signed until September 8th following and conclusions of law were not amended or corrected, vacating orders were nullities since, under Code Civ. Proc. § 663 and section 663a, as added by St. 1915, p. 203, only order within power of court was one setting aside judgment and directing as part of same order entry of another judgment.

3. Judgment 🔑388—Where notice of motion to vacate judgments did not specify wherein conclusions of law and findings of fact were inconsistent, court could not vacate judgments (Code Civ. Proc. § 663; § 663a, as added by St. 1915, p. 203).

Where notice of motion to set aside judgments under Code Civ. Proc. § 663, and section 663a, as added by St. 1915, p. 203, did not specify any particular in which conclusions of law and findings of fact were inconsistent, such motions amounted to nothing more than abortive attacks on judgments, and there was nothing before trial court upon which to base order vacating judgments.

4. Judgment 🔑360—Judgment is not "conclusion of law" within meaning of statutes relating to vacating judgments (Code Civ. Proc. § 663; § 663a, as added by St. 1915, p. 203).

Judgment is not "conclusion of law" within meaning of Code Civ. Proc. § 663, and section 663a, as added by St. 1915, p. 203, relating to vacating judgments, and does not supersede any conclusion of law in decision, since, upon motion to vacate judgment under such statutes, whether judgment is set aside depends wholly upon whether conclusions of law are consistent with findings of fact.

5. Judgment 🔑388—Notice of motion to vacate judgment, stating grounds, not named in statute, was ineffective to confer jurisdiction (Code Civ. Proc. § 663; § 663a, as added by St. 1915, p. 203).

Notice of motion to vacate judgment stating some grounds, but none of those named in Code Civ. Proc. § 663, and section 663a, as added by St. 1915, p. 203, as being basis for relief sought, was as ineffective to confer jurisdiction on court to vacate judgment as though no ground had been specified.

6. Certiorari 🔑64(1)—On all questions except power to act, rulings of superior court are conclusive on certiorari.

Orders and rulings of superior court are final and conclusive on every question except that of power to act when attempted to be controverted in certiorari proceedings.

Application by Fannie Stanton, as executrix of the estate of A. A. Stanton, deceased, and Fannie Stanton, individually, for writ of review to annul orders of the Superior Court of Los Angeles County, Hugh J. Crawford, Judge, vacating judgments in two separate actions, and entering other and different judgments in lieu thereof. Orders and judgments annulled.

Kemper Campbell and A. W. Sorenson, both of Los Angeles, for petitioners.

★Superseded by opinion of Supreme Court 261 P. 1001.

Montgomery, Stick, Moerdyke & Gibson, of Los Angeles, for respondents.

CRAIG, J. These proceedings are instituted by the petitioners for the purpose of reviewing certain orders of the superior court of Los Angeles county setting aside the respective judgments in two separate actions, orders directing the entry of other judgments in lieu thereof, and such substituted judgments.

It appears that on November 9, 1925, Anna Grazide Alvarado and William P. Alvarado, her husband, commenced an action in said superior court, numbered 182980, wherein it was alleged that the plaintiffs were the owners of certain real property which they had theretofore leased to A. A. Stanton for oil-drilling purposes; that the defendants had failed to perform the conditions of such lease, and that the same had therefore been terminated; and the plaintiffs prayed for the possession of all the leased property, and for damages. The defendants answered, and also filed a cross-complaint by which they alleged that they were lawfully in possession of and entitled to retain 20 acres of the land above mentioned under an oral lease; that the plaintiffs had failed and refused to perform the conditions of such parol contract, as a result of which the cross-complainants had been damaged in the sum of $100,000, for which they in turn prayed judgment.

On March 13, 1926, Alvarado and wife filed a second suit in the superior court of the same county against the same defendants, wherein it was alleged that the latter claimed some interest in said property, and prayed a decree quieting title thereto. In such second proceeding, the answering defendants pleaded the pendency of another action involving the same cause, asserted a leasehold interest in 20 acres of the property described by the plaintiffs, and disclaimed any interest in the remainder. Counsel stipulated, and the trial court ordered, that the cross-complaint and the answer thereto in the first action should serve as such in both cases.

On April 23, 1926, it was stipulated by the respective counsel and ordered by the trial court that the two cases be consolidated and tried together. On the last-mentioned date evidence was introduced, and judgment was ordered "for defendants for $15,000 and specific performance." Findings of fact, conclusions of law, and judgment were made in case No. 182980 that the defendant Stanton "have, hold, and retain 20 acres" of said lands, and awarded to Stanton damages in the sum of $15,000, and directed that the plaintiff specifically perform the verbal lease. At the same time findings of fact, conclusions of law, and judgment were made in case No. 191794, reciting and decreeing that the defendant was entitled to, and that the plaintiffs be required to pay to Stanton, damages in the sum of $15,000, and specifically perform such lease. In this latter proceeding it was found that another action was pending between the same parties and involving the same cause of action.

The plaintiffs on July 1, 1926, served and filed in each suit a notice of intention to move that the judgment be vacated and for the entry of another and different judgment. Such motions were presented together on July 21, 1926, and on July 30, 1926, each was granted. In lieu of the original judgments, the trial court on September 8, 1926, decreed in the first action that plaintiffs' title be quieted to all of the property, except 20 acres constituting the verbal leasehold interest of Stanton, and in the second suit it was adjudged that "defendants and cross-complainants have and recover from plaintiffs and cross-defendants $7,500," less the amount of a counterclaim for $850. The findings and conclusions of law in each case were allowed to stand, however, as originally made. In brief, as the record is here presented, notwithstanding the fact that the two cases were consolidated, the trial court appears to find from the facts and to conclude as a matter of law that the defendants are entitled to $15,000 damages in each case, whereas by its judgments the defendants are awarded one-half such amount in one case, and nothing in the other.

The defendant, A. A. Stanton, since deceased, is substituted by his widow, Fannie Stanton, as executrix of his estate, and she prosecutes this proceeding individually and as such representative, alleging that the trial court exceeded its jurisdiction in vacating the original judgments, and in rendering others in their stead.

Our statutes provide two modes of procedure by which, according to the existing circumstances, judgments may be vacated. Section 473 of the Code of Civil Procedure permits relief to a party or his legal representative from a judgment taken against him through his mistake, inadvertence, surprise or excusable neglect. The motions were not based upon any of these grounds. Section 663 of the same Code provides that:

> "A judgment or decree of a superior court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes materially affecting the substantial rights of such party and entitling him to a different judgment: 1. Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be amended and corrected. 2. A judgment or decree not consistent with or not supported by the special verdict."

[1] This latter section does not authorize the setting aside of a judgment upon the ground of inadvertence (Dolan v. Superior Court, 47 Cal. App. 235, 190 P. 469), nor did the respondents herein base their motions upon that ground. In considering the question as to the validity of the orders vacating the original judgments, we are therefore solely concerned with a consideration of the procedural requirements contained in section 663 of the Code of Civil Procedure.

Such motions must be supported by notice "specifying the particulars in which the conclusions of law are not consistent with the findings of fact," as required by section 663a of the Code of Civil Procedure, which section was added by amendment in 1915 (St. 1915, p. 203). The motions upon which the orders vacating the judgments were founded specified in each instance that (1) the judgment contained a copy of the lease, "many of the terms of which are not set forth or provided for in said findings of fact"; (2) that the judgment therefore attempts to make a lease for the defendants by order of court; (3) that the lease contained in the judgment is not the same as that specified in the findings; (4) that the judgment attempts to specifically enforce a lease not referred to in said findings, specifications 5 and 6 state the same grounds in other terms; (7) that the judgment "set forth a restraining order and an injunction against the plaintiffs and cross-defendants, and that there is no provision in said findings of fact for such injunction or restraining order"; and (8) "that said judgment is against law."

[2] As we have seen, the motions to vacate the judgments were presented on July 21, orders granting them and directing the entry of new judgments were made on July 30, though the latter were not made nor signed until September 8, 1926, and the conclusions of law were not amended or corrected. That such vacating orders were nullities is obvious. In Dolan v. Superior Court, supra, it was held that sections 663 and 663a do not permit two orders to be made, one setting aside the judgment and another at a later date directing the entry of a different one, but that:

> "If on the motion it appears to the court that the findings require the judgment to be set aside, it must also appear what conclusions of law should be made on the facts, and the only order within the power of the court under these circumstances is one setting aside the judgment and directing as a part of the same order the entry of another judgment. It is from such an order only that an appeal is provided. An order merely setting aside the judgment and leaving the case undetermined is void and not merely erroneous."

[3] It will be observed that the proponents of such motions did not specify any particular in which the conclusions of law and the findings of fact were inconsistent; in fact, the notices fail to mention the conclusions of law. These purported motions, therefore, amounted to nothing more than abortive attacks upon the judgments themselves, and, since this procedure is not sanctioned by our statutes, there was nothing before the trial court upon which to base the action taken.

[4] Respondents argue that the judgment is the "real conclusion of law," and supersedes any conclusion of law in the decision. Such is the rule upon an appeal from the judgment, but upon a motion under sections 663 and 663a of the Code of Civil Procedure, the conclusions of law, as evidenced by those sections, are the center of attack. In the latter instance the judgment is sustained or set aside, as the case may be, wholly depending upon the decision as to whether or not the conclusions of law are, or are not, consistent with the findings of fact. If the order be granted, the setting aside of the judgment necessarily follows, as well as the entry of a new one, but this results from the fact that the conclusions of law are inconsistent with the findings of fact. Both of the decisions cited by respondents were upon appealed cases. The respective judgments were affirmed, but in neither case was it stated what the result might have been, had the judgment and conclusions of law been contrary to the findings of fact.

[5] It is true, as stated in Roberts v. Hall, 147 Cal. 434, 82 P. 66, that upon an appeal, where the contention is that the judgment is not supported by the findings, the conclusions of law are superseded by the judgment, and hence it is of no consequence that the conclusions do not support the judgment or have not been made to conform to the findings. But an entirely different question is presented here. The complaint is that the notice of motion to vacate was defective. That such a notice is essential and jurisdictional is clear. That a failure of the notice to state any ground for the granting of the motion would be equally fatal is also obvious. It follows that, even though a notice may state some ground, but none of those named in the statute as being the basis for the relief sought, the notice is as ineffective as though no ground had been specified.

An examination of the opinion in Roberts v. Hall, supra, shows that the complaint there made by the appellant was "that the 'conclusions of law' as stated in the decision of the court do not warrant all the provisions of the judgment as to the terms of the injunction awarded." Obviously the question presented here was not involved. In Wilkinson v. Grant, 46 Cal. App. 429, 189 P. 319, the other case cited by respondents, appeals were taken from judgments entered after motions to set aside other judgments had been granted. No question was raised as to the sufficiency of the notices of the motions, nor could there be upon appeals from the judgments. An appeal is authorized to be taken from an order setting aside a judgment originally entered, and upon such appeal the sufficiency of the grounds set forth in the notice might be decided; but in neither of the cases just mentioned was an appeal taken from such order nor the sufficiency of the notice made a ground of complaint.

[6] Respondents also argue at length questions which constitute subjects of appeal only. On every question except that of power to act the orders and rulings of the superior court are final and conclusive when attempted to be controverted in certiorari proceedings. Fleming v. Superior Court, 196 Cal. 344, 238 P. 88.

The orders vacating the judgments and directing the entry of different judgments in lieu thereof, and said last-named judgments, are annulled.

We concur: WORKS, P. J.; THOMPSON, J.

81 Cal. App. 137

COOMBS v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5411.) ★

(District Court of Appeal, Second District, Division 2, California. Feb. 25, 1927. Hearing Denied by Supreme Court March 28, 1927.)

1. Master and servant ⚷417(5)—Findings of Industrial Commission held reviewable as part of decision (Workmen's Compensation Act 1917, §§ 20, 67; Code Civ. Proc. §§ 632, 633).

Findings of Industrial Accident Commission in proceedings under Workmen's Compensation Act 1917 (Deering's Gen. Laws [1923 Ed.] Act 4749), *held* part of decision subject to review under section 67, in view of general rule of practice that court's decision consists of written findings of fact and conclusions of law, and section 20, which provides, after final hearing, commission shall make and file its findings upon all questions involved, and its award stating determination as to parties' rights; language used being similar to Code Civ. Proc. §§ 632, 633, relating to statement of facts on court's decision.

2. Master and servant ⚷417(7)—Commission's findings, without support of testimony are reviewable (Workmen's Compensation Act, 1917, § 67).

Workmen's Compensation Act 1917, § 67 (Deering's Gen. Laws [1923 Ed.] Act 4749), providing findings and conclusions of commission on questions of fact shall be conclusive and not subject to review merely, makes findings conclusive, where commission has not exceeded its jurisdiction by making finding without support of testimony.

Certiorari to Review Order of Industrial Accident Commission.

On petition for rehearing. Denied.

For original opinion, see 252 P. 1069.

John A. Rush, of Los Angeles, for petitioner.

G. C. Faulkner, of San Francisco, for respondents.

THOMPSON, J. [1] In denying the petition for rehearing we deem it expedient to say that the language used by the other division of this court in Coombs v. Industrial Accident Commission (Cal. App.) 245 P. 445, "Whether a finding of fact can be annulled where the award is not involved is doubtful, as section 67, referring to review by the courts, provides only for review of orders, rules, regulations, decisions, and awards, and not findings of fact which are expressly made not subject to review," does not receive our approval. It has long been the rule in our practice that the decision of a court consists of written findings of fact and conclusions of law, which decision constitutes the foundation for the judgment. By section 20 of the Workmen's Compensation, Insurance and Safety Act of 1917 (Deering's General Laws [1923 Ed.] p. 1710), we find the same practice outlined in the provisions as follows:

> "After final hearing by the commission, it shall, within thirty days, make and file (1) its findings upon all facts involved in the controversy, and (2) its award which shall state its determination as to the rights of the parties."

[2] The similarity of the provision to sections 632 and 633 of the Code of Civil Procedure is indicative of an intent upon the part of the Legislature, in using the word decision, to designate the decision or the findings of the commission on questions of fact. That portion of section 67 of the Workmen's Compensation, Insurance and Safety Act which says that "the findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review" simply means that the findings of the commission are conclusive, where the commission has not exceeded its jurisdiction by making a finding without the support of testimony. Clapps P. Station v. Industrial Accident Commission, 51 Cal. App. 624, 627, 197 P. 369.

The petition for rehearing is denied.

We concur: WORKS, P. J.; CRAIG, J.

★Hearing denied by Supreme Court.

200 Cal. 546

PEOPLE ex rel. CITY OF TURLOCK v. TURLOCK HOME TELEPHONE & TELEGRAPH CO. (Sac. 3771.)

(Supreme Court of California. Feb. 28, 1927.)

1. Telegraphs and telephones 🔑10(16)—Telephone company's franchise from city may be forfeited for nonpayment of tax notwithstanding statutory right to use streets (Broughton Act, § 3; Civ. Code, § 536).

The right given telephone companies by Civ. Code, § 536, to use streets, even if such section be still in force, does not prevent maintenance of action to have franchise given company by city declared forfeited under Broughton Act, § 3 (St. 1905, p. 777), for nonpayment to city of the required annual franchise tax; at least where complaint does not justify conclusion that company is exercising no rights under the franchise other than those given it by the Code.

2. Forfeitures 🔑5—Complaint and proof must be positive and explicit for declaration of forfeiture.

Forfeitures are never favored by the courts, and in order to declare forfeiture the allegations of the complaint and the proofs must be positive and explicit.

3. Telegraphs and telephones 🔑10(16)—Complaint for forfeiture of franchise for nonpayment of franchise tax held not to authorize inference of receipt of earnings from switch services.

Complaint for forfeiture of franchise of telephone company for nonpayment of annual franchise tax of percentage of gross receipts, by allegation that company has paid the tax on all earnings received by it, except on earnings received from switch services, does not authorize inference that any earnings have been received from such switch service.

4. Pleading 🔑225(2)—Leave to amend should be granted in sustaining demurrer to complaint for defect curable by amendment.

The defect in a complaint of failing to make an essential allegation, being one that may be overcome by amendment, the court in sustaining demurrer should do so with leave to amend.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the People, on the relation of the City of Turlock, against the Turlock Home Telephone & Telegraph Company. From a judgment for defendant, on the sustaining of demurrer to the complaint, plaintiff appeals. Reversed, with leave to amend.

U. S. Webb, Atty. Gen., Leon French, Deputy Atty. Gen., and Wm. N. Graybiel, of Turlock, for appellant.

Samuel V. Cornell, of Turlock, and Pillsbury, Madison & Sutro, of San Francisco, amici curiæ, for respondent.

CURTIS, J. This is a proceeding instituted in the name of the people of the state of California upon the relation of the city of Turlock, a municipal corporation, for a judgment declaring forfeited a certain franchise held by the defendant. The amended complaint alleges that the franchise involved herein was granted by said city of Turlock on the 16th day of March, 1909, to J. L. Randolph, his successors and assigns, for a term of 50 years, to erect and operate over the streets of said city poles, masts, and other structures upon which to suspend wires and other appliances for the construction and maintenance of a telephone and telegraph system; that Randolph at some time subsequent to January 1, 1912, assigned and transferred said franchise to defendant; that defendant is the owner, holder, and user of said franchise; and that defendant at all times since the expiration of the five-year period subsequent to the granting of said franchise has paid to the city of Turlock its annual 2 per cent. franchise tax on its gross earnings, except that portion of its gross earnings derived from performing switch service for the farmers' telephone lines that connect with the lines of the defendant at the corporate limits of said city. It is also alleged that said 2 per cent. tax is a tax provided for and required by section 3 of the act known as the Broughton Act. A general demurrer to this amended complaint was sustained by the court without leave to amend, and judgment was entered in favor of defendant. From this judgment the plaintiff has appealed.

[1] The principal argument advanced by respondent before the trial court in support of its demurrer, and the one mainly relied upon before this court to sustain the judgment herein, is that by virtue of the provisions of section 536 of the Civil Code telephone corporations are given the right to construct telephone lines along and upon the streets and highways of the municipalities of the state; and that under the provisions of said section of the Code respondent is given the right to operate and maintain its telephone system over the streets and highways of the city of Turlock independent of any right it may have acquired under the Randolph franchise. Appellant replies to this argument of respondent by contending that section 536 of the Civil Code has been repealed by section 19 of article 11 of the Constitution as amended in 1911. Much of the briefs of the parties is taken up with a discussion of the merits of these respective contentions. We question whether the validity of section 536 of the Civil Code is material to any issue involved in this proceeding. This action was not brought to exclude the respondent, the telephone company, from the use of the streets and highways of the city of Tur-

lock, but simply to declare forfeited the Randolph franchise, which, it is alleged in the amended complaint, the respondent now owns and holds and is using in said city. It may well be that the respondent, under section 536 of the Civil Code, if said section is still in force, has a right to maintain its telephone system in said city, but this right, whatever it may be, as respondent contends, is entirely apart from, and independent of, any right acquired by it by virtue of the ownership of the Randolph franchise. Conceding, therefore, that the rights of respondent under section 536 of the Civil Code are sufficient to protect it in the maintenance and operation of its telephone system in said city, still that fact presents no reason sufficient to defeat appellant's claim to have the Randolph franchise, an entirely different right, forfeited, if it can be shown that the respondent has failed to comply with the law under which the latter franchise was granted, and which failure worked a forfeiture thereof. Section 3 of the Broughton Act provides:

> "In the event said payment [2 per cent. of the gross annual receipts] is not made, said franchise shall be forfeited. * * *" Stats. 1905, p. 777.

If section 536 of the Civil Code is held to be still in force, the difference between the rights which respondent is granted by the terms thereof and those which it has under the Randolph franchise may be very slight. As the Randolph franchise is not set out in the amended complaint and the reference thereto in said pleading is quite brief, we have no means of knowing its exact provisions. We hardly think, however, we would be justified in assuming that the rights acquired by respondent thereunder are the same as those given under the Code section. On the other hand, it appears from the amended complaint that respondent is now not only the owner but the user of said franchise, and that it is paying to the city of Turlock by reason of its ownership and use thereof a franchise tax of 2 per cent. on certain of its gross earnings. Of course, if respondent were exercising no rights under the Randolph franchise, other than those given to it by the Civil Code, provided said Code section is still in force, it would be an idle act to declare a forfeiture of the franchise and it would be useless to prolong this litigation, but the facts, as they are set forth in the amended complaint, do not justify us in drawing any such conclusion. We must assume, therefore, that the facts as pleaded show that the respondent is claimed to be exercising some rights under said Randolph franchise in addition to those acquired by it under section 536 of the Civil Code. Whatever those rights are, the appellant seeks to have declared forfeited, and that is all appellant can recover in this proceeding, should it be successful.

[2-4] Under these circumstances, if the pleadings were otherwise sufficient, the judgment of the court should be reversed and the trial court directed to overrule the demurrer. There is, however, another question presented by the pleadings which we think cannot be passed by without notice. This proceeding is one to declare a forfeiture. It is elementary that forfeitures are never favored by the courts, and, in order to declare a forfeiture, the allegations of the complaint and the proof in support thereof must be positive and explicit. Appellant seeks to have the Randolph franchise forfeited by reason, we may surmise, of respondent's failure to pay the 2 per cent. franchise tax on certain of the gross earnings—that is, on the gross earnings received by respondent for performing switch services for the farmers' telephone lines that connect with respondent's lines at the corporate limits. But there is no allegation whatever to be found in the amended complaint that any earnings have ever been received by respondent for such switch services. We cannot even infer from the allegation that the respondent has paid the tax on all earnings received by it, except on earnings received for switch services, that any earnings whatever have been received by respondent for such switch services. The amended complaint is fatally defective in failing to show that the respondent has received earnings for said switch service and the general demurrer thereto was rightly sustained, but as it is a defect that may be overcome by amendment, appellant should have an opportunity to further amend the complaint. In justice to the trial court we would say that as far as the record shows this defect was not called to its attention at the time of the argument on the demurrer. The parties, it appears, addressed themselves exclusively to the question as to whether section 536 of the Civil Code had been repealed.

It is ordered that the judgment be reversed and appellant be given ten days after the going down of the remittitur to further amend the complaint.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; PRESTON, J.; LANGDON, J.

81 Cal. App. 479

LINSER v. LAUFFER. (Civ. 3193.)★

(District Court of Appeal, Third District, California. Feb. 24, 1927. Hearing Denied by Supreme Court April 25, 1927.)

1. Deeds ⚷206—In suit to set aside deeds from mother to son, evidence held to sustain finding that deeds were given without promise of reconveyance.

In suit by daughter's husband to set aside conveyances from mother to son, evidence *held* sufficient to sustain finding that conveyances were not made on promise or understanding that premises were to be reconveyed to mother upon demand.

2. Deeds ⚷211(4)—Evidence held sufficient to sustain finding that deeds from mother to son were not obtained by undue influence.

In suit against son to set aside deeds obtained from mother, evidence *held* sufficient to sustain finding that deeds were not obtained by son as result of undue influence.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Suit by Fred. W. Linser, as administrator of the estate of Phillipina Schroeder, deceased, against Martin P. Lauffer. Judgment for defendant, and plaintiff appeals. Affirmed.

Puter & Quinn, of Eureka, for appellant.

W. F. Clyborne and Delos A. Mace, both of Eureka, for respondent.

FINCH, P. J. This action was brought to set aside two deeds, executed by Phillipina Schroeder, conveying certain lands to defendant, Martin P. Lauffer, and Emma Lauffer, his wife. Judgment was entered in favor of defendant and the plaintiff has appealed.

In the year 1880 Frederick Schroeder, a widower, owned and with his daughter Emma resided upon a mountain ranch, consisting of the land, or the greater part thereof, here in controversy. At that time Phillipina Lauffer was a widow, residing with whom were her two children, Julia B. Lauffer and Martin P. Lauffer, defendant, of the respective ages of 15 and 9 years. During that year Schroeder and Mrs. Lauffer married and thereafter lived together on the Schroeder ranch as husband and wife, their said children living with them, except as hereinafter stated, and performing services suitable to their ages and capacities. Julia married Charles Linser about three years later, and she and her husband lived on the ranch for about a year and thereafter they resided elsewhere. At a subsequent time Martin and Emma married and thereafter lived together on the ranch as husband and wife, and there were there born to them two children. Schroeder died December 20, 1899. In the final settlement of his estate, in accordance with the terms of his last will, an undivided half interest in the lands in controversy was distributed to Phillipina Schroeder, and Martin P. and Emma Lauffer were given a life estate in the other half, the remainder being distributed to their minor children. In June, 1901, Mrs. Schroeder purchased for $2,000 and gave Julia a home, consisting of 220 acres of land, with a house and other improvements thereon. In October, 1901, Mrs. Schroeder signed and acknowledged a deed conveying her half interest in the mountain ranch to Martin P. and Emma Lauffer, but she did not deliver the deed until April, 1905. In March, 1910, she executed a second deed of the same property to the same parties for the purpose of correcting a part of the description in the deed of October, 1901. These are the two deeds which plaintiff seeks to have set aside. April 17, 1905, Mrs. Schroeder made a homestead entry for 160 acres of government land adjoining the lands in controversy, and for a considerable time thereafter she resided on the homestead. In May, 1910, she gave notice of intention to make final proof, but her application therefor was "canceled for failure to appear and make proof." She then abandoned the homestead, and the defendant removed the improvements therefrom. Emma Lauffer died prior to the commencement of this action, and the defendant succeeded to her interest in the Schroeder ranch. Mrs. Schroeder died July 24, 1921, being then of the age of 88 years, "lacking two days." The plaintiff is the duly appointed administrator of her estate.

[1] Appellant contends that the deeds in question were executed for the purpose of qualifying Mrs. Schroeder to make the homestead entry and "at the request and by the advice of the said defendant, and upon the promise of the said defendant and the said Emma Lauffer to reconvey the same upon demand." In support of this contention appellant calls attention to the defendant's testimony relative to a payment of $300 to his mother September 4, 1907. He was asked "whether that was the rent or what," to which he replied, "Well, I think it is, as near as I can remember." The evidence does not show whether the rent referred to was that of the then current year or of some previous year. The defendant testified that he held the land under lease until some time in the year 1905. Plaintiff also produced assessment lists for the years 1906, 1907, and 1908, signed by the defendant, in which the property was listed as belonging to the estate of Frederick Schroeder. The evidence shows that the decree of distribution in that estate was not recorded in the office of the county recorder until the year 1908, and that it was the practice of the county assessor to assess all real estate to the record owners thereof as shown by the records of the county re-

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★Hearing denied by Supreme Court.

corder. The assessment lists signed by the defendant therefore were of little value as evidence. Had the defendant listed the property as belonging to Mrs. Schroeder, that circumstance would have been entitled to greater weight. The defendant testified that there was no promise or understanding to the effect that the property was to be reconveyed to Mrs. Schroeder. The evidence is amply sufficient to sustain the finding that there was no such promise or understanding.

[2] Appellant's main contention is that the evidence conclusively shows that Mrs. Schroeder executed the deeds as a result of undue influence exercised over her by the defendant. There undoubtedly existed a confidential relation between the defendant and his mother, and, in addition to such relation as a proposition of law, she had great confidence in her son. Except for the presumptions arising from such relation, however, the evidence tending to show undue influence is very slight, and there is an entire lack of direct evidence that Mrs. Schroeder was in any manner influenced by any person to execute the deeds. She spoke English brokenly, but could make herself understood in that language. She could read and write German and signed her name in German characters. She was a strong woman, energetic and intelligent. The family physician testified:

> "I knew her 28 or 29 years. * * * She was able to go about very well until the last few years. * * * I considered she was a very bright woman, a very capable woman. * * * I always considered her a very bright woman, perfectly able to attend to her own business. * * * I never saw her but what I thought she was all right. * * * She was a hard worker; she always worked around the garden, and most of the time did a good deal of it; * * * visited the neighbors, riding horseback all over the country. * * * About the time that she bought the property there, the Williams property, she told me that she gave Mrs. Linser $2,000, I believe, something like that, and that was her share of the property. * * * She and I were quite intimate friends and she spoke to me about it in a confidential manner. * * * I stopped there sometimes two or three days or three or four days at a time."

A banker, who was acquainted with Mrs. Schroeder for many years, testified:

> "I was as well acquainted with her as anybody. * * * She was sound mentally and physically as well. * * * I never saw anything the matter with her in the world. Of course, she could not speak very good English, and she was sometimes difficult to understand what she was saying, but a person acquainted with her could understand her particularly. She was a bright woman. * * * Perfectly capable. * * * The first time I saw her she was horseback. She was the pioneer woman to ride astraddle that I ever saw in California up to that time. * * * That was when she married Fred Schroeder. She rode from Harris to Blocksburg to get married, and I have known her ever since. * * * (From 1900 to 1910) she was just as sound mentally as I am. * * * I never saw any difference. * * * The time I last saw her she was all right. * * * That might have been a year or so before she died. * * * She was in my office here and called on me. * * * I did not see any difference so far as her mind was concerned; she was getting older, that is all."

A number of other witnesses gave testimony to the same effect as that of the physician and the banker. Several of them testified that Mrs. Schroeder said that she had given Mrs. Linser a home and that that was all she would get, that the mountain ranch was to go to the defendant and his wife. The evidence shows that Mrs. Schroeder traveled alone as late as 1917, visiting friends in Alameda county during that year; that the defendant frequently furnished her money; that she told some of her friends that she could get money from him whenever she wanted it. One of her friends testified:

> "She told me that she bought the property for Julia * * * and that Julia had sold it. When she was telling me about it she was very sorry and deplored the fact that Julia could not have kept it, and she said Julia gets nothing more from me. I have heard her say that a half dozen times. * * * She gets nothing more from me, because she considered that Julia's share. * * * She always expressed the wish that her property would go to Emma and Martin. She said a good deal of it came through Emma, her property, and she always claimed Emma and Martin should have that property."

A neighbor of Mrs. Schroeder testified:

> "She told me that she had bought that property for Julia and Charles and that was to be her part of her estate. * * * She said she thought it would make them a good home. It was a nice place, and that was to be her share of her property. * * * She said that Emma and Martin, her son, was to get her share of the place, she had made a gift of that to them, if they would look after her as long as she lived. * * * She told me she could get money from her son, Martin, any time she wanted it. * * * She told me often that she had a hundred dollar check that Martin had given her. * * * She seemed to have all she wanted."

There is much other testimony of the same character as that quoted. The defendant testified that he never attempted in any manner to influence his mother to execute the deeds, and that, in addition to the consideration of love and affection expressed in the deeds, and as a further consideration therefor, he agreed to support and maintain his mother as long as she lived, and that he had faithfully performed the agreement on his part. It is very doubtful whether the evidence, viewed in the light most favorable to the appellant, is sufficient to support a finding that the execution of the deeds in question was the result of undue influence, but it is perfectly clear that the whole evidence is amply sufficient to justify a contrary finding. This is so manifest from the evidence herein set out that citation of authorities is deemed unnecessary.

The judgment is affirmed.

We concur: HART, J.; PLUMMER, J.

81 Cal. App. 499

ROBERTS v. ROBERTS. (Civ. 5724.)

(District Court of Appeal, First District, Division 1, California. Feb. 26, 1927.)

1. Venue 🔑66—Affidavit of merits on motion for change of venue held insufficient in allegation of statement to counsel.

Allegation of affidavit of merits, on motion for change of venue, that defendant fully stated to his counsel all the facts relating to said demand, *held* not equivalent of allegation of statement of "the case" or of "the facts of the case," and so to render affidavit insufficient.

2. Venue 🔑66—Affidavit of merits on motion for change of venue held defective in not showing advice was by attorney.

Averment of defendant's affidavit of merits on motion for change of venue that, after fully stating the facts to his attorney, he is advised that he has a good and meritorious defense, *held* insufficient in not showing the advice was from the attorney.

3. Evidence 🔑43(3)—Trial court held warranted in taking judicial notice of judgment in other action therein by reference thereto in affidavit of merits claiming res judicata.

Reference, in affidavit of merits on motion for change of venue, to judgment in action of a certain number in the same court, pleaded by such reference as res judicata, was sufficient to warrant the trial court in taking judicial notice of judgment.

4. Appeal and error 🔑931(3)—Implied finding of effect of judgment not in record, but of which trial court could take judicial notice, is presumed sustained by it.

Appellate court must presume that implied finding as to effect of judgment, not in record, but of which trial court could take judicial notice, was sustained by the terms of the judgment.

Appeal from Superior Court, Alameda County; John J. Allen, Judge.

Action by Emilie Roberts against Elmore W. Roberts. From order denying motion for change of venue, defendant appeals. Affirmed.

James Donovan, of Los Angeles, for appellant.

John L. McVey, of Oakland, for respondent.

CASHIN, J. An action was commenced in the superior court of Alameda county to recover on a written contract for the payment of money. The defendant, who is the appellant here, filed with his demurrer to the complaint a demand and motion for a change of venue to Los Angeles county, where, according to his affidavit of merits, he resides. The motion was denied, and the appeal was taken from the order.

[1] It is alleged in the affidavit mentioned that defendant "fully stated all of the facts relating to said demand in this action to his counsel herein." We are of the opinion that a statement "of all the facts relating to said demand" was not equivalent to a statement of "the case" or of "the facts of the case," and the affidavit in this particular was insufficient to meet the requirements of the rule established by the following cases: Nickerson v. California Raisin Co., 61 Cal. 268; People v. Larue, 66 Cal. 235, 5 P. 157; Palmer v. Barclay, 92 Cal. 199, 28 P 226; Westover v. Bridgford, 25 Cal. App. 548, 144 P. 313; Hanna v. De Koch, 52 Cal. App. 389, 198 P. 1006.

Appellant contends that the rule stated in the cases cited has been changed by the decision in Hughes v. Elliott, 167 Cal. 494, 140 P. 17. We do not think that such was the effect of the decision, as the affidavit there in question, in addition to the averment that affiant had stated "all the facts and grounds of defense to the complaint and cause of action," contained a verified declaration of facts amounting to a complete answer to the unverified complaint. As held in Westover v. Bridgford, supra, an affidavit of merits which avers the facts of the case and leaves the question of whether or not the defendant has a meritorious defense based thereon to the consideration of the court is sufficient.

[2] In the instant case defendant's affidavit further avers that, "after fully stating said facts to his said attorney, he is advised that he has a good and meritorious defense to said action."

As held in Walling v. Williams, 183 Cal. 600, 192 P. 34, and Jensen v. Dorr, 9 Cal. App. 19, 98 P. 45, this averment also was insufficient. In the latter case it was said:

> "Assuming, however, that affiant did fully and fairly state all the facts to his counsel, the affidavit is, nevertheless, defective in not stating, in substance at least, that he is advised by such counsel that he has a good and substantial defense upon the merits. * * * As shown by the affidavit, the advice referred to might have been obtained from a nonprofessional source. We cannot assume that, by reason of his stating the facts to his counsel, such counsel advised him that he had a meritorious defense. Non constat counsel, for all that appears in the averment, may have advised him there was no merit in his case, and yet, by reason of other advice, the averment be strictly true."

Appellant further contends that, notwithstanding these defects, his affidavit sets forth facts from which it appears that he has a meritorious defense to the action.

[3, 4] The affidavit avers that by a judgment of the superior court of Alameda county, in an action between the same parties numbered 83587, as shown by the register of actions in that court, the provisions of the contract which are sought to be enforced in the instant case were adjudged to be void, and that the judgment was not appealed from, and has become final. The record does not contain a copy of the judgment, nor was the latter made a part of the affidavit except by reference. Such reference, however, was sufficient to warrant the trial court in taking judicial notice thereof (Sewell v. Johnson, 165 Cal. 762, 134 P. 704, Ann. Cas. 1915B, 645); and we must presume that the implied finding as to its effect, which was adverse to the allegations of the affidavit, was sustained by the terms of the judgment (Estate of Young, 149 Cal. 173, 85 P. 145; Fonner v. Martens, 186 Cal. 623, 625, 200 P. 405; Western Cal. Land Co. v. Welch, 41 Cal. App. 435, 183 P. 169).

The order appealed from is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

MEMORANDUM DECISIONS

200 Cal. 521

FRED W. HAUGER MOTORS COMPANY (a Corporation), Plaintiff and Respondent, v. P. M. REIDY, Defendant and Appellant, and California Stearns Company (a Corporation), Defendant. (S. F. 11782.) (Supreme Court of California. Feb. 26, 1927.) In Banc. Orders to show cause why appeal from the Superior Court, City and County of San Francisco, John L. Hudner, Judge, should not be dismissed for failure of respondent to file briefs. Order to show cause discharged. I. Henry Harris, of Los Angeles, for appellant. R. L. McWilliams and H. H. McPike, both of San Francisco, for respondent.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. Upon the calling of such calendar the respondent failed to appear and the said order to show cause was thereupon submitted. Thereafter, and on February 23, 1927, the respondent, pursuant to permission theretofore granted, filed herein its brief to be used on this appeal. It is therefore ordered that the order to show cause, heretofore made herein on December 27, 1926, be and the same is hereby discharged.

200 Cal. 309 1

George G. GRAHAM, Plaintiff and Appellant, v. C. K. BONESTELL and A. Y. Chrisman, Defendants and Respondents. (S. F. 11840.) (Supreme Court of California. Jan. 28, 1927.) In Banc. Appeal by plaintiff from a judgment of the Superior Court of Fresno County, Stanley Murray, Judge, in an action for the recovery of personal property. Affirmed. Geo. G. Graham, of Fresno, for appellant. C. K. Bonestell, of San Francisco, and Samuel F. Hollins, of Fresno, for respondents.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondents to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondents had been filed, although the time for the filing of such brief under the rules of this court had long since expired. In response to said order the respondents appeared with a notice of motion for an order affirming the judgment, notice of which motion was duly served upon the appellant herein more than 10 days prior to the hearing thereon. Upon the call of such calendar and the hearing upon said motion, the appellant failed to appear or to respond thereto. The respondents, however, appeared to urge that their said motion should be granted. The matter was submitted to the court for decision in accordance with the terms, of its order to show cause. An examination of the appellant's brief herein discloses the fact that it fails to conform to the requirements of the rules of this court with relation to a supplement thereto or to a setting forth therein of a sufficient summary of the evidence. An examination thereof and of the record on appeal herein fully discloses that this appeal is entirely without merit and is a frivolous appeal. It is therefore hereby ordered that the judgment be and the same is affirmed.

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200 Cal. 520 2

W. W. SEARCH, Jr., Plaintiff and Respondent, v. John DOE, Defendant, and Pickwick Stages, Inc. (a Corporation), Defendant and Appellant. (S. F. 11550.) (Supreme Court of California. Feb. 26, 1927.) In Banc. Appeal by defendant from an order of the Superior Court, City and County of San Francisco, E. P Shortall, Judge, denying motion for change of venue. Barry J. Colding and Theodore Hale, both of San Francisco and B. P. Gibbs, of Los Angeles, for appellant. Edward Brady, of Los Angeles, for respondent.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. Upon the calling of such calendar the respondent failed to appear, and the said order to show cause was thereupon submitted. Thereafter, and on February 1, 1927, the respondent filed herein his consent that the order appealed from be reversed, with directions to the trial court to grant the motion of the appellant for a change of venue. It is therefore ordered that the order appealed from be and the same is hereby reversed, with directions to the court below to grant the relief sought by the appellant herein. Remittitur to issue forthwith.

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3 81 Cal. App. 478

PEOPLE of the State of California, Plaintiff and Respondent, v. Joseph BROCCO, Defendant and Appellant. (Cr. 950.) (District Court of Appeal, Third District, California. Feb. 24, 1927.) Appeal by defendant from a judgment of the Superior Court of Sonoma County, Ross Campbell, Judge, of conviction of violation of section 288, Penal Code. W. N. Vallandigham, of Santa Rosa, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Sonoma county of a felony, to wit, the crime of "lewd and lascivious act with and upon the body of a child under the age of fourteen years." The transcript on appeal was filed in this court October 18, 1926. No brief has been filed in behalf of appellant. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and order are affirmed.

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4 81 Cal. App. 253

PEOPLE of the State of California, Plaintiff and Respondent, v. Ernest KOPP, Defendant and Appellant. (Cr. 946.) (District Court of Appeal, Third District, California. Feb. 7, 1927.) Appeal by defendant from a judgment of the Superior Court of Sacramento County, Charles O. Busick, Judge, of conviction of violation of the Wright Act. Affirmed. Lee Gebhart, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript on appeal was filed in this court August 9, 1926. No. brief has been filed in behalf of appellant. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

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5 81 Cal. App. 251

PEOPLE of the State of California, Plaintiff and Respondent, v. Kenneth PERRY and Arthur Larry, Defendants and Appellants. (Cr. 925.) (District Court of Appeal, Third District, California. Feb. 7, 1927.) Appeal by defendants from a judgment of the Superior Court of Sacramento County, John F. Pullen, Judge, of conviction of robbery. Affirmed. J. M. McMahon, of Lodi, and Wallace Shepard, of Sacramento, for appellants. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript on appeal was filed in this court April 2, 1926. No brief has been filed in behalf of appellants. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellants at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgments and the orders are affirmed.

81 Cal. App. 252

1

PEOPLE of the State of California Plaintiff and Respondent, v. Walter SMITH, Defendant and Appellant. (Cr. 935.) (District Court of Appeal, Third District, California. Feb. 7, 1927.) Appeal by defendant from a judgment of the Superior Court of Sacramento County, John F. Pullen, Judge, of conviction of escape from state prison. Affirmed. Walter Smith, in pro. per. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript on appeal was filed in this court April 30, 1926. No brief has been filed in behalf of appellant. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

81 Cal. App. 253

2

PEOPLE of the State of California, Plaintiff and Respondent, v. Robert YORK, Defendant and Appellant. (Cr. 937.) (District Court of Appeal, Third District, California. Feb. 7, 1927.) Appeal by defendant from a judgment of the Superior Court of Sacramento County, John F. Pullen, Judge, of conviction of escape from state prison. Affirmed. A. R. Price, of Sacramento, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript on appeal was filed in this court May 12, 1926. No brief has been filed in behalf of appellant. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment and the order are affirmed.

81 Cal. App. 250

3

PEOPLE of the State of California, Plaintiff and Respondent, v. Harry YOUNG, Defendant and Appellant. (Cr. 898.) (District Court of Appeal, Third District, California. Feb. 7, 1927.) Appeal by defendant from a judgment of the Superior Court of Sacramento County, Charles O. Busick, Judge, of conviction of burglary. Affirmed. Harry Young, in pro. per. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The transcript on appeal was filed in this court December 8, 1925. No brief has been filed in behalf of appellant. The case was regularly placed on the February calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing. Pursuant to the provisions of section 1253 of the Penal Code, the judgment is affirmed.

4

81 Cal. App. 796

W. I. WAGG, Plaintiff and Appellant, v. John HATCH and Catherine Hatch, Defendants and Respondents. (Civ. 3180.) (District Court of Appeal, Third District, California. Feb. 19, 1927.) Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, J. B. Landis, Judge, in an action upon a promissory note. Gerald Willis Myers and Bigby & Myers, all of Los Angeles, for appellant. James S. Bennett, of Los Angeles, for respondents.

PER CURIAM. This is an appeal by the plaintiff from a judgment in favor of defendants. The parties have filed herein the following stipulation: "It is hereby stipulated * * * that the above-entitled case involves the same facts and circumstances as the case of Wagg v. Toler et al. (Cal. App.) 251 P. 973, * * * civil number 3179, and it is hereby stipulated that the above-entitled case may be submitted without oral argument for decision by the court, upon the authority of the opinion in Wagg v. Toler, supra, rendered December 28, 1926." Pursuant to the foregoing stipulation, and on the authority of Wagg v. Toler (Cal. App.) 251 P. 973, the judgment is affirmed.

CALIFORNIA REPORTER

254 PACIFIC REPORTER

254

200 Cal. 268

MELLA v. HOOPER. (L. A. 8534.)

(Supreme Court of California. March 5, 1927.)

1. Municipal corporations 🔑706(5)—Evidence held to support recovery for injuries by taxicab colliding with motorcycle at street intersection.

Evidence *held* to support verdict for plaintiff, both on issue of negligence and contributory negligence, in action against taxicab owner for injuries sustained when defendant ran into plaintiff's motorcycle at street intersection.

2. Appeal and error 🔑1050(1)—Admission of evidence as to plaintiff's wages when injured, if error, held harmless.

In personal injury action against taxicab owner, admission of evidence as to amount of wages plaintiff was receiving at time of injury, if error, *held* not prejudicial.

3. Appeal and error 🔑1064(1)—Instruction that injured plaintiff must prove case to moral certainty, though incorrect, held not prejudicial to defendant.

In personal injury action by motorcyclist against taxicab owner, instruction that plaintiff must prove case to moral certainty, though incorrect statement of law, *held* not reversible error on appeal by defendant.

4. Appeal and error 🔑216(2)—Instruction on burden of proof held not erroneous for failure to refer to evidence necessary to establish contributory negligence, in absence of request for proper instruction.

Instruction on burden of proof in personal injury action is not erroneous for failure to make any reference to evidence necessary to establish contributory negligence, since if defendant desired such instruction he should have prepared and submitted it with request that it be given.

5. Trial 🔑194(20)—Instruction that injured plaintiff could recover for future physical pain and mental anxiety held not erroneous as indicating permanency of injury (Civ. Code, § 3283).

In personal injury action, instruction that plaintiff could recover for physical pain and mental anxiety which he suffered "or must necessarily suffer in the future" *held* not erroneous as indicating that injury would continue to exist, in view of Civ. Code, § 3283, since such instruction only authorized consideration of such injury as would be certain to result.

6. Damages 🔑32—Injured plaintiff may recover damages for future pain and suffering certain to result (Civ. Code, § 3283).

Plaintiff in personal injury action is not limited to damages for past suffering and pain, but jury may include damages for future pain and suffering certain to result, in view of Civ. Code, § 3283.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Joe J. Mella against George Hooper. Judgment for plaintiff, and defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Albert Sidney Brown, of Los Angeles, for respondent.

WASTE, C. J. In this action for personal injuries alleged to have been received by plaintiff through the negligent operation of an automobile used as a taxicab, owned and driven by defendant, the jury awarded plaintiff damages in the sum of $5,000. From the judgment entered on the verdict, defendant appealed.

The accident out of which the injuries arose happened in the space formed by the intersection of Alameda street and East Third street in the city of Los Angeles. At that point a double line of street car tracks run east and west, which are intersected by tracks of a steam railway running north and south. Gates were operated on the east and west sides of Alameda street to protect traffic from passing trains. Just prior to the collision, the plaintiff was riding a motorcycle in a northerly direction on the right, or east, side of Alameda street. Defendant was driving his taxicab easterly along East Third street. A westerly bound street car on East Third street was approaching the intersection. Traffic at the point was congested on both streets, and the gates were down, giving the north and south bound traffic on Alameda street the right of way. The gates were raised, permitting the east and west bound traffic on East Third street to move, the street car and the taxicab approaching each other from opposite directions. An instant before the gates were raised, the plaintiff on his motorcycle and an automobile on his left had entered the intersection and were proceeding northerly across East Third street. Defendant drove rapidly into the intersection, and the driver of the automobile, seeing the speed at which he was approaching, abruptly stopped his car. The plaintiff's vision being obstructed by the automobile on his left, he proceeded across East Third street and had nearly reached the westbound street car track when his motorcycle was struck by the automobile of the defendant. By the impact of the collision plaintiff was thrown onto the fender of the street car. He suffered a compound fracture of the left leg below the knee and was bruised and cut.

[1] On this appeal the appellant contends, first, that the evidence was insufficient to show that he was guilty of any negligence whatsoever, and, second, conceding that appellant was guilty of negligence, the respondent was guilty of contributory negligence directly contributing to and which was the proximate cause of his injuries. As in most cases in which sudden accidents furnish the cause of action, various inferences and different conclusions may be drawn from the evidence. A number of witnesses testified on each side of this case, explaining their testimony of means of a diagram. The respondent contends that the evidence of physical facts and statements made by the appellant after the accident sustains the contention that the collision was brought about through the undue haste of the defendant to "get to the depot," and in his not allowing sufficient time for the northerly bound traffic to clear the intersection before he attempted to cross Alameda street. There is evidence, also, to show that he drove into the intersection at an excessive rate of speed. The situation of the parties and the surroundings at the time of the accident were made very clear to the jurors. Their verdict finds ample support in the record of the evidence taken at the trial, both as to the negligence of the appellant and the lack of contributory negligence on the part of the respondent.

[2] Appellant complains of the admission, over his objection, of the testimony of the respondent as to the amount of wages the latter was receiving at the time of the injury. Read as a whole, however, the testimony only showed that respondent was receiving $4.50 a day when he was injured, and that, but for the injury, he would be receiving the same amount at the time of the trial, and did not, in any way, prejudice the case of the appellant.

[3, 4] Complaint is made of the giving of certain instructions. One, given at the request of the plaintiff and which informed the jury, in effect, that it was incumbent on the plaintiff to prove his case to a "moral certainty," was not a correct statement of the law in civil causes (People v. Miller, 171 Cal. 649, 654, 154 P. 468, but it was more injurious to the plaintiff than to appellant. The concluding portion of the instruction is somewhat garbled and rather meaningless; but the fact that the instruction referred only to the burden of proof of the plaintiff, and made no reference to the evidence necessary to establish contributory negligence, did not constitute error. If the defendant desired any instructions to be given on the subject of contributory negligence, he should have prepared and submitted them to the court with the request that they be given.

[5, 6] Appellant complains that in one of the instructions the jury was told that it might consider as an element of damages such physical pain and mental anxiety as it found plaintiff suffered, or must necessarily suffer, in the future. The contention, in part, is that the word "necessarily" impliedly conveyed to the jury the court's view that the injury sustained by plaintiff would continue to exist in the future, which was a question to be passed upon by the jury. This criticism is without merit. Furthermore, as to the use of the word "necessarily," the statute provides that damages may be awarded in a judicial proceeding for detriment certain to result in the future. Civ. Code, § 3283. At the time of the trial, the respondent was still suffering pain in his leg, on which there was an open sore which required treatment, and it was painful for him to walk. He was not limited to damages for past suffering and pain, and the jury had a right to include in its award damages for future pain and suffering certain to result. To say that the jury may consider such injury as the plaintiff must necessarily suffer was but another way of saying that the jury may consider such injury as would be certain to result. Ryan v. Oakland Gas, etc., Co., 21 Cal. App. 14, 24, 130 P. 693.

What is said with reference to the exception to the instruction under the ruling and exception just discussed is applicable to the objection here made to an instruction defining and explaining "compensatory damages."

The judgment is affirmed.

We concur: CURTIS, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.

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200 Cal. 463

POSTAL TELEGRAPH-CABLE CO. v. RAILROAD COMMISSION OF CALIFORNIA et al. (S. F. 11956.)

(Supreme Court of California. Feb. 19, 1927.)

1. Telegraphs and telephones 🔑10(2)—Railroad Commission cannot order telegraph company holding federal franchise to cease operation along "post road" for intrastate business until certificate is obtained (Public Utilities Act 1915, § 50, subds. [a], [b], as amended by St. 1917, p. 168; Act Cong. July 24, 1866, §§ 1, 2, 4 [14 Stat. 221, 222]; Const. U. S. art. 1, § 8; U. S. Comp. St. § 7457).

Railroad Commission cannot, under Public Utilities Act (St. 1915, p. 148), § 50, subds. (a) and (b), as amended by St. 1917, p. 168, order telegraph company, operating under federal franchise through acceptance of Act Cong. July 24, 1866, §§ 1, 2 (14 Stat. 221), under provisions of section 4, which act was authorized by Const. U. S. art. 1, § 8, to cease operation of line constructed along "post roads," which, under Act Cong. March 1, 1884 (U. S. Comp. St. § 7457), include all public roads and highways maintained as such, for intrastate business until it secures certificate of public convenience and necessity, though it may regulate conduct of company's business under police power.

[Ed. Note.—For other definitions, see Words and Phrases, Post Road.]

2. Commerce 🔑28—Telegraph company, by obtaining federal franchise, became government agency for transaction of postal business (Act Cong. July 24, 1866, §§ 1, 2, 4 [14 Stat. 221, 222]).

Telegraph company obtaining federal franchise by accepting Act Cong. July 24, 1866, §§ 1, 2, 4 (14 Stat. 221), under provisions of section 4 thereby became agency of federal government for transaction of postal business, and an agent of interstate and foreign commerce.

3. Telegraphs and telephones 🔑7—Telegraph company acquired state franchise under state statute by building lines (Civ. Code, § 536).

Building of lines by telegraph company within state is sufficient acceptance of Civ. Code, § 536, which constitutes grant of franchise to telegraph corporation to construct lines within state.

4. Constitutional law 🔑101—Railroad Commission order requiring telegraph company holding state franchise to procure certificate of public convenience held unauthorized as impairing vested rights (Civ. Code, § 536; Public Utilities Act 1911, § 50[b]).

Railroad Commission cannot require telegraph company, which accepted grant of franchise under Civ. Code, § 536, to procure certificate of public convenience and necessity before carrying on intrastate business over new line erected after amendment of Constitution in 1911 and enactment of Public Utilities Act (St. 1911, Ex. Sess. 1911, p. 43), § 50 (b), since rights acquired under Civ. Code, § 536 are vested, and cannot be taken away by subsequent state legislation.

In Bank.

Application by the Postal Telegraph-Cable Company for certiorari to review an order of the Railroad Commission of California, and H. W. Brundaze and others, members thereof, requiring the procurement of a certificate of public convenience and necessity. Order annulled.

Max Thelen and Willard P. Smith, both of San Francisco, for petitioner.

Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan, of San Francisco, for respondents.

WASTE, C. J The petitioner, Postal Telegraph-Cable Company, constructed a line from Niland, through Brawley, Imperial, and El Centro, to Calexico, known as its Imperial valley extension, and opened offices in the places mentioned for the transaction of a general telegraph business. The respondent Railroad Commission, of its own motion, and assuming to act under the provisions of section 50, subds. (a) and (b), of the Public Utilities Act (Stats. 1915, p. 115; amended Stats. 1917, p. 168), instituted an investigation into the construction of the line and the business being carried on over it. After due hearing, it made an order that the telegraph company cease and desist from the operation of the line for intrastate business, unless and until it shall have secured a certificate that the present and future public convenience and necessity require, or will require, such operation. This proceeding is brought to determine the validity of that order.

The Postal Telegraph-Cable Company, at times hereinafter referred to as the telegraph company, a California corporation, is one of several telegraph and telephone companies doing a competitive business in this state. It is part of the "Mackay System," which operates telegraph and cable companies throughout the United States and foreign countries. Its predecessors first entered California in 1886, by a telegraph line extending from the Canadian boundary south through the states of Washington and Oregon, and thereafter constructed and extended their lines generally throughout the state. In 1908 the predecessor companies conveyed all their property in California to this petitioner, and it has carried on all subsequent construction and operation in the state. Apart from the period during which this country was engaged in the World War, there has been a continual increase in the telegraph company's facilities, equipment, and lines in California. During 1924 a line from Los Angeles to Dallas, Tex., and running through Niland, was completed. Prior to the construction of this interstate line, the petitioner's nearest point to the Imperial valley was at Redlands, 124 miles away. The extension, which is physically connected with the line at Niland, is 46½ miles in length. It is substantially constructed, and, except for a distance of one and a half miles, runs along the county and state highways.

It is not now claimed by the respondent commission that the line from Niland to Calexico was unlawfully constructed, and it is conceded that it was being lawfully operated for interstate business and the transmission of government messages. Respondent admits that neither it nor the state, whose agent it is, can demand a certificate of convenience and necessity as a prerequisite to the construction or operation of a telegraph line within the state for the doing of interstate business; and that any order of the commission requiring such a certificate or any statutory enactment purporting to require a certificate, would be violative of the commerce clause of the federal Constitution. Respondent further concedes that the state cannot require a certificate of public convenience and necessity as a prerequisite to the construction of a line physically connected to an interstate line, even though potentially usable for intrastate purposes, for such line, regardless of where constructed, would also be potentially usable for interstate business. These concessions remove from any possible application to this proceeding the provisions of section 50 (a) of the Public Utilities Act, which require certificates from the Railroad Commission in certain cases of construction by specified classes of public utilities.

But, with so much conceded, the respondent contends that, as to intrastate telegraph business authority inheres in the state to require compliance with a proper and reasonable exercise of the state's police power. It therefore invokes the provisions of section 50 (b) of the Public Utilities Act, which provides that certain named types of public utilities, including telegraph corporations, shall not exercise "any right or privilege under any franchise or permit hereafter granted, or under any franchise or permit heretofore granted but not heretofore actually exercised, or the exercise of which has been suspended for more than one year, without first having obtained from the commission a certificate that public convenience and necessity require the exercise of such right or privilege; provided, that when the commission shall find, after hearing, that a public utility has heretofore begun actual construction work and is prosecuting such work, in good faith, uninterruptedly and with reasonable diligence in proportion to the magnitude of the undertaking, under any franchise or permit heretofore granted but not heretofore actually exercised, such public utility may proceed, under such rules and regulations as the commission may prescribe, to the completion of such work, and may, after such completion, exercise such right or privilege; and provided, further, that this section shall not be construed to validate any right or privilege now invalid or hereafter becoming invalid under any law of this state."

[1] By reason of the concessions of the respondent and its present contentions, the sole issue to be considered in this proceeding may be thus stated: Can the Postal Telegraph-Cable Company, after it has lawfully constructed its line from Niland to Calexico, for the construction of which no certificate from the Railroad Commission was necessary, be forced to let the line stand idle, in so far as California intrastate business is concerned, unless and until it secures a certificate of public convenience and necessity for the transaction of such business? In answer to this question, the petitioner contends that the provisions of the Public Utilities Act relied on by the respondent (if applied to it) and the order of the Commission violate its rights under the federal Constitution and the statutes enacted by Congress pursuant thereto. In making this contention it relies, first upon the fact that it is lawfully within this state and carrying on its business under a "federal franchise," from which it contends that it is beyond the power of the state to in any way interfere with its operation. That petitioner possesses a federal franchise is beyond question. Section 8 of article 1 of the Constitution of the United States provides:

> "The Congress shall have power * * * to establish post offices and post roads."

By an act to "Aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military, and other purposes," passed July 24, 1866 (14 Stats. at L. 221, c. 230; Rev. Stats. §§ 5263–5268 [U. S. Comp. St. §§ 10072–10077]), Congress provided (section 1) that any telegraph company then organized, or which might thereafter be organized, under the laws of any state in the Union, "shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress. * * *" It is further provided in the act (section 2) "that telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the postmaster general." Before any telegraph company may exercise any of the powers or privileges conferred by the act, such company is required (section 4) to file its written acceptance with the postmaster general of the restrictions and obligations thereby imposed. Petitioner filed its written acceptance of the act with the postmaster general on August 4, 1908, since which time it has been entitled to all the rights and privileges granted thereby. These rights and privileges constitute its federal franchise. Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 110, 113, 116 P. 557. By a subsequent act, Congress declared that all public roads and highways, while kept up and maintained as such, are post routes. Act March 1, 1884, 23 Stat. at L. 3, c. 9 (U. S. Comp. St. § 7457). Petitioner therefore has the right to construct, maintain, and operate its lines over and along the public roads and highways of the United States, while kept up and maintained as such, irrespective of whether mail is actually being carried thereon, either by way of city letter carriers or in rural delivery. This right cannot be denied to it. Western Union Tel. Co. v. Hopkins, supra; Western Union Tel. Co. v. Lakin, 53 Wash. 326, 335, 101 P. 1094, 1098, 17 Ann. Cas. 718; Town of Essex v. New England Tel. Co., 239 U. S. 313, 36 S. Ct. 102, 60 L. Ed. 301. As Congress has authority to say that a telegraph company may construct and operate its telegraph over these lines, the state can have no authority to say it shall not be done, and cannot, by any specific statute, prevent the company from placing its lines along the post roads, or stop the use of them after they are placed there. Western Union Tel. Co. v Massachusetts, 125 U. S. 530, 548, 554, 8 S. Ct. 961, 31 L. Ed. 790.

[2] The decisions appear to be uniform to the effect that, by the act of Congress, and its acceptance by petitioner, the latter became an instrumentality of the United States in carrying out its governmental functions. Western Union Tel. Co. v. Visalia, 149 Cal. 744, 746, 87 P. 1023. Having accepted the benefits and burdens of the act, it thereby became an agency of the federal government for the transaction of its postal business, and an agent of interstate and foreign commerce. State v. Western Union Tel. Co., 43 Mont. 445, 117 P. 93.

The respondent seems to understand the petitioner as arguing that the effect of its "federal franchise" is to give it an absolute right to carry on its intrastate telegraph business, to the complete exclusion of the police power of the state. Petitioner makes no such contention, as, indeed, it cannot. It concedes the right of the state and its municipalities to impose upon a telegraph company, under the police power, reasonable regulations with reference to the manner of the exercise by it of the rights conferred by the national government. Town of Essex v. New England Tel. Co., supra; Carver v. State, 11 Ga. App. 22, 74 S. E. 556; Western Union Tel. Co. v. Lakin, supra. These powers are, however, regulatory, and not prohibitory, and this distinction renders tenable the contention petitioner is here making that the state cannot so interfere with its operation, even under the assumed guise of the exercise of the police power, as to work a prohibition of any part of its business. In Western Union Tel. Co. v. Lakin, supra, the court said:

> "The power of the city was limited to its right to regulate the use of the privilege granted by Congress. * * * Beyond this it had no power to go."

Regulations of the state must not be arbitrary, unreasonable, nor such as have the effect of excluding the company from the state or forbidding it to carry on its business therein. A state cannot so exclude or prohibit either directly or indirectly. In Western Union Tel. Co. v. Superior Court of Sacramento County, 15 Cal. App. 679, 688, 115 P. 1091, 1095, 115 P. 1100, it was said that, notwithstanding the fact that the state has no power under the indicated circumstances to exclude such telegraph corporations from the right or privilege of carrying on the business for which they are formed within its borders, it may impose upon such corporations, "as it may upon all corporations of whatever kind or nature, organized and existing under the laws of another state, reasonable regulations, and to that end prescribe and require certain reasonable prerequisites to the exercise of the authority conferred on them by Congress to do business in such state," with the limitation, of course, that "no state will be permitted, whether under the guise of regulation or otherwise, to enact any legislation the effect of which would or might, practically, be to prevent them from doing business in such state, or in effect result in an attempt on the part of such state to regulate commercial intercourse between its citizens and those of other states, or to control the transmission of all telegraphic correspondence within its own jurisdiction."

When the act of Congress granting telegraph companies the right to construct, maintain, and operate their lines over the public domain (July 24, 1866, supra) first came before the Supreme Court of the United States, it was carefully examined by it in order to determine whether or not Congress had power to prevent the states from placing obstructions in the way of the usefulness of the telegraph. It was decided that the statute was a proper exercise of the power of Congress over interstate commerce, and the power to establish post offices and post roads, and that "the statute, * * * in effect, amounts to a prohibition of all state monopolies in this particular. It substantially declares in the interest of commerce and the convenient transmission of intelligence from place to place by the government of the United States and its citizens, that the erection of telegraph lines shall, so far as state interference is concerned, be free to all who will submit to the conditions imposed by Congress, and that corporations organized under the laws of one state for constructing and operating telegraph lines shall not be excluded by another from prosecuting their business within its jurisdiction." Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, 11 (24 L. Ed. 708). A statute of the state of Florida, which purported to grant a monopoly to a particular telegraph company in certain state territory, to the exclusion of all other telegraph companies, was held unconstitutional as to those telegraph corporations which had accepted the act of Congress of July 24, 1866, for the reason that it interfered with interstate commerce and with the transmission of intelligence from place to place by the government. The opinion of the court in the Pensacola Case was cited in a comparatively recent decision of the same court as establishing beyond question the validity, and pointing out the general purposes, of the act of 1866, and it was held that a state has no authority to say that a telegraph company may not operate lines constructed over postal routes within its borders. Town of Essex v. New England Tel. Co., supra, page 320 (36 S. Ct. 102).

We take it to be, therefore, conclusively settled that the authority for the "federal franchise" possessed by the petitioner is the provision of the United States Constitution, supra, that "the Congress shall have power * * * to establish post offices and post roads." Under this provision, the authorities seem to as conclusively establish that the power of the national government is exclusive, subject to the right of the state, under its police power, to make certain reasonable regulations as to the manner in which the business of the telegraph company shall be conducted. The order here sought to be annulled amounts to an injunction entirely suspending the doing of intrastate business over the Imperial Valley extension of the telegraph company's line. It does not, therefore, find support in the exercise of the police power to regulate, but amounts to an attempt to exercise a power to prohibit. For this reason, the order of the commission and the provisions of section 50 (b) of the Public Utilities Act, if applied to the petitioner here, violate petitioner's rights under the federal Constitution and the act of Congress which give effect to its provisions relating to post offices and post roads. Western Union Tel. Co. v. Massachusetts, supra, page 554 (8 S. Ct. 961).

[3, 4] For another reason the respondent may not now demand the certificate of public convenience and necessity from petitioner before it can carry on its intrastate business. Section 536 of the Civil Code provides:

> "Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters."

This section constitutes a grant of a franchise which the state offered, and petitioner accepted by the construction of its lines. The rights acquired by the telegraph company, by accepting and availing itself of the provisions of the section, are vested rights which the Constitutions, both state and federal, protect. They cannot be taken away by the state, even though the Legislature should repeal the section, or by the people through a constitutional provision. Western Union Tel. Co. v. Hopkins, supra, page 119 et. seq. (116 P. 557); Postal-Telegraph-Cable Co. v. Los Angeles County, 160 Cal. 129, 131, 116 P. 566; In re Keppelmann, 166 Cal. 770, 773, 138 P. 346. The finding of the respondent commission of the physical fact that petitioner was maintaining and operating its lines of telegraph over the roads and highways of the state establishes, as a matter of law and of fact, the proposition that it has accepted, and owns a state franchise for that purpose, which was offered to it by section 536, supra. Postal-Telegraph-Cable Co. v. Los Angeles, 164 Cal. 156, 160, 128 P. 19.

Respondent takes the position that, conceding that it may have been true when section 536 was enacted that the right to operate telegraph lines was implied as a necessary adjunct to the right to construct, the situation was changed by the adoption, in 1911, of amendments to the state Constitution, and the enactment by the Legislature of the "Public Utilities Act," which went into effect March 23, 1912 (Stats. 1911, Extra Session, pp. 18, 43), and which expressly added (section 50 [b]) a new requirement; i. e., a certificate of public convenience and necessity from the Railroad Commission as a condition precedent to the exercise by the public utility of its franchise rights. This statute, it admits, did not prevent the continuation of public utility facilities already in operation, without a certificate; but it contends that the continuing right to construct telegraph lines offered by the state, under section 536, did not give the petitioner an unexpressed, but nevertheless vested, right to operate new lines constructed after the Public Utilities Act went into effect. We cannot agree with this contention. Neither the constitutional amendments nor the passage of the Public Utilities Act worked the change contended for by the respondent. In view of the nature of the business of the telegraph company, and the broad and unrestricted terms of the offer contained in section 536, which has not been withdrawn or modified, we find no ground for the contention that each act of constructing a telegraph line, or an extension of service, was to constitute an acceptance pro tanto. The offer was intended to be, and was accepted in its entirety as made. Petitioner has now exactly the same rights under its state franchise that it has had from the time it constructed and began to maintain and operate its first telegraph line within the borders of the state. The grant, resulting from the acceptance of the state offer, constituted a contract between the telegraph company and the state, secured by the Constitution of the United States against impairment by any state legislation. Western Union Tel. Co. v. Hopkins, supra, page 120 (116 P. 557); Sunset Tel. & Tel. Co. v. Pomona (C. C. A.) 172 F. 829, 837; Russell v. Sebastian, 233 U. S. 195, 204, 208, 34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E, 882, Ann. Cas. 1914C, 1282; State ex rel. Shaver v. Iowa Telephone Co., 175 Iowa, 607, 616, 154 N. W. 678, Ann. Cas. 1917E, 539.

The conclusion we have reached renders it unnecessary to consider the other points made by the petitioner.

The order is annulled.

We concur: SHENK, J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

200 Cal. 494

FIRST NAT. BANK OF LOS ANGELES v. SILVA et al. (Sac. 3723.)

(Supreme Court of California. Feb. 21, 1927.)

1. Liens 🔑12—Wording of lien statute existing when contract lien was created determines priority of subsequent statutory lien (Civ. Code, § 2897).

Wording of existing statutes or codes creating lien subsequent to liens created by contract determines question of priority, under Civ. Code, § 2897, as contract lien is presumed to have been created with knowledge of law.

2. Constitutional law 🔑161—Lien under statute existing when earlier contract lien was created may be given precedence without violating Constitution (Civ. Code, § 2897).

If statute providing for creation of liens and determining their priority exists at time of creation of contract lien, no constitutional provisions are violated by giving precedence to a subsequently acquired statutory lien, under Civ. Code, § 2897.

3. Animals 🔑26(1)—Agister's lien "dependent upon possession" may be maintained until discharged by payment; "may retain possession" (Civ. Code, § 3051).

Agister's lien, under Civ. Code, § 3051, may be maintained until discharged by payment, as in case of lien for charges for work done and materials furnished in making, altering, or repairing personal property; "dependent on possession" and "may retain possession of the same until the charges are paid" meaning the same.

4. Chattel mortgages 🔑138(1)—Agisters have preferential lien as against holders of chattel mortgages (Civ. Code, §§ 3051, 3052).

Under Civ. Code, § 3052, as amended in 1907 (St. 1907, p. 86, § 2), giving every holder of lien under section 3051 the same rights and remedies, agisters, as well as persons repairing or altering personalty, have a preferential lien as against holders of chattel mortgages.

5. Chattel mortgages 🔑138(1)—Agister's lien is statutory, not merely contractual, and should be given precedence over lien of mortgagee, who is benefited by preservation of cattle (Civ. Code, § 3051).

Agister's lien is not a mere creature of contract, but is created by Civ. Code, § 3051, from fact of keeping cattle rightfully in his possession, and should be given preference over lien of mortgagee, to whose benefit indebtedness for any expenditure reasonably necessary for preservation of cattle really inures.

Shenk, J., dissenting in part.

In Bank.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by the First National Bank of Los Angeles against Charles F. Silva and others. Judgment for defendants, and plaintiff appeals. On hearing in the Supreme Court after judgment of affirmance in the District Court of Appeal. Judgment of the superior court affirmed.

Flint & MacKay and Robert B. Jackson, all of Los Angeles, and F. W. Henderson, of Merced, and Joseph Barcroft, of Madera, for appellant.

Sherwood Green and John W. Maloy, both of Madera, for respondents.

WASTE, C. J. A petition to have this cause heard in the Supreme Court after judgment in the District Court of Appeal, Third Appellate District, was granted in order that further argument might be had on the question therein involved. After further consideration of the case, we are of the view that the decision of the District Court of Appeal was correct. The following portion of the opinion by Mr. Justice Plummer is therefore adopted as the opinion of this court:

"The facts necessary to be stated are in brief as follows: The defendant Charles F. Silva, the owner of a band of cattle, made, executed and delivered to the plaintiff a chattel mortgage thereon. Thereafter, and on the 1st day of September, 1923, the defendant Silva placed said cattle in the possession of the defendants Donnelly and Clark for pasturage purposes upon pasture lands belonging to said defendants. Said cattle were pastured by Donnelly and Clark until the 1st day of December, 1923, and they claim an agister's lien for the value of the pasturage in the sum of $1,890. The amount of this claim is not disputed. The only question involved is whether an agister's lien takes precedence of a prior chattel mortgage.

[1, 2] "Section 2897 of the Civil Code, in relation to priority of liens, reads as follows: 'Other things being equal, different liens upon the same property have priority according to the time of their creation, except in cases of bottomry and respondentia.' In order to determine whether a lien takes precedence under this section, it is necessary to determine whether other things are equal. Where the lien is created by contract, there is no difficulty whatever in determining the question of priority; it is only when a lien is created by contract and a subsequent lien is created by reason of an existing statute. In the latter case, the wording of the statutes or codes determines the question of priority, as the contract lien is presumed to have been created with knowledge of the law. If the statute exists providing for the creation of liens and determining their priority at the time of the creation of the contract lien, then no constitutional provisions are violated by giving precedence to a subsequently acquired statutory lien over a prior contract lien.

[3] "Some of the cases also distinguish between what are purely common-law liens and statute liens. In this case, however, whether formerly existing as common-law liens or otherwise, a large number of liens, including the lien of agisters, are grouped together and provided for in the same section of the Civil Code. Section 3051 of the Civil Code places agister's liens in the category which we have mentioned. We here quote: 'Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safe-keeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service; a person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and materials furnished, and may retain possession of the same until the charges are paid; and livery or boarding or feed stable proprietors, and persons pasturing horses or stock, have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, or pasturing such horses or stock; and laundry proprietors and persons conducting a laundry business, have a general lien, dependent on possession, upon all personal property in their hands belonging to a customer, for the balance due them from such customer for laundry work; and veterinary proprietors and veterinary surgeons shall have a lien, dependent on possession, for their compensation in caring for, boarding, feeding, and medical treatment of animals; and keepers of garages for automobiles shall have a lien, dependent on possession, for their compensation in caring for and safekeeping (of) such automobiles.' There seems to be no difference in the legal meaning of the language used in reference to the different liens there provided for, although there is some difference in the actual language used. In all but one instance, the lien given is 'dependent on possession,' while, in one instance, the language reads, 'and may retain possession of the same until the charges are paid.' While the language differs, the meaning is the same; that is, the lien is dependent upon the possession of the article upon which the lien is claimed by the one asserting the lien, and may be maintained until the lien is discharged by payment.

[4] "Section 3052 of the Civil Code was amended in 1907 (St. 1907, p. 86, § 2), giving to every lienholder of a lien provided for in section 3051 of the Civil Code exactly the same rights and the same remedies. Prior to the amendment, section 3052 gave rights and remedies only to a person who had altered or repaired articles of personal property. Thus, a clear distinction was made by the Legislature with regard to the remedies afforded lienholders. Since the amendment of section 3052, the right to sell the property upon which the lien is claimed is given to any one of the several classes of persons named in section 3051, with the same right and privilege to convert the personal property into cash, irrespective of the prior chattel mortgage, as might have been exercised by any one claiming a lien for repairs or alterations prior to the amendment of the section. In the case of Wilson v. Donaldson, 121 Cal. 8, 53 P. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17, the question involved was whether one who had harvested certain grain had a lien thereon for the charges and expenses of harvesting that would take precedence of a chattel mortgage. The court in that case, in holding that a harvester's lien did not take precedence, commented upon the character of lien which is involved in this case, and in its comments quoted from an Indiana case, there cited, the following language: 'As the agister's lien depends alone upon the statute, it can have no greater force than the statute gives, and as the Legislature has, as we have said, manifested no intention of giving to it superiority over other liens, it can have none,' and then in relation to the lien involved in that case, further said: 'In the absence of the statute, the appellant would have no lien whatever. All his rights come from the statute, and therefore must be weighed and limited by the statute. If the Legislature had desired to give such lien claimants a priority over contract liens, it was an easy thing to have said so.' This decision was rendered in May, 1898, since which date section 3052, Civil Code, relied upon in that case, has been amended, and the Legislature has placed agister's liens along with a number of other kinds of liens in the same class occupied by repairmen. This being true, if persons making repairs or alterations on articles of personal property, etc., have a preferential lien as against holders of chattel mortgages, and it has been so held by the courts of this state, then we can perceive no valid reason why other lienholders grouped with repairmen under section 3051, Civil Code, and given exactly the same rights and privileges by section 3052, Civil Code, should not also occupy the same preferential

position, and chattel mortgages held to be executed with knowledge of the law and the possibility of statutory preferential liens in all of the cases specified in section 3051, Civil Code, as well as in one or two particular instances therein specified, especially when the language of the two sections of the Code indicates that the Legislature intended no such difference, and has, by the amendment of section 3052, Civil Code, explicitly placed all the lienholders there referred to upon an equality. In the case of Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118, the Supreme Court of this state has held that, under sections 3051 and 3052 of the Civil Code, the statutory lien of one who makes repairs upon personal property is superior to the pre-existing lien of a chattel mortgage. In that case the court refers to the amendment to section 3052, Civil Code, giving the same rights and remedies to all the lienholders mentioned and provided for in section 3051, Civil Code. The case of Wilson v. Donaldson, supra, is also referred to and the fact pointed out that that decision was prior to the amendment, and also further states that the case of Wilson v. Donaldson cannot be treated as having been a thoroughly considered case. In neither the Wilson v. Donaldson Case, nor in the case of Mortgage Securities Co. v. Pfaffmann, was the question of an agister's lien involved. The former related to harvesting grain, and the latter referred to repairs made upon an automobile upon which a chattel mortgage had previously been given. Both cases, however, take up and discuss agister's liens. The Wilson Case refers to the case of Case v. Allen, 21 Kan. *217, 30 Am. Rep. 425, wherein an agister's lien is held superior to a chattel mortgage, and commented adversely on this holding, while the court in the later case of Mortgage Securities Co. v. Pfaffmann refers to the Kansas decision as a well-considered case, and entirely approves the rule there laid down. After considering and mentioning the different kinds of liens, the court in the Mortgage Securities Co. Case says: 'It remains to be added that the question of priority is wholly controlled by our statutory law. If by the fair intendment of that law these classes now enumerated in section 3051 of the Civil Code are given a preferential lien over the holder of an earlier chattel mortgage, we are not embarrassed in so declaring. We are well convinced that our law does with intention make the possessory lien of the improver and of the repairer superior to the lien of the pre-existing chattel mortgage. True, it is said in Wilson v. Donaldson that if the Legislature had desired to give such lien claimants priority over chattel mortgage liens it was an easy thing to have said so, but our conviction is that it has said so and that its declaration has the support of reason and justice. Did the Legislature mean that every artisan and mechanic to whom might be delivered a chattel for improvement and repair must search the records to discover whether that article had been mortgaged, and, failing so to do, be at the peril of the impairment or total destruction of his lien, or did it mean that the money lender who took for security a chattel mortgage should take it with the understanding as part of his contract that improvements and repairs placed upon the article should be subject to a preferential possessory lien? Without hesitation we answer that the second alternative is sustainable as a just interpretation of the legislative enactments. Under the language of the two sections it seems most manifest that such is the true construction. Instancing but one consideration alone, and that the right and power of the possessory lien claimant to sell the property, that right absolute is given him, and he may exercise it so far as the statute reads without regard to the existence of the chattel mortgage and without regard to whether or not the chattel mortgage is foreclosable. One would certainly look to see some limiting language in the law if these provisions as to the right of sale and disposition of the proceeds of the sale were to be subordinated to a preferential right on the part of the holder of a chattel mortgage, and it certainly makes more for the protection of society and for the conduct of its business to say that all of these classes of men who preserve, improve, or repair personal property should, like mechanics and artisans, under the mechanic's lien law, have their liens declared preferential. Concerning the money lender who holds the chattel mortgage, two suggestions may be briefly advanced—one, that the possessory lien claimant has preserved, improved, or repaired the property upon which he has a lien, and, consequently, has added a value to the security commensurate with his just charge; the other, that the money lender desiring to take the security of a chattel mortgage can with much more readiness reduce the amount of his loan to protect himself against the possible liability of a possessory lien than can the work-a-day artisan take the time to inspect the records to see whether such chattel mortgage exists against the property.'

"If by section 3052, Civil Code, the Legislature, in giving the right to a repairman to sell the property on which he has made repairs without reference to the chattel mortgage, indicated its intention to say that such lien shall take precedence, we do not well see how it can be argued that other lienholders provided for in section 3051, Civil Code, and given exactly the same rights and remedies by section 3052, Civil Code, are not likewise placed in the preferential class. If it is correct that the Legislature intended to say that a repairman shall have a preferential lien as against chattel mortgages, then it certainly has said the same thing as to all other lienholders grouped with the repairmen and given the same standing as to rights and remedies.

"The case of Guinn v. McReynolds, 177 Cal. 230, 170 P. 421, where a preferential lien was denied to the county of Tulare, under section 2322a of the Political Code as it then stood in giving liens for the extermination of squirrels and other pests, did not involve a construction of section 3052, Civil Code, and at the time of the [transactions involved in that case] there was nothing in the codes or statutes indicating that the county should have a preferential lien. It may be added that section 2322a of the Political Code has been amended (St. 1921, p. 1157; St. 1923, p. 1180, § 2), and gives such lien. In Case v. Allen, 21 Kan. *217, 30 Am. Rep. 425, the Supreme Court of that state expressly held that an agister's lien created by statute is paramount to a lien of a prior chattel mortgage upon the same cattle, and sets forth therein fully the reasons for so holding. This case, as we have shown, was approved by the Supreme Court of this state in the Mortgage Securities Co. Case, which practically overruled the Wilson Case. It may also be mentioned that the Wilson Case was a department decision, while the Mortgage Securities Co. Case was a decision en banc. The Mortgage Securities Co. Case was before the appellate court (47 Cal. App. 383, 190 P. 641), after retrial, and the judgment therein upholds the priority of the lien of the repairman. Kranzthor v. Al. G. Faulkner Co., 43 Cal. App. 441, 185 P. 305, also upholds the priority of a repairman's lien over a chattel mortgage. Other cases holding that an agister's liens take precedence may be cited as follows: Colquitt & Baggs v. Kirkman, 47 Ga. 555; Smith v. Stevens, 36 Minn. 303, 31 N. W. 55. In line with the decision in Mortgage Securities Co. Case is that of Jesse A. Smith Auto Co. v. Kaestner, 164 Wis. 205, 159 N. W. 738."

[5] While it may be, as contended by appellant, the weight of authority in other jurisdictions is against giving precedence to any of the lienholders mentioned in section 3051 of the Civil Code, we are of the opinion that it is now the established rule in this state they are given preferential liens over holders of earlier chattel mortgages. It is eminently just that the rule should be applied to this case. As was said in Case v. Allen, supra, at page *220:

> "The lien of the agister is not the mere creature of contract. It is created by statute from the fact of the keeping of the cattle. The possession of the agister was rightful; and, the possession being rightful, the keeping gave rise to the lien; and such keeping was as much for the interest of the mortgagee as the mortgagor. The cattle were kept alive thereby; and the principle seems to be that where the mortgagee does not take the possession, but leaves it with the mortgagor, he thereby assents to the creation of a statutory lien for any expenditure reasonably necessary for the preservation or ordinary repair of the thing mortgaged. Such indebtedness really inures to his benefit. The entire value of his mortgage may rest upon the creation of such indebtedness and lien, as in the case at bar, where the thing mortgaged is live stock, and the lien for food."

The conclusion we have reached makes it unnecessary to consider the further contention of the respondents that the appellant gave express or implied consent that the bill for pasturage should constitute a lien superior to that of the chattel mortgage.

The judgment is affirmed.

We concur: CURTIS, J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.

SHENK, J. (concurring in part). I concur in the judgment on the ground that the record discloses that appellant assented to the creation of a statutory lien preferment as against itself. The facts were stipulated. On the first day of September, 1923, the respondents Donnelly and Clark became the lessees of 13,760 acres of land in Madera county formerly held under lease by the respondent Silva. While in possession of the premises Silva had mortgaged some 700 head of cattle to the plaintiff's assignor with the usual provision in the mortgage that on the default of the mortgagor the mortgagee would have the right to take possession of the mortgaged property without notice. On September 1, 1923, Silva was in default and the cattle were on said premises. On that day Donnelly and Clark notified the appellant that they were informed that the appellant had an interest in said livestock and that from September 1, 1923, a charge of one dollar per head per month would be made against the appellant for pasturage. Under date of September 5th the appellant's representative notified Donnelly and Clark that the cattle would be removed in ten days. They were not removed and when on November 22, 1923, their possession was demanded by the appellant such possession was refused on account of nonpayment of pasturage charges. Under these circumstances the implied consent of the appellant that pasturage charges would accrue and the lien thereof attach would seem to have been satisfactorily shown.

But I cannot agree that under our law an agister's lien has priority over a pre-existing recorded chattel mortgage. It is conceded that an agister's lien did not exist at common law and the well-established rule is not questioned that under a statute which creates a lien which did not exist at common law such lien has no priority unless plainly authorized by the statute which creates it. Sections 3051 and 3052 of the Civil Code do not expressly create a preference as to the liens provided for in section 3051 and, in my opinion, such preference is not fairly implied from the language used. As to those which were liens at common law no difficulty is encountered, for under established rules they may be accorded priority. Such a lien was involved in Mortgage Securities Co. v. Pfaffmann, 177 Cal. 109, 169 P. 1033, L. R. A. 1918D, 118, where it was declared that under the sections of the code referred to the possessory lien of the repairer of personal property was superior to the lien of a pre-existing chattel mortgage. One who made, altered or repaired an article of personal property had a lien at common law and the Pfaffmann Case was necessarily limited in its effect to a repairman's lien. Nothing else was there involved or decided. That case recognized that the agister had no lien at common law. In commenting upon such a lien it was there definitely stated that "under statutes creating agister's liens where questions of priority arose, all the reasoning which, * * * goes to support the priority of the repairer's lien was wholly absent". This for the reason that the agistment does not fall within the principle of improving personal property. The main opinion recognizes that the weight of authority in other jurisdictions is against the preferment of the agister's lien. The rule is stated in 11 Corpus Juris, at page 652, with a citation of some forty-two cases from twenty-one states and the respondents have cited no authority to the contrary except Case v. Allen, 21 Kan. *217, 30 Am. Rep. 425, which, in Wilson v. Donaldson, 121 Cal. 8, 53 P. 404, 43 L. R. A. 524, 66 Am. St. Rep. 17, was stated to be a well-considered case upholding the priority of an agister's lien provided by statute. But the supreme court of Kansas in Bank v. Brecheisen, 65 Kan. 807, 70 P. 795, was at pains to limit the effect of Case v. Allen, and the supreme court of Utah (Grubb v. Lashus, 42 Utah, 254, 129 P. 1029) correctly says that courts are practically unanimous in disapproving the views expressed in Case v. Allen. So it may properly be said that the overwhelming weight of authority elsewhere is that an agister's lien has no priority over a pre-existing chattel mortgage unless given such by statute. The main opinion declares that it is now the established rule in this state that the lienholders mentioned in section 3051 of the Civil Code have preferential liens over prior chattel mortgages. In my opinion this may not rightly be said. Rather should it be said that only such liens provided for in said section as were liens at common law should have such preference. As has been pointed out such a common law lien confirmed by statute was involved in the Pfaffmann case and the reasons for its priority were there declared to be wholly lacking in the case of an agistment. Fifteen days after the decision in the Pfaffmann Case this court decided in Guinn v. McReynolds, 177 Cal. 230, 170 P. 421, that prior to 1917 section 2322a of the Political Code which gave a lien and substantially the same right of foreclosure thereof as section 3052 of the Civil Code did not prefer the lien therein created to a pre-existing chattel mortgage. Section 2322a was later amended to grant such preference. In Guinn v. McReynolds reference is made to many instances in which the statutes of this state have declared particular liens created to be prior and always with plain language to that effect. In neither section 3051 nor section 3052 is the priority of an agister's lien declared and there is no case in this state and no well-considered case elsewhere granting such preferment in the absence of statutory authority.

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200 Cal. 652

PUGLIESE v. PUGLIESE. (L. A. 9549.)

(Supreme Court of California. March 10, 1927.)

Divorce ⊂⊃262—Husband's appeal in divorce case will not be stayed for noncompliance with orders to pay counsel fees without showing of ability.

Appeal by husband in divorce case will not be stayed for his failure to comply with orders to pay certain amounts as plaintiff's counsel fees in lower court and on appeal, in absence of showing that he was able to pay or that wife was unable to provide herself with counsel on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action for divorce by Anita Pugliese against Frank Pugliese. Judgment for plaintiff, and defendant appeals. On motion to stay appeal. Motion denied.

E. M. Torchia and C. W. Pendleton, both of Los Angeles, for appellant.

Clyde W. Smith, of San Pedro, for respondent.

PER CURIAM. Motion to stay appellant's appeal. The action was one for divorce, wherein the plaintiff obtained an interlocutory decree of divorce, which included a judgment or order for a division of the community property between the parties. The community property consisted of certain real estate, and also of a gasoline launch partly owned by the defendant and which was the source of his livelihood as a fisherman. The order also provided for the payment of the sum of $50 per month for the support of the minor children of the parties, and further provided for the payment of $250 as plaintiff's counsel fees, and also for her costs of suit. The defendant began and has since continued to make the monthly payment for the support of his minor children as required by said order. He has also paid a sum of money which would satisfy the plaintiff's demand for costs. He has not, however, paid the amount of the counsel fees as provided in the original order. The defendant has appealed from said interlocutory decree.

Upon taking said appeal the appellant was cited by the superior court to show cause why he should not be punished for contempt in failing to obey the order of the court relating to the payment of counsel fees. The record discloses that, upon the hearing of said citation, the trial court dismissed the contempt proceedings. The record further shows that the court, upon the showing that such appeal had been taken, ordered the appellant to pay an additional sum of $250 for the payment of counsel fees upon said appeal. So far as this record discloses, the plaintiff has made no further effort to enforce said orders for the payment of counsel fees, either by execution or by any further proceedings in contempt. She, however, appears in this court with a further motion to stay the appellant's appeal until he shall have complied with said orders. In support of her motion she presents an affidavit which merely shows that the defendant has not obeyed said orders or either of them, but which fails to show either that the appellant is able to comply with said orders, or that she herself is not able to provide herself with and to pay counsel to represent her upon said appeal.

The record upon the trial of the cause shows that the only property which the defendant was permitted to retain was his interest in his gasoline launch, his earnings by means of which as a fisherman being uncertain, and at best little more than sufficient to enable him each month to make the payment required for the support of his children. There has been no showing made here that he has any further ability to comply with the orders of the trial court with relation to his payment of his wife's counsel fees upon the trial and upon appeal. In the presence of the foregoing facts we are of the opinion that the respondent has made an insufficient showing for an order herein staying the hearing upon this appeal.

The motion is denied.

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200 Cal. 632

ARNOLD v. SULLENGER, County Auditor.
(S. F. 11372.)

(Supreme Court of California. March 5, 1927.)

1. Constitutional law 🔑63(3)—Statute authorizing board of supervisors to fix county surveyor's compensation held to contravene Constitution; "regulate" (Pol. Code, § 4044; Const. art. 11, § 5).

Pol. Code, § 4044, authorizing board of supervisors to fix county surveyor's compensation, not exceeding $10 per day, *held* invalid as contravening Const. art. 11, § 5, providing that Legislature shall regulate compensation of county officers; since "regulate" means to fix or establish.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Regulate.]

2. Officers 🔑100(1)—Statute fixing salary of county surveyor did not increase salary during term, where law fixing compensation at time of election was invalid; "increase of salary" (St. 1923, p. 1060, amending Pol. Code, § 4242, subd. 12; Const. art. 11, § 9).

St. 1923, p. 1060, amending Pol. Code, § 4242, subd. 12, to fix salary of county surveyor of counties of thirteenth class, *held* not to constitute "increase of salary" of county surveyor elected in November, 1922, during his term of office, within Const. art. 11, § 9, since there was no law in force fixing compensation at time of election; Pol. Code, § 4044, being invalid.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Increase.]

In Bank.

Appeal from Superior Court, Contra Costa County; H. V. Alvarado, Judge.

Proceeding in mandamus by Ralph R. Arnold against A. N. Sullenger, as Auditor of the County of Contra Costa. From a judgment granting the writ, defendant appeals. Affirmed.

Archibald B. Tinning, Dist. Atty., of Martinez, and T. H. De Lap, Deputy Dist. Atty., of Richmond, for appellant.

Jones & Dall, of San Francisco, for respondent.

SHENK, J. The respondent, as surveyor of the county of Contra Costa, commenced this proceeding in mandamus in the superior court to compel the appellant, as auditor of said county, to draw his warrant upon the county treasurer in the sum of $500 as salary due the respondent for the month of August, 1924. The appellant answered, and the cause was heard on an agreed statement of facts which are set forth in the findings. Judgment was rendered ordering the issuance of a peremptory writ, from which judgment this appeal is prosecuted on the judgment roll.

The respondent was elected county surveyor of the county at the general election in November, 1918. When he qualified, in January, 1919, Contra Costa county was a county of the sixteenth class, and under subdivision 12 of section 4245 of the Political Code (as amended by Stat. 1917, p. 978), his salary was fixed at $3,250 per annum. On July 27, 1919, the County Engineer Act (Stats. 1919, p. 1290), became effective. Pursuant to the provisions of this act the respondent was appointed county engineer, and his salary was fixed at $6,000 per annum by the board of supervisors. He received this compensation until the County Engineer Act was, on October 7, 1921, declared unconstitutional. Coulter v. Pool, 187 Cal. 181, 201 P. 120. Under the provisions of section 11 of said act the office of county surveyor was deemed abolished when the person holding said office should be appointed county engineer. On July 20, 1921, Contra Costa was placed in the thirteenth class. Stats. 1921, p. 850. As the County Engineer Act was then deemed to be valid, no provision was made in the amendment of section 4242 of the Political Code for the salary of county surveyor. After the decision in Coulter v. Pool the respondent drew a salary at the rate of $3,250 per annum under the provisions of section 4245 of the Political Code until the expiration of his term, in January, 1923. At the November election in 1922 the respondent was reelected county surveyor, and, upon his qualification, took office to succeed himself in January, 1923. From the commencement of said term until July 31, 1924, the respondent presented claims to the board of supervisors of said county for compensation at the rate of $10 per day, and his claims were allowed under the terms of section 4044 of the Political Code, which provided that: "The surveyor shall receive such compensation as the board of supervisors may allow, not to exceed ten dollars per day for all work performed." On June 21, 1923, section 4242 of the Political Code was amended, whereby, in subdivision 12 thereof (Stats. 1923, p. 1060), the compensation of the surveyor of counties of the thirteenth class was fixed by the Legislature at $6,000 per annum. It is the compensation fixed by the amendment of section 4242 that is claimed by the respondent in this proceeding.

[1, 2] The question for determination is whether section 4044 of the Political Code is unconstitutional in so far as it attempts to vest in the board of supervisors the power and discretion to fix the compensation of the county surveyor at "not to exceed ten dollars per day." If such provision be valid it would follow that the compensation fixed in subdivision 12 of section 4242 of the Political Code, as amended in 1923, at $6,000 per annum would constitute an increase in the compensation of the respondent after his election and during his term of office in contravention of section 9 of article 11 of the Constitution, for on no theory may it be said that on the face of the statute (Shearer v. Flannery, 68 Cal. App. 91, 228 P. 549) the compensation authorized by section 4044 would in one year be equal to $6,000. Compensation at the maximum rate of ten dollars per day for every day in the year would be slightly in excess of one-half of that sum. The conclusive presumption recognized in Galeener v. Honeycutt, 173 Cal. 100, 159 P. 595, and cases therein cited, to the effect that the governor and legislature have investigated, ascertained and determined that the change does not result in the increase of compensation would therefore have no application in this case. On the other hand, if section 4044, so far as it attempts to delegate to the board of supervisors the power to fix the compensation of the county surveyor, be held to be constitutionally unauthorized, it would then follow that no compensation for the respondent was lawfully fixed at the time of his election or during his term of office until the amendment of section 4242 of the Political Code became effective. When so fixed it would not result in an unconstitutional increase or an increase at all. When the compensation of the county surveyor is not fixed at the time of his election the constitutional provision does not prevent the fixing thereof after his term begins. Shearer v. Flannery, supra, and cases therein cited.

That the respondent is a county officer is not questioned. It is well settled, in view of the provisions of section 5 of article 11 of the Constitution, that the Legislature cannot directly delegate to a board of supervisors the power to fix the compensation of a county officer. Coulter v. Pool, supra; People v. Wheeler, 136 Cal. 652, 69 P. 435; People v. Johnson, 95 Cal. 471, 31 P. 611; Dougherty v. Austin, 94 Cal. 601, 28 P. 834, 29 P. 1092, 16 L. R. A. 161; Sarter v. Siskiyou County, 42 Cal. App. 530, 183 P. 852.

Section 5 of article 11 of the Constitution provides that the Legislature by general and uniform laws shall "regulate the compensation of all such officers," which includes county officers. It is insisted by appellant that the word "regulate" as employed in the constitutional provision should be defined to mean "adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws." An examination of the cases in this state, and particularly those above cited, clearly indicates that the word "regulate" has always been deemed to mean "to fix" or "to establish," and no other signification may now properly be attached to that word in the connection in which it is so employed in this section of the Constitution. No controlling importance may be attached to the fact that in section 4044 the Legislature purported to fix a maximum of $10 per day to the compensation that might be fixed by the board of supervisors for the county surveyor. Even so the section attempts to vest in the board of supervisors the power in its discretion to fix said compensation within the limits specified.

Under the fee system it was undoubtedly competent for the Legislature to fix the fees that might be charged by certain public officers and authorize them to retain the same as long as the aggregate did not exceed the maximum fixed by statute. Instances of such action are found in the county government acts of earlier years (see Martin v. Santa Barbara, 105 Cal. 208, 38 P. 687). In such cases the compensation to which the officer was entitled was fixed by statute, with no power in the board of supervisors to alter the same. Under section 4044 the board of supervisors could, if the provision be valid, fix the compensation of the county surveyor at five or six or any number of dollars per day within the maximum, and thus exercise a discretionary power in fixing the compensation for a county officer not authorized by law.

We conclude, therefore, that section 4044 of the Political Code, in so far as it attempts to delegate to the board of supervisors the power to fix the compensation of the county surveyor, is invalid, as contrary to section 5 of article 11 of the Constitution. When so considered there was no law in force at the time of the election of the respondent which fixed his compensation, and the amendment of section 4242 of the Political Code in 1923, fixing such compensation at $6,000 per annum did not constitute an increase during his term of office as contemplated by section 9 of article 11 of the Constitution.

The judgment is affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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200 Cal. 644

JOHNSTON et al. v. FIELD et al.
(L. A. 8515.)

(Supreme Court of California. March 10, 1927.)

Appeal and error ⚷1011(1)—Trial court's findings on conflicting evidence that there was fraud inducing conveyance from aged woman will be upheld.

Findings of trial court, based on conflicting evidence, that there was fraud inducing conveyance from aged woman, will be upheld.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Suit to set aside a deed by Louis Johnston and others against Emilla June Field and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

Head, Rutan & Scovel, of Santa Ana, for appellants.

Roland Thompson and James L. Davis, both of Santa Ana, for respondents.

RICHARDS, J. This is an appeal from a judgment of the superior court in and for the county of Orange in favor of the plaintiffs in an action brought by them to set aside a deed executed by one Eva Jeanette Shaffer, since deceased, on the 4th day of April, 1922, by which deed she purported to transfer to the defendants and appellants certain real property constituting practically the whole of her estate. The alleged grounds upon which the plaintiffs sought to have said conveyance set aside were that the same was obtained by said grantees by fraud and undue influence and that the same was without consideration and was never in fact delivered by said grantor to the grantees named therein. The cause was tried by the court, sitting without a jury, at the conclusion of which trial the court made its findings of fact and conclusions of law wherein the averments of the plaintiffs were sustained and the said conveyance avoided.

The sole contention of the appellants is that the findings of the trial court in the foregoing regard were insufficiently supported by the evidence. Practically the entire brief of the appellants, consisting of 80 printed pages, is devoted to a review of the evidence in the case. The brief of the respondents is also largely made up of a similar recital of the evidence which, it is claimed, sustains the findings and conclusions of the trial court. We are thus brought to an examination of the entire record, with a view to determining whether, upon the several issues presented at the trial, the evidence is so far conflicting that we ought not to disturb the findings and judgment of the trial court. We are satisfied from such a review that such is the case. The grantor of the deed in question was an infirm old woman, of whom the plaintiffs and defendants are her children by two marriages and constitute her only heirs. At the time of her death she was of the age of 75 years, and during the several days preceding her death, and during the course of which the conveyance in question was made, was in a dying condition, and was so known to be, not only by her said children, but also by the physicians who were in attendance upon her during said period. It would be useless to attempt to review in detail the testimony of her said children and of her said physicians in order to point out the sharply conflicting evidence givien by these witnesses as to the mental and physical condition of the grantor of this conveyance during these several days preceding her decease. We shall not therefore attempt such review, but will merely state it to be our fixed conclusion that the case presents such a conflict in the evidence that the judgment of the trial judge, who, acting impartially, and after seeing the parties and hearing the evidence in the case, reached the conclusion that the conveyance ought not to stand, should be upheld.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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200 Cal. 646

In re O'CONNOR'S ESTATE. (L. A. 9395.)

(Supreme Court of California. March 10, 1927.)

1. Executors and administrators ⚷510(2)—Order overruling exceptions to executor's final account is unappealable (Code Civ. Proc. § 963).

Order overruling exceptions to executor's final account is not appealable, under Code Civ. Proc. § 963.

2. Executors and administrators ⚷314(12)—Notice of appeal from decree of distribution held sufficient as against contention that it was from order overruling objections to final account (Code Civ. Proc. § 963).

Notice of appeal from decree of distribution, designating its date and date of its entry and amendment, *held* sufficient to vest appellate jurisdiction, under Code Civ. Proc. § 963, as against contention that it applied solely to unappealable order overruling objections to executor's final account.

3. Executors and administrators 🔑503—Approval of executor's expenditure of $55, representing items less than $20, without voucher on verified account, omitting names of payees, held erroneous, in absence of evidence of payment (Code Civ. Proc. § 1632).

Court's approval of $55 item without vouchers, in executor's final account, because of unverified statement by counsel that item was aggregate of smaller items of less than $20, *held* erroneous, under Code Civ. Proc. § 1632, in absence of evidence of payment thereof or statement in verified account as to payees' identity.

4. Executors and administrators 🔑110—Executor held properly credited with taxes and street assessments paid on lot devised to him.

Past-due taxes, levied before testatrix' death, and street assessments, payable in annual installments, on lot devised to executor, *held* properly paid by him in care and management of estate, so as to entitle him to credit therefor on final accounting; his title to lot being subject to be divested if estate became insolvent.

5. Executors and administrators 🔑495(1)—Realization loss held properly credited to executor, but erroneously included in aggregate on which his and his attorney's compensation was computed (Code Civ. Proc. § 1618).

Executor was properly given credit on final accounting for realization loss, but such item should not have been included in aggregate on which compensation of himself and his attorney was computed, under Code Civ. Proc. § 1618.

6. Executors and administrators 🔑496(2)—Executor held entitled to commission on value of lot devised to him, in absence of showing that he did not take possession thereof (Code Civ. Proc. §§ 1581, 1618).

In absence of contrary showing, it will be presumed that executor complied with requirement of Code Civ. Proc. § 1581, that he take possession of all of testator's real and personal estate, so as to entitle him to commission, under section 1618, on value of lot devised to him, which appraisement and account showed as part of estate's assets.

7. Executors and administrators 🔑288—Gas and oil rights held properly distributed as directed by codicil, as against contention that all hope of production had been abandoned and that distribution would constitute cloud on title.

Gas and oil rights *held* properly distributed among devisees as directed by codicil, in absence of evidence or citation of authorities sustaining contention that all hope or expectation of oil or gas production had been abandoned and that such distribution would constitute cloud on title.

8. Executors and administrators 🔑497—Allowances to executor and attorney for extraordinary services in securing loan will not be disturbed, without showing abuse of discretion (Code Civ. Proc. §§ 1618, 1619).

Allowances to executor and his attorney for extraordinary services in securing loan to pay debts of estate will not be disturbed by Supreme Court, in absence of showing that lower court improperly exercised its discretion, under Code Civ. Proc. §§ 1618, 1619.

In Bank.

Appeal from Superior Court, Los Angeles County; W. H. Thomas, Judge pro tem.

In the matter of the estate of Mary Esther O'Connor, deceased. From an order overruling objections to the final account of Charles F. Bailey, executor, and from a decree of distribution, Lucy J. Hartman, residuary legatee, appeals. Motion to dismiss appeal denied, and decree reversed, with directions.

Lee Utley, of Los Angeles, for executor and petitioner.

James Donovan and Edgar L. Bishop, both of Los Angeles, for residuary legatee and objector.

SHENK, J. Mary Esther O'Connor died testate in the county of Los Angeles. Her will, including a codicil, was admitted to probate. Both in the will and codicil Lucy J. Hartman, a sister of the decedent, was made residuary legatee. In the codicil Charles F. Bailey, the respondent herein, was devised a lot at the corner of Figueroa and Sixty-Seventh streets, in the city of Los Angeles, and he was also made sole executor without bond. Certain property belonging to the estate and located at Los Nietos had been appraised at $15,000, based to a large extent on its probable oil and gas indications. This property was later reappraised at $6,500. The administration proceeded to a consideration of an amended final account and petition for distribution, which came on regularly for hearing. Exceptions to certain items of the account and objection to distribution according to the terms of the codicil were filed by the residuary legatee and were overruled. The court thereupon entered its order settling the final account and rendered its decree of distribution. In the decree the court recited that, "after hearing the evidence at such time," the court arrived at the determination therein set forth. The residuary legatee made a motion to strike out the quoted phrase on the ground that no evidence had been taken. The motion was granted, and in lieu of the words stricken the court inserted the following:

"On taking up the first objection of counsel for objector, Lucy J. Hartman, Mr. Lee Utley, attorney for the executor in said matter, arose and stated in open court that the item amounting to $55 was the sum total of several items, none of which amounted to $20, and did not present any vouchers for any of said items amounting in the aggregate to said sum total. That there was no objection made to such statement and the court accepted said statement as a fact and then overruled the said objection. As to the five remaining objections to the final account of the executor, no evidence of any kind was offered or received at the time, and in arriving at its final conclusions the court considered only said objection to the amended final account, the amended final account itself, and other documents and papers among the files on file in the above-entitled action."

[1, 2] The decree of distribution was dated May 12, 1926, and was entered on June 11, 1926. The order amending the recital in the decree was made and filed June 17, 1926. The residuary legatee served and filed a notice of appeal from both the order overruling her exceptions to the final account, and also from the decree dated May 12th and entered June 11th, as amended June 17, 1926, reciting said dates in the notice. The respondent made a motion in this court to dismiss the appeal on the ground that the notice of appeal was insufficient to vest appellate jurisdiction. On the hearing of said motion it was insisted that the said notice of appeal applied solely to the order overruling the objections, and that such an order is not appealable, under section 963 of the Code of Civil Procedure. If the notice of appeal were so limited there would be no recourse but to dismiss the appeal, for it is clear that an order overruling exceptions to a final account is not an appealable order. But, when the notice of appeal is analyzed and the surplusage discarded, it may fairly be said to constitute a notice of appeal from the decree of distribution. It gave notice of appeal from said decree, designating correctly its date and the date of its entry and amendment, and there was no other decree entered in the matter. While the language of the notice is somewhat confusing, it sufficiently identifies the decree from which the appeal was intended to be taken, and the respondent was not misled thereby. Harrelson v. Miller & Lux, Inc., 182 Cal. 414, 188 P. 800; 2 Cal. Jur. p. 318. The motion to dismiss the appeal was continued for determination preliminarily to the consideration of the appeal on its merits. From what has been said it follows that the motion should be denied.

[3] On the merits the appellant urges six points for reversal. The first point is that the court erroneously approved an item of $55 for money expended in administering upon certain property of the estate in Spokane. There was no voucher for this item, and it is insisted that it should be excluded for the reason that it represents an expenditure of over $20. Section 1632, Code Civ. Proc. As indicated in the order of the court above quoted, the basis for the approval of the item without vouchers was a statement by counsel for respondent in open court, not under oath, that the item was an aggregate of smaller items of less than $20 each. There was no evidence in support of the fact of payment of this item, nor does the verified account state to whom payment was made. The item should therefore have been rejected. Section 1632, Code Civ. Proc.; Estate of Hedrick, 127 Cal. 184, 59 P. 590.

[4] The second objection relates to taxes and street assessments paid by the executor on the Figueroa street lot. The court allowed credit to the executor for the payment thereof. It is the contention of the appellant that taxes are a charge against the land, and not the estate, and that certain assessments paid by the executor were not personal claims against the testatrix, but against the land. It is also claimed that as the executor is to receive this particular lot on distribution, he should not receive credit for these payments. A portion of the taxes were levied prior to the death of the testatrix, and the whole thereof were due when paid. The assessments were annual payments on a street bond which were paid as they became due during the course of administration. Although the lot had been devised to the executor, it was and continued to be a part of the assets of the estate until distribution. The title of the devisee was at all times subject to be divested if the estate became insolvent. The taxes and assessments were past-due liens upon the property of the estate in course of administration and were properly payable by the executor in the care and management of the estate. People v. Olvera, 43 Cal. 492; Weinreich v. Hensley, 121 Cal. 647, 657, 54 P. 254; Estate of Freud, 131 Cal. 667, 63 P. 1080, 82 Am. St. Rep. 407; 12 Cal. Jur. p. 113.

[5, 6] The third and fourth exceptions are addressed to the allowance of compensation to the executor and his attorney. The compensation was computed upon the reappraised value of the estate, including a realization loss of $100. The executor was properly given credit for this loss, but the item should not have been included in the aggregate upon which the compensation of himself and his attorney was computed. Section 1618, Code Civ. Proc.; Estate of Fernandez, 119 Cal. 579, 585, 51 P. 851. It is insisted that neither the executor nor his attorney is entitled to a commission on the value of the Figueroa street lot devised to the executor "unless the same was taken into possession for the purpose of administration." The statute requires the executor to take into possession all the estate of the testator, both real and personal (section 1581, Code Civ. Proc.), and in the absence of a showing to the contrary, and none is here shown, it will be presumed that the executor has complied with the statutory requirement. The inventory and appraisement and the account show the lot as part of the assets of the estate. The objection that compensation should not be allowed to both the executor

and his attorney is without merit. Section 1618, Code Civ. Proc.; 11 Cal. Jur. 1176.

[7] The fifth objection is to the distribution of the 1 per cent. gas and oil rights made in the codicil to certain devisees, on the ground that all hope or expectation of oil or gas production from said property has been abandoned and such distribution will constitute a cloud upon the title. No evidence was offered, and no authority has been cited to sustain the contention. The dispositive language of the codicil was authority for the order, and the point is untenable.

[8] The sixth exception is to the allowance of $75 to the attorney and $50 to the executor for extraordinary services in securing a loan of $2,500 with which to pay debts of the estate. Sections 1618 and 1619 of the Code of Civil Procedure permit the court, in its discretion, to make such allowances, and it does not appear that the court has improperly exercised such discretion.

The motion to dismiss the appeal is denied. The decree is reversed, with direction to the trial court to disallow the said item of $55 and to not include the said item of $100 in the amount upon which the compensation of the executor and his attorney is computed, the costs of this appeal to be paid out of the assets of said estate.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; LANGDON, J.; CURTIS, J.; PRESTON, J.

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81 Cal. App. 409

GOULD v. OTTO et ux. (Civ. 5639.)★

(District Court of Appeal, First District, Division 1, California. Feb. 19, 1927. Hearing Denied by Supreme Court April 18, 1927.)

1. Brokers ⚿43(1)—Where contract employing plaintiff as real estate agent was not in writing, he could not recover on quantum meruit (Code Civ. Proc. § 1973, subd. 6; Civ. Code, § 1624, subd. 6).

Where contract employing plaintiff as agent to sell certain real estate was not in writing, as required by statute of frauds (Code Civ. Proc. § 1973, subd. 6; Civ. Code, § 1624, subd. 6), he could not recover on quantum meruit.

2. Brokers ⚿43(1)—Agent, having no written authority to sell real property, could not recover compensation for sending purchaser to owner (Code Civ. Proc. § 1973, subd. 6; Civ. Code, § 1624, subd. 6).

Agent, having no written authority for sale of real property as required by statute of frauds (Code Civ. Proc. § 1973, subd. 6; Civ. Code, § 1624, subd. 6), could not recover compensation for merely sending purchaser to owner, on ground that he did not complete negotiations and statute did not apply, since verbal contract, being invalid, conferred no legal authority on him to procure purchaser.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action to recover commission on sale of real property by M. D. Gould against F. W. Otto and wife. From a judgment for plaintiff, defendants appeal. Reversed.

Ross & Ross, of Redwood City, for appellants.

Eric Lyders, of San Francisco, and J. J. Bullock, of Redwood City, for respondent.

KNIGHT, J. Plaintiff brought this action to recover the sum of $640 claimed to be due for services rendered in connection with the sale of defendants' real property, and was given judgment for the sum of $300. The defendants appeal.

The amended complaint contained six counts. The first declared upon an agreement authorizing respondent to sell said real property at a stated price, for commission of $640; the others were common counts, the third being upon a quantum meruit for services rendered at appellants' request. Answering, appellants denied the allegations of the respective counts, and alleged as affirmative defense that the agreement upon which the several causes of action were founded was unenforceable because there was no note or memorandum thereof in writing subscribed by appellants or their agent, as is required by the statute of frauds. Subdivision 6, § 1973, Code Civ. Proc.; subdivision 6, § 1624, Civ. Code.

The material facts are not disputed, and are as follows: On March 9, 1924, at the office of the California Homes Association in San Carlos, San Mateo county, appellants verbally authorized respondent to sell the real property described in the complaint, respondent at the time being a licensed real estate salesman in the employ of said company, and one Fred H. Drake. The next day, according to respondent's testimony, pursuant to such verbal authorization, and acting in the capacity of a real estate salesman, he took three prospective buyers to inspect the property, among them being one Mansfield, and on April 14, 1924, Mansfield's wife purchased the property, having carried on the negotiations and concluded the sale directly with appellants.

It is apparent from the rulings of the trial court made on the admissibility of evidence and on motion for nonsuit, as well as from the conclusions stated in its written opinion, that judgment was rendered in respondent's favor upon the theory that, although a contract for the employment of an agent to sell real estate must be in writing, respondent in fact made no sale of the property having merely sent a prospective buyer to appellants, who negotiated and concluded the sale, without solicitations on the part of respondent, and that, for the service of "sending the purchas-

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★Hearing denied by Supreme Court.

er" to appellants, respondent was entitled to reasonable compensation. Therefore, basing its decision solely on the third count of the amended complaint, the court made findings to the effect that respondent had "rendered and performed for defendants certain services" for which the latter agreed to pay a reasonable amount and accordingly judgment was entered for the sum of $300, the court having found such amount to be the reasonable value of said services.

[1] We are of the opinion that the judgment cannot be sustained. In a certain class of cases arising under the seventh subdivision of the statute of frauds it has been held that, where a party has conferred upon another, with the assent of the latter, a benefit which was not intended as a gratuity, and the recipient cannot be held upon his original promise to compensate by virtue of the statute of frauds, the law implies a promise on the part of the party receiving the benefits to pay the reasonable value of whatever has been received under the contract; and under those circumstances recovery may be had under a quantum meruit, but not on the contract itself. Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Hagan v. McNary, 170 Cal. 141, 148 P. 937, L. R. A. 1918E, 562; Rutherford v. Peppa, 53 Cal. App. 309, 199 P. 1111. But it is also held that the rule mentioned has no application to those cases where the contract of employment is itself within the statute of frauds, such as the oral employment of an agent to sell real estate. Under such circumstances the law does not imply a promise, and if there be no contract of employment in writing, the agent is not entitled to recover upon a quantum meruit. Jamison v. Hyde, 141 Cal. 109, 74 P. 695; Kleinsorge & Heilbron v. Liness, 17 Cal. App. 534, 120 P. 444; Sellers v. Solway Land Co., 31 Cal. App. 259, 160 P. 175; 12 Cal. Jur. 932.

In Jamison v. Hyde, supra, the complaint was in two counts, the first declaring on a contract for the payment of commissions on the sale of real estate and the second being a common count based upon allegations similar to those contained in the third count herein; and it was said:

> "There being no contract of employment in writing, it is clear also that plaintiff is not entitled to recover the reasonable value of the services under the second count of his complaint. This question has long been settled by the decisions of this court. McCarthy v. Loupe, 62 Cal. 299; Myres v. Surryhme, 67 Cal. 657 [8 P. 523]; McGeary v. Satchwell, 129 Cal. 389 [62 P. 58])."

To the same effect is Sellers v. Solway Land Co., supra, wherein it is declared:

> "It has long been held in this state that an agent having sold real property under a contract of employment invalid because not in writing can recover neither upon the contract nor upon quantum meruit. McCarthy v. Loupe, 62 Cal. 299; Myres v. Surryhme, 67 Cal. 657 [8 P. 523]; Zeimer v. Antisell, 75 Cal. 509 [17 P. 642]; McPhail v. Buell, 87 Cal. 115 [25 P. 266]; Shanklin v. Hall, 100 Cal. 26 [34 P. 636]; McGeary v. Satchwell, 129 Cal. 389 [62 P. 58]; Jamison v. Hyde, 141 Cal. 109 [74 P. 695]."

[2] The fact that respondent may not have completed the negotiations and concluded the sale does not have the effect of taking the case out of the operation of the foregoing rules, for the reason that the verbal contract under which he presumed to act being invalid, conferred no legal authority on him to procure a purchaser for said property. Kleinsorge & Heilbron v. Liness, supra.

In support of the judgment respondent cites the cases of West v. Visalia Abstract Co., 53 Cal. App. 467, 200 P. 351, and Shaffer v. Beinhorn, 190 Cal. 569, 213 P. 960, but we think neither is in point. In the first case the oral agreement sued upon was one made between real estate brokers to divide commissions, and therefore was not an agreement for the employment of an agent to sell real estate so as to fall within the requirements of the statute of frauds. The second case involved the question of whether, in view of section 20 of the Real Estate Brokers Act (St. 1919, p. 1259), providing that no action for the recovery of real estate commissions can be maintained unless it be alleged and proved that the parties claiming such commissions were duly licensed brokers or salesmen at the time the cause of action arose, the plaintiffs therein, neither of whom was so licensed, might recover compensation from a real estate broker under an agreement to pay them if they would find anyone interested in the purchase of the property to whom the broker would be able to negotiate a sale, or would introduce the broker to such person. The opinion in the case does not disclose whether or not the agreement upon which the cause of action was founded was in writing, and the question of the application of the statute of frauds was not raised.

For the foregoing reasons the judgment is reversed.

We concur: TYLER, P. J.; CASHIN, J.

ENTERPRISE DAIRY CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (Civ. 5423.) ★

(District Court of Appeal, Second District, Division 2, California. Feb. 28, 1927. Hearing Granted by Supreme Court April 28, 1927.)

1. Master and servant 🔑417(5)—Court will assume Accident Commission allowed compensation only for compensable injuries, where no complaint was made of failure to segregate injuries.

Where no complaint was made of failure of Industrial Accident Commission to segregate compensable injuries from those not compensable, the appellate court will assume that award was made only for compensable injuries.

2. Master and servant 🔑416—Award of Accident Commission will be affirmed if any part of injuries are compensable, in absence of objection to omission to segregate injuries.

In the absence of objection to failure of the Industrial Accident Commission to segregate compensable injuries from those not compensable, award will be affirmed if any part of injuries were compensable.

3. Master and servant 🔑373—Injuries due to increased hazard of employment over that of public in vicinity of earthquake arise out of employment.

Where the greater risk over that of public in his vicinity, to which an employee is exposed by his employment contributes to his injuries in an earthquake, the injuries, although unexpected and unusual, arise out of employment.

4. Master and servant 🔑373—Injury to truck driver by glass from bottles broken during earthquake held to arise out of employment within Workmen's Compensation Act.

Where dairy company's driver, while loading milk bottles on truck in employer's garage, was injured by fragments of glass from bottles broken by wall of adjoining building falling in earthquake, *held* that injuries arose out of employment within Workmen's Compensation Act (St. 1913, p. 279, as amended); they being caused by the broken glass and not by the earthquake.

Proceeding under the Workmen's Compensation Act by William Wilson to recover for personal injuries, opposed by the Enterprise Dairy Company, employer, and another. Compensation was awarded by the Industrial Accident Commission, and the employer and State Compensation Insurance Fund petition for certiorari. Award affirmed.

Frank J. Creede, of San Francisco, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

WORKS, P. J. The facts involved in this controversy are shown by a stipulation entered into at a hearing before the Industrial Accident Commission. It was stipulated that one William D. Wilson was in the employ of petitioner dairy company as an automobile truck driver, and that, in the course of his employment, "the employee was injured in the following manner: After having driven his automobile into a garage of the employer to load said automobile with milk, and while he was engaged in loading the said automobile with milk from a refrigerator belonging to the employer in said garage, an earthquake occurred, and the brick wall of an adjoining two-story building fell through the roof of said garage, causing the employee to receive severe contusions over the spine and left chest posterior, with multiple lacerated wounds of his hands and arms from broken glass, the said glass coming from milk bottles which he was loading and had loaded." As a result of the hearing, an award was made allowing compensation to Wilson for the injuries mentioned in the stipulation. Petitioners, after asking for a rehearing before the commission, and, upon the request for a rehearing being denied, applied to this court for the writ of review, and the writ issued.

[1, 2] The sole question presented for our determination is whether Wilson's injuries arose out of his employment. The award was for a small lump sum, payable forthwith. If it be granted, for the sake of argument, without deciding, that a part of the injuries were compensable and that the remainder were not, no complaint is made of the failure of respondent commission to segregate the two parts. Under such circumstances, indeed, we should doubtless be compelled to assume that the commission allowed compensation only for the compensable injuries. Be that as it may, however, and considering alone the fact that there is no objection to a lack of segregation, if any part of the injuries were compensable the award must stand. Consequently, we shall henceforth disregard that rather uncertain portion of the stipulation relating to "severe contusions over the spine and left chest posterior." Even with this exclusion the stipulation may not be regarded as a model of certainty. After the exclusion the concord of the parties may be rendered thus: While the employee, after driving his truck into a garage belonging to his employer, was engaged in loading bottled milk upon the truck, taking the bottles from a refrigerator located in the garage and also belonging to the employer, "an earthquake occurred, and the brick wall of an adjoining two-story building fell through the roof of said garage, causing the employee to receive * * * multiple lacerated wounds of his hands and arms from broken glass, the said glass coming from milk bottles he was loading and had loaded." In solving the problem here presented, we shall assume that the milk bottles, both those which the employee "was loading" and those which he "had loaded," were broken by the falling brick wall

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★Opinion adopted by Supreme Court 259 P. 1099.

and not by improper handling by the employee, or by any other means. We shall also assume that the brick wall fell because of the earthquake shock. These assumptions embody our understanding of the import of the stipulation, and they remove its principal uncertainties.

[3] The rule which is to govern the disposition of this proceeding has been correctly stated, we think, in this language, relating to a claim of compensation because of the death of an employee:

> "We believe the reasonable rule to be that, if deceased, by reason of his employment, was exposed to a risk of being injured by a storm which was greater than the risk to which the public in that vicinity was subject, or if his employment necessarily accentuated the natural hazard from the storm, which increased hazard contributed to the injury, it was an injury arising out of the employment although unexpected and unusual." Central Illinois Co. v. Industrial Commission, 291 Ill. 256, 126 N. E. 144, 13 A. L. R. 967.

[4] We think the present proceeding is within the rule stated. Let us ascertain the true situation under the facts before us by the statement of an imagined case. Suppose that Wilson had been in the employ of a merchant engaged in the sale of glassware; his duty having been to make delivery to customers of goods sold by the employer. Suppose that he was engaged in the delivery of a quantity of fragile merchandise of the character mentioned, that he transported it in his truck to the sidewalk curbing in front of the residence of a customer who had bought it, and that then, with a heavily loaded basket on his shoulder, containing the fragile glassware, he started on foot toward the residence of the customer. Suppose further that before he reached his goal an earthquake shock occurred of sufficient intensity to throw him to the ground, thereby causing the glass to break and to cut him severely, he suffering no injury whatever from the fall itself—that is, by his mere contact with the ground. Is there any doubt that under such circumstances Wilson would have been entitled to compensation because of his injuries? The question appears to answer itself. Nor can we see a difference in legal effect between the supposed case and the one actually presented to us. We think, specifically, that no difference arises merely because milk bottles, as commonly known, are not to a great extent fragile. Although they are fabricated for the purpose of withstanding some considerable degree of rough usage, the fact remains that Wilson was cut—lacerated, in the language of the stipulation—by the fragments into which flew those that he handled. This fact, we think, demonstrates that in the course of Wilson's employment he was subject to risks different from and in addition to those to which other persons were exposed who were within the area affected by the earthquake in question. His injuries from the broken bottles, therefore, arose out of the employment. Within the meaning of the Workmen's Compensation Act (St. 1913, p. 279 as amended), he was injured by the broken glass and not by the earthquake. As bearing upon the question here presented, it is instructive to note the facts upon which compensation was directed in Central Illinois Co. v. Industrial Commission, supra.

We see nothing to interfere with the conclusion here reached in the cases cited by petitioner, among which are State v. District Court, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, Thier v. Widdifield, 210 Mich. 355, 178 N. W. 16, and Alzina Construction Co. v. Industrial Commission, 309 Ill. 395, 141 N. E. 191.

Award affirmed.

81 Cal. App. 556

We concur: CRAIG, J.; THOMPSON, J.

FASHION HAT FRAME CO. v. RINGEL et al.
(Civ. 5673.) ★

(District Court of Appeal, First District, Division 2, California. March 2, 1927. Rehearing Denied March 31, 1927. Hearing Denied by Supreme Court April 28, 1927.)

1. Bills and notes 🔑526—Finding that indorser promised to pay money due under note, knowing of absence of due presentment and notice, held proper under evidence.

In action against indorser on promissory note, finding that, subsequent to demand upon maker and notice of dishonor, indorser, with full knowledge of failure to make due presentment and notice, promised to pay all moneys due *held* sustained by evidence.

2. Bills and notes 🔑423—Indorser's promise to pay note, knowing of failure of presentation, constituted waiver of demand and notice.

Indorser who promised to pay promissory note, knowing of failure of presentation, waived demand and notice.

3. Bills and notes 🔑423—Indorser's promise to pay after holder's failure to give proper notice is affirmance of original obligation, waiving notice (Civ. Code, § 3163).

Promise of indorser to pay note after holder's failure to give due notice constitutes affirmance of indorser's original obligation and waiver of right to due notice, in as much as notice of dishonor is provided for indorser's benefit, in view of Civ. Code, § 3163, providing presentment for payment is dispensed with by waiver express or implied.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the Fashion Hat Frame Company against Leah Ringel, Samuel Malnick,

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★Rehearing denied. Hearing denied by Supreme Court.

also known as Sam Malnick and S. Malnick, and another. Judgment for plaintiff, and defendant Sam Malnick appeals. Affirmed.

Frank E. Powers, of San Francisco, for appellant.

Harry K. Wolff and D. K. Seibert, both of San Francisco, for respondent.

NOURSE, J. Plaintiff sued on a promissory note for $1,000, executed by defendant Ringel, made payable to Sam Malnick, and indorsed by him and by the other defendant. Plaintiff had judgment for the amount prayed for, together with interest and attorney's fees, and the defendant Sam Malnick has alone appealed on a bill of exceptions.

The note was assigned to Joseph Malnick by Sam Malnick for money advanced by the former to the latter for the benefit of defendant Ringel. It was presented to Joseph Malnick by Sam Malnick, fully executed by Ringel, and indorsed by defendant Semon and by Sam Malnick. Subsequent to the maturity of said note it was assigned and delivered for a valuable consideration by Joseph Malnick to the plaintiff.

The appellant specifies two particulars in which he claims that the evidence was insufficient to support the judgment—because it does not show that the note was presented to Ringel on the day it became due, and because it shows failure to give the appellant notice of dishonor as required by law. Respondent insists that the judgment must be affirmed because this appellant waived demand and notice. This issue was raised by amendment to the complaint, and the trial court found that, subsequent to the demand upon the maker and subsequent to the notice to appellant of the dishonor, the appellant, with full knowledge of the circumstances, promised to pay all moneys due under the note and requested a short extension of time for that purpose.

[1] This finding is not attacked in the bill, and, though appellant states in his brief that it is not supported by the evidence, the record does not support appellant's claim. It appears that numerous demands were made upon the appellant subsequent to the maturity of the note and that on each occasion he promised that he and the maker would pay or that he alone would pay and asked time to arrange for the payment. With the evidence appearing in the record and the inferences which the trial court could draw therefrom, we are satisfied that the finding of waiver cannot be successfully attacked.

[2] This being so, the case comes within the rule that a promise by the indorser to pay after knowledge of the failure of presentation is a waiver of demand and notice. Oxnard v. Varnum, 111 Pa. 193, 2 A. 224, 56 Am. Rep. 255, 259.

[3] Notice of dishonor being provided for the benefit of the indorser, his subsequent promise to pay is to be treated as a waiver of the right to notice and an affirmance of his original obligation. Section 3163, Civ. Code; Stanley v. McElrath, 86 Cal. 449, 457, 25 P. 16, 26 P. 800, 10 L. R. A. 545; Curtis v. Sprague, 51 Cal. 239, 240.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

81 Cal. App. 523

NAFFZIGER v. ILLBEG. (Civ. 5683.)

(District Court of Appeal, First District, Division 1, California. March 1, 1927.)

1. Appeal and error ⚷1008(1)—Appellate court may consider evidence only where it is insufficient as matter of law, or where there is no evidence sustaining finding.

It is only where there is no evidence to sustain finding, or where it can be said as matter of law that evidence is insufficient, that appellate court has jurisdiction to consider evidence.

2. Physicians and surgeons ⚷24(4)—Patient's uncle held not liable as matter of law for fees of doctor.

Uncle of patient *held* not liable, as matter of law, for fees of doctor operating on nephew, in view of evidence showing conflicting theories as to effect of letter written by uncle to doctor telling him to have operation performed, if necessary, since, in case of doubt, question of liability is one of fact.

Appeal from Superior Court, Fresno County; Charles R. Barnard, Judge.

Action by Dr. Howard C. Naffziger against J. T. Illbeg. Judgment for defendant, and plaintiff appeals. Affirmed.

A. V. Dalrymple, Walter E. Hettman, and John Douglas Short, all of San Francisco, for appellant.

K. Kuyumjian and L. B. Hayhurst, both of Fresno, for respondent.

TYLER, P. J. Action by a physician to recover the reasonable value of professional services. The complaint alleges that plaintiff, at the special instance and request of defendant, performed the alleged services for the benefit of defendant's nephew. It is claimed that the work done was of the reasonable value of $1,500; that the sum of $500 had been paid on account thereof, leaving a balance of $1,000, for which sum judgment is prayed.

The answer admits that the services were rendered, but denies that they were reasonably worth the amount claimed, or that they were performed at the special instance and request of defendant. As a further answer and defense defendant pleaded the statute of

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⚷For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

frauds, claiming that the action was an attempt to hold the defendant for the debt of another without a memorandum in writing. The trial court found in favor of defendant. It is plaintiff's contention that the findings to the effect that the services were not rendered at the request of defendant, and that, if any promise was made, it was not in writing, and was therefore invalid under subdivision 2, § 1973, of the Code of Civil Procedure are contrary to, and not supported by the evidence. For a full understanding of the case a somewhat extended review of the evidence becomes necessary. Defendant was an uncle of one Tom Arslan. In 1922 Arslan came from Fresno to the University of California Hospital at San Francisco to consult and be treated for a tumor by Dr. Naffziger, a brain specialist. He was accompanied by his brother Harry Arslan. Upon examination, it was discovered that an immediate operation was necessary. Plaintiff first performed a decompression operation for relief of pressure. A major operation was necessary, and plaintiff discussed with the brothers the question of the payment of his fees. He was assured by them that they were responsible, but that their uncle would pay the same, but the doctor was cautioned by them not to mention the fact to their relative that they had used his name. Immediately after entering the hospital the patient procured the services of a private nurse, and at his request she wrote to his uncle at Fresno. The exact contents of this letter do not appear, as neither the nurse nor defendant could remember the particular language used. The nurse testified that it informed defendant of the condition of his nephew, and requested that he become responsible for the payment of plaintiff's fee. Defendant, on the other hand, testified that, while he did not remember the exact wording of the letter, he considered it a mere request to obtain his consent as a relative of the patient to the serious operation contemplated. In answer to this communication, defendant wrote to plaintiff as follows:

> "I received a letter from Miss Keesecer, nurse for Tom Arslan, who advised that you are waiting to hear from me. If an operation is necessary, please have it done right away.
> "Yours very truly, J. T. Illbeg."

Shortly after the receipt of this letter by plaintiff an operation was performed, which improved the patient's condition, and he was discharged from the hospital, but subsequently died. Prior to his death Arslan had paid plaintiff the sum of $500 on account of his services. Appellant contended at the trial, and does here, that the letter written by the nurse to defendant Illbeg was for an assurance as to the payment of plaintiff's fee; that defendant's letter in reply constitutes a request for the operation which makes him an original obligor. It is upon these facts that plaintiff bases his claim that the findings are contrary to the evidence. In cases of doubt, the question as to which party is primarily liable is a question of fact. McClenahan v. Keyes, 188 Cal. 574, 206 P. 454.

[1, 2] It is only when there is no evidence to sustain a finding or where it can be said as a matter of law that the evidence is insufficient to sustain it that this court has jurisdiction to consider the evidence. It was respondent's contention at the trial that the letter written by the nurse was for the sole purpose of obtaining his consent to the serious operation, he being a close relative of the patient, and that his reply thereto did not constitute a request by him for the operation, nor did it contain a promise to pay any sum whatsoever, and defendant at no time ever agreed to become liable for the services rendered. In support of this claim, defendant introduced evidence to show that constant demand was made by plaintiff upon his nephews to pay, but no demand was ever made upon him; that the only instance in which the matter was brought to his attention was on the occasion immediately following the operation, when he received a letter from plaintiff advising him of his nephew's condition. This letter, in concluding, advised defendant that Harry Arslan promised to attend to the settlement of his brother's account, and requested that defendant see him, and have him communicate with plaintiff concerning the same. It is claimed that this letter clearly evidences the fact that plaintiff did not consider defendant liable. Other letters written by plaintiff to the Arslan brothers and their replies thereto show that plaintiff was looking to them for payment. In one of these letters the plaintiff agreed to accept the sum of $750 in full for his services if the amount was paid at once. It also appeared that defendant had in his hands funds belonging to Tom Arslan to the amount of about $1,500, and that he advanced the entire sum to his nephew from time to time during his illness for the purpose of paying his bills, and it was owing to this fact that the Arslan brothers had assured plaintiff that they were responsible as their uncle would send the money. It further appeared that plaintiff had never met defendant, and knew nothing concerning his affairs, nor did he ever request the nurse to write to defendant for an assurance of the payment of his fees.

Under all these circumstances, we are of the opinion that the question presented to the trial court was one of fact, and that the case is one which presents a conflict of evidence, and is controlled by the familiar rule upon the subject.

The decision of the trial court being amply supported by evidence, the judgment should be, and it is hereby, affirmed.

We concur: CASHIN, J.; KNIGHT, J.

81 Cal. App. 494

MAHL v. E. A. PORTAL CO., Inc., et al. (Civ. 5746.)

(District Court of Appeal, First District, Division 2, California. Feb. 25, 1927.)

1. Corporations 🔑133—Proper remedy to compel transfer of stock on corporation's books was in equity, where assignor's wife claimed stock as community property.

Where assignee of certificate of stock in corporation desired transfer of certificate on corporation's books, stock having been community property in assignment of which wife did not join and which she claimed, proper remedy to compel transfer on corporation's books was by suit in equity, and not by proceeding for mandamus.

2. Mandamus 🔑126—Mandamus does not lie to compel transfer of stock on corporation's books, where assignor's wife claimed community interest.

Mandamus does not lie to compel transfer of stock on corporation's books, where assignor's wife claimed stock as community property in transfer of which she did not join, though wife was made party.

Application by Frederick W. Mahl, Jr., for writ of mandate to be directed to E. A. Portal Company, Inc., and others to compel the transfer of a certificate of stock on the books of the defendant first named. Writ denied.

Byrne & Lamson, of San Francisco, for petitioner.

Knight, Boland & Christin, of San Francisco, for respondents.

STURTEVANT, J. The petitioner applied to E. A. Portal Company, a corporation, and C. A. Budd, its secretary, to have a certificate of stock transferred on the books of the corporation, the respondents refused to make the transfer, and the petitioner has applied to this court for a writ of mandate directing the respondents to make the transfer. The parties stipulated as follows:

"Respondent E. A. Portal Company, Inc., is now, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the state of California, having 500 shares of capital stock of a par value of $100 per share, of which 300 shares and no more are subscribed, issued and outstanding.

"C. A. Budd is now, and at all times herein mentioned was, the duly elected, qualified, and acting secretary of said E. A. Portal Co., Inc.

"On and prior to the 20th October, 1926, Frederic Gehret and Blanche Gehret were, and now are, husband and wife, and as such had, on and prior to said day, saved and accumulated from the earnings of said Frederic Gehret and Blanche Gehret, as husband and wife, certain money and property which then constituted, and now constitutes, community property; that included in said savings and accumulations and such community property were 50 shares of the capital stock of respondent E. A. Portal Co., Inc., represented by certificate No. 1, standing on the books of said corporation in the name of Frederic Gehret.

"On said 20th October, 1926, said Frederic Gehret indorsed his name on the back of said certificate, and without any consideration whatever therefor delivered the same to petitioner, with the present intent and design of transferring to petitioner all his right and said Blanche Gehret's right and title thereto and interest therein.

"Concurrently therewith the commissioner of corporations of the state of California, upon application made therefor, issued his permit wherein and whereby he authorized the transfer of said certificate, and the shares and property evidenced thereby, from said Frederic Gehret to petitioner.

"Petitioner thereupon presented said certificate, so indorsed by said Frederic Gehret, together with said permit so issued by the commissioner of corporations, to respondent C. A. Budd, as secretary of respondent E. A. Portal Co., Inc., and then and there demanded of said respondents Budd and said corporation, that she and it, respectively, transfer upon the books of said corporation the said fifty shares of stock from the name of Frederic Gehret to the name of your petitioner, and to issue to your petitioner a certificate therefor.

"Prior to the presentment of said certificate as last aforesaid, respondent Blanche Gehret gave notice to respondent E. A. Portal Co., Inc., and C. A. Budd, that said certificate and the shares and property represented thereby were community property, and that she had not consented in writing, or otherwise, to the transfer thereof, but in fact repudiated, and objected to, the transfer of said certificate and the shares and property represented thereby from said Frederic Gehret to petitioner, and that the same was and is wholly void under and by virtue of the laws of the state of California having to do with community property of husband and wife.

"Respondent E. A. Portal Co., Inc., and C. A. Budd thereupon did and do now refuse to transfer said shares of stock upon the books of said E. A. Portal Co., Inc., to petitioner and/or to issue to him a certificate therefor, and each of said respondents assigned, and still do assign, as the only reason therefor, that said certificate of stock and the shares and property represented thereby and the property right therein, was and is community property of Frederic Gehret and Blanche Gehret, his wife, and that said Blanche Gehret had given notice in writing to said respondents that said certificate and the shares and property represented thereby was community property, and that she had not consented in writing or otherwise to the transfer thereof.

"Said corporation is engaged in the business of buying and selling radio receiving sets and the accessories thereto, and has established valuable trade connections, and has acquired a valuable good will, together with certain tangible property; that it is impossible to estimate or appraise the value of said 50 shares of stock; that, until the transfer aforesaid, all of the issued, subscribed and outstanding stock of said corporation was in the name of one E. A. Portal and Frederic Gehret, and it is impossible to

> procure or buy any of said stock in the open market, or otherwise, and said stock has no established market value, and that petitioner desires to vote said stock at the forthcoming annual meeting of the stockholders of said E. A. Portal Co., Inc.; that the penalty of $400 as provided in section 324 of the Civil Code of California is inadequate to compensate petitioner for his loss of said stock and the right to vote the same."

[1] In Cook on Corporations (6th Ed.) § 391, the author said:

> "This (remedy by suit in equity) is the surest, most complete, and most just remedy for compelling a corporation to register a transfer of stock, and for adjusting the various conflicting rights or claims of other parties. It is a remedy applicable to almost all cases arising under a refusal of the corporation to allow a registry of transfer. The case will be decided on equitable principles, however, and a transfer will not be decreed if it involves bad faith. The corporation itself is of course a necessary and in fact the chief defendant where stock has been presented for transfer, which has been refused. In a suit in equity by the claimant of stock against other parties, claiming the stock, the corporation is a proper but not a necessary party defendant, in order that a transfer of the stock may be had upon the corporate books."

In Spangenberg v. Western, etc., Co., 166 Cal. 284, 135 P. 1127, there was before the court an appeal from the judgment of the trial court granting a writ of mandamus directing the officers of the defendant corporation to transfer on defendant's books shares of stock in said corporation. In sustaining the appeal and reversing the judgment of the trial court, speaking through Mr. Justice Shaw, the court said:

> "But by the great weight of authority it has been generally settled that a suit in equity is, to quote from Cook on Corporations, 'the surest, most complete and most just remedy for compelling a corporation to register a transfer of stock.' Cook on Corporations (6th Ed.) § 39. This remedy, being practically a suit for the specific performance of the obligation to transfer the stock, would generally be more satisfactory than the remedy by mandamus, since every claimant could be made a party to the action and a complete adjustment could be made of the rights and interests of all concerned. Such actions have been maintained in this state. National Bank of the Pacific v. Western P. R. Co., 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, for example. That case was contested on other grounds, but it was conceded by both parties that a suit in equity was the appropriate remedy. We are of the opinion that, unless some extraordinary emergency exists, a suit in equity to compel the transfer would be found to be the most appropriate remedy."

[2] The reasoning of the above authorities is specially applicable to the facts of this case. It is apparent from the agreed statement of facts that the corporation defendant is asserting no title or claim in itself. However, it is apparent that Mrs. Gehret is claiming that she is about to be wronged by the transfer which the petitioner would have this court direct the officers of the corporation to consummate by transferring the shares of stock represented by certificate number one on the books of the corporation. True it is that Mrs. Gehret has been made a party, but it is likewise true that "the surest, most complete, and most just remedy" for protecting her rights is a suit in equity.

The writ is denied.

We concur: KOFORD, P. J.; NOURSE, J.

YORK JUNCTION TRANSFER & STORAGE CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.★ (Civ. 5474.)

(District Court of Appeal, Second District, Division 2, California. Feb. 24, 1927. Hearing Granted by Supreme Court April 2, 1927.)

1. Master and servant ⟹361—Compensation claimant's employment to repair furniture, held not in employer's trucking and storage business (Workmen's Compensation Act).

In workman's compensation proceeding for injuries resulting to claimant from automobile collision after repairing furniture for employer, facts *held* to show that employment in which claimant was engaged was without trade, business, profession, or occupation of his employer, which was that of trucking and storage, so that employer was not liable under Workmen's Compensation Act (St. 1913, p. 279, as amended by St. 1915, pp. 1079, 1302, St. 1917, p. 831, and St. 1919, p. 910).

2. Master and servant ⟹403—Burden is on compensation claimant to show employment was part of employer's business.

In workman's compensation proceeding, burden was on injured claimant to establish that repairing of furniture in which he was engaged was part of employer's business of storage and trucking.

3. Master and servant ⟹362—Compensation claimant's employment to repair furniture for transfer and storage company held "casual" within statute (Workmen's Compensation Act, § 8, subd. [c]).

In workman's compensation proceeding, facts *held* to show that claimant's employment of repairing furniture at 75 cents per hour for three hours for transfer and storage company was casual, within meaning of Workmen's Compensation Act, § 8, subd. (c), being St. 1917, p. 831, even though prior to time of accident company had occasionally engaged claimant's services in like manner.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Casual.]

★Superseded by opinion of Supreme Court, 261 P. 704.

Proceeding under the Workmen's Compensation, Insurance, and Safety Act for injuries by Arthur Eckstrom, claimant, opposed by the York Junction Transfer & Storage Company, employer, and the Zurich Accident & Liability Insurance Company, Limited, insurer. The Industrial Accident Commission awarded claimant compensation, and the employer and insurer apply for certiorari. Award annulled.

J. L. Kearney and Verge, Cooney & Kearney, all of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

CRAIG, J. The respondent, Arthur Eckstrom, on the occasion forming the basis of this proceeding, maintained a furniture repairing shop designated and known as the Highland Park Enameling Company, in the city of Los Angeles, wherein he engaged in cabinet making, furniture repairing, piano and furniture polishing, upholstering, and mattress making, for various persons who patronized his shop. The petitioner York Junction Transfer & Storage Company conducted a general trucking and storage business, some 10 miles from Eckstrom's establishment. In moving household effects the transfer company at times injured or broke pieces of furniture, which it had been accustomed to engage Eckstrom to repair, either at his shop or at the residence of a patron whose articles had been so damaged.

At the time in question, a representative of the transfer company called at the respondent's shop, requested him to refinish certain tables and a chair which the former had previously removed to a residence on Rimpau avenue in said city, and conveyed Eckstrom thereto. The latter testified that such work was completed in about three hours, and that, when being returned to his shop in an automobile of said company, another machine collided therewith, resulting in an injury to his shoulder.

Upon application to the Industrial Accident Commission for adjustment of claim, evidence was introduced by the respective parties, from which the commission made findings reciting that Eckstrom sustained injury occurring in the course of and arising out of his employment; that he was performing services as an employee of the transfer company, "and he was not at said time acting as an independent contractor," and made an award "of the sum of $20.83 a week, commencing on the 8th day after the date of injury, continuing until the termination of the disability, or the further order of the commission."

It is conceded that the applicant conducted and advertised for the repair work of the general public, and that he had performed services for the transfer company only at isolated and infrequent intervals during a period of about three years. It appears that for an entire year previous to the injury there were two months during which he did no work for the company; that it had no preference as to calls for his services as compared with other people, and had paid him 75 cents per hour for ordinary custom work as occasional odd jobs might require, although there is no showing that a definite compensation had ever been agreed upon. During the month of April, 1925, it paid him for such services $11.85, in May but 50 cents, and during other months various small amounts, aggregating $44.55, to and including March, 1926. It further appears that the members of the transfer company were not familiar with furniture repairing or finishing, and actually exercised no supervision over the manner in which the applicant did such work.

It seems to have been assumed that the sole question here presented is as to whether or not the applicant was such employee as to entitle him to compensation under the provisions of the Workmen's Compensation, Insurance, and Safety Act (St. 1913, p. 279 as amended by St. 1915, pp. 1079, 1302, St. 1917, p. 831, St. 1919, p. 910).

[1-3] Under the facts as above delineated, it is apparent that the particular employment in which Eckstrom was engaged was both casual and without the "trade, business, profession, or occupation of his employer." Under such circumstances the employer is not liable under the provisions of the Workmen's Compensation Act. The business of the employer, York Junction Transfer & Storage Company, was a general trucking and storage business. This is the only business in which said employer is shown by the record to have engaged. If the repairing of furniture was also a part of its business, it was incumbent upon the applicant to have established that fact. On the other hand, the employment was casual. The term "casual" is defined by subdivision (c), § 8, of the act (St. 1917, p. 831), as referring "only to employments where the work contemplated is to be completed in not exceeding ten working days, without regard to the number of men employed, and where the total cost of such work is less than one hundred dollars." When on the 2d day of October, 1925, Eckstrom was asked by a representative of the York Junction Transfer & Storage Company to go to Rimpau avenue and repair some furniture, it cannot be doubted that both the employer and the employee realized that the employment would not involve a compensation amounting to $100, or that its duration would not be as much as ten days. The period of time actually consumed was about three hours, and Eckstrom charged 75 cents per hour. It is immaterial that occasionally, but at no regular intervals prior to this time, the company had engaged Eckstrom's services in a like manner. Each occasion was entirely distinct from the others, each was charged for separately, and there is

nothing to indicate any continuing contract of employment.

The award is annulled.

We concur: WORKS, P. J.; THOMPSON, J.

81 Cal. App. 456

PEOPLE v. ALPINE. (Cr. 1349; 3017.)★

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1927. Hearing Denied by Supreme Court April 22, 1927.)

1. Homicide 🔑192—Defendant, pleading self-defense, may testify to being held up by deceased, and reporting it to policeman, to show aggression.

In prosecution for murder, in which defendant claimed he killed deceased in self-defense, in attack following holdup and threats, he may testify to being held up by deceased and reporting it to policeman, since relation of parties prior to homicide may be shown to indicate who was the aggressor under self-defense plea.

2. Homicide 🔑339—Error in excluding defendant's testimony that deceased held him up held not cured by bringing out facts on cross-examination.

In prosecution for murder, in which defendant pleaded self-defense, error in refusing to allow defendant's testimony as to being held up by deceased *held* not cured by bringing out such facts on cross-examination, though injurious effect may have been minimized.

3. Witnesses 🔑277(2)—Where defendant testified that deceased held him up, cross-examination as to standing of policeman to whom hold-up was reported, held improper.

Where defendant in murder case pleaded self-defense, claiming that deceased threatened him after he reported to policeman that deceased held him up, cross-examination as to such policeman's standing as police officer, and whether defendant had ever seen him in jail, *held* improper.

4. Homicide 🔑190(8) — That deceased's threats against defendant were communicated to him before homicide might be shown on issue of self-defense.

In prosecution for murder, in which defendant pleaded self-defense, it was proper for him to show that deceased had threatened his life, or to do him great bodily harm, and that threats had been communicated to him.

5. Criminal law 🔑419, 420(11)—Evidence that witness heard deceased's threats against defendant communicated to defendant held not inadmissible as hearsay.

Where defendant pleaded self-defense in murder case, and showed that deceased had told witnesses to tell defendant that he would "cut him up," evidence that witness heard such threats communicated to defendant *held* admissible, not being hearsay, since one hearing conversation need not be party thereto to relate it.

6. Homicide 🔑188(5)—In murder case, witness who knew deceased, knew others who knew him, and knew his reputation for quietude, may state what that reputation was without preliminary examination.

In murder case, defendant's witness, who stated that he knew deceased, and knew others who knew him, and knew his reputation for peace and quietude, and as to his being dangerous, turbulent and bloodthirsty, should be allowed to state what that reputation was without preliminary examination by prosecutor who could minimize or destroy weight of testimony on cross-examination.

7. Homicide 🔑188(5)—Hotelkeeper, acquainted with deceased, who saw him about twice in neighborhood, knew people who knew him, and discussed his character with various people, may state deceased's reputation for quietude.

In murder case, hotelkeeper who was acquainted with deceased, saw him "about twice" in neighborhood, knew a few people who knew him when they saw him, and had talked with "various people," when deceased's name, general conduct, and character was discussed, *held* qualified to state what deceased's reputation was for peace and quietude.

8. Homicide 🔑188(5)—Witness well acquainted with deceased may testify to deceased's reputation for quietude without showing that he knew any one who knew deceased.

In murder case, witness may testify to reputation of deceased for peace, quietude, and as to being dangerous, turbulent and bloodthirsty, though there was no showing whether he knew any one who knew deceased, where he had known him for 16 years, and had seen him "lots of times" within period of 8 months.

9. Homicide 🔑340(2)—Instruction that self-defense is not available to one killing another in prearranged duel, though erroneous under evidence, held not prejudicial.

In prosecution for murder, instruction that self-defense is not available to one entering into deadly mutual combat, in which he slays his adversary by prearranged duel, or by consent, though erroneous, since there was no evidence on which to base it, *held* not prejudicial.

10. Criminal law 🔑720(9)—Argument that defendant "skipped town" because he was involved in holdup held misconduct, in view of evidence.

Where defendant in murder case had taken trip to British Columbia shortly after time when he alleged deceased held him up, argument that he "skipped town" because he had been involved in holdup *held* misconduct, in view of evidence, and refusal to instruct jury to disregard it was error.

11. Criminal law 🔑730(8)—Argument in murder case that defendant's witnesses were underworld characters and hi-jackers held misconduct, and court's refusal to instruct error.

Argument, in murder case, that defendant's witnesses were members of underworld and hi-jackers, and that it would not be safe for any juror to meet any one of them in a dark alley at night, *held* misconduct, and refusal to instruct jury to disregard it was error.

★Hearing denied by Supreme Court.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Harry Alpine was convicted of murder, and he appeals. Reversed.

Morris Abraham and Charles I. Rosin, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, P. J. Defendant was convicted of murder in the first degree, and was sentenced to life imprisonment, under recommendation of the jury that tried him. He appeals from the judgment and from an order of the trial court denying his motion for a new trial.

The victim of the alleged murder was one Barney Blum. Appellant admitted the killing, and defended solely on the ground that he took Blum's life in defense of his own. In order properly to consider the points made upon the appeal, it becomes necessary to state in a general way the theories upon which, respectively, the prosecution and the defense were conducted in the trial court. It was the theory of the prosecution that appellant was indebted to Blum in the sum of $150, and that he had delivered a watch and chain to that individual to hold as security for the payment of the debt; that difficulties arose between the two because of this state of affairs; and that appellant's killing of Blum was deliberate and premeditated.

The theory of the defense was that about 3 weeks before the killing Blum "held up" appellant at the muzzle of a gun, and robbed him of a watch and chain and of money; that he then threatened to kill appellant if the latter reported the robbery to the police; that he also demanded that appellant bring more money to him at a certain place on the next day, whereupon he would return to appellant the watch and chain, but threatened to kill appellant if he did not bring the money; that appellant did not deliver the money as demanded, but reported the robbery to a police officer with whom he was acquainted, and requested the officer to ask Blum to return the watch and chain; that the officer later asked Blum in the presence of appellant to return the articles, but that Blum said he had pawned them, and promised to give to appellant, if allowed the chance to do so, the pawn ticket which he held for them, provided appellant did not proceed against him criminally; that appellant said he would give him the chance, as he did not care for the small amount of money that had been taken from him; that the pawn ticket was not produced; that Blum told several persons that he would kill appellant as a "squawker" and "stool pigeon"; and that these threats were repeated to appellant; and that, finally, appellant shot Blum in the midst of a vicious attack which the latter made upon him, and after Blum had struck him on the hand with a monkey wrench, as the hand was held to protect his head, at which the blow was aimed. Blum was shot by appellant on September 2, 1925.

When appellant was on the witness stand, he was asked a variety of questions designed to elicit the story of his relations with Blum from August 11, 1925, to the day of the final catastrophe; the day in August being the one, according to the theory of the defense, upon which appellant had been robbed by Blum. Objections to these questions were uniformly made by the district attorney on the grounds that they were incompetent, irrelevant, and immaterial, and in one or two instances, as assuming something not in evidence, and the objections were as uniformly sustained. The questions were, in part, as follows, after appellant had testified that he was on Brooklyn avenue, near Cummings street, at which point it was claimed the robbery had occurred, on August 11, 1925:

> "Was any one with you at the corner of Cummings and Brooklyn avenue on the 11th day of August, this year? * * * Were you at Cummings street near Brooklyn avenue in the nighttime of that day? * * * Did you see that night Barney Blum at Cummings street and Brooklyn avenue? * * * When you were at [that corner] did you have a Howard gold watch? * * * A gold chain and $15 in money? * * * Did Barney Blum rob you of a gun—of a gold watch, a chain, and $15 in money on the 11th of August? * * * Had you ever seen this man Blum before the 11th day of August, 1925, in the city of Los Angeles? * * * Did you make a report to a police officer of the city of Los Angeles a short time after the 11th of August, 1925, of a robbery committed by this man upon you at that point?"

Here the district attorney, after interposing his objection, remarked:

> "I * * * am going to ask the court to warn counsel not to ask further questions in that regard. He knows perfectly well under the rules of evidence, and under your honor's rulings in this matter, that it is incompetent, it is immaterial, and he is endeavoring by his questions to get before this jury a matter indirectly, which he knows cannot be done directly."

The court merely sustained the objection. These further questions were then propounded:

> "Do you know a police officer by the name of Ben Penosky? * * * Did you see police officer Ben Penosky at the University Police Station or near there a short time after the 11th day of August, 1925?"

After sustaining the objections to these interrogatories, the trial judge remarked:

> "I have been consistent in my rulings, * * * and will continue to be consistent in my rulings along that line of questioning, so far as this witness is concerned."

The witness was then asked:

> "Did you with police officer Ben Penosky in this city go together and search for Barney Blum and did you find him in this city?"

An objection to this question was sustained. Various other questions devoted to the purpose already stated, and which it is unnecessary further to specify, were propounded to the witness. They were all ruled out.

[1] The trial court erred in these rulings, except in one or two instances, in which the objection was made that questions assumed something not in evidence. Even that objection, however, was not always good when it was made. Appellant, clearly, was entitled to show the matters sought to be elicited by the questions as a part of the evidence under his plea of self-defense. The prosecution contended that the watch and chain had been delivered to Blum as security for the payment of debt. It was the theory of the defense that Blum had taken the articles from appellant in a holdup; that appellant had reported the occurrence to a police officer; and that Blum had repeatedly threatened to kill him because of the exposure. What appellant sought to prove was, therefore, a vital element in the case. "The relations of the parties to a homicide, prior to the commission thereof, may be shown for the purpose of determining their state of mind at the time of the killing, and to establish malice or motive on the part of the defendant, or to assist the jury in determining who was the aggressor in the fatal affray, or as tending to shed light upon the issue whether defendant, as a reasonable man, believed that he was in danger of losing his life or suffering great bodily harm." 13 Cal. Jur. p. 696. For the time being, at least, the trial court effectually emasculated the only defense appellant was seeking to present to the jury.

[2] During the cross-examination of appellant, however, the district attorney went into the matters which appellant had been denied the right to produce on direct examination. The Attorney General contends that the errors of the trial court, committed during the direct examination, were cured by the inexplicable course of the district attorney, after effectually throttling the direct examination, in opening up the subject on cross-examination. Whether this is so depends in some measure upon the attitudes of the district attorney and trial judge during the direct examination, upon the very fact that the prosecutor was allowed to produce evidence which it was the right of the defense to elicit, which right had been denied, as well as upon the manner in which the cross-examination was conducted.

Toward the close of the direct examination of appellant he was allowed to testify that the police officer, Penosky, had a conversation with Blum in his presence on August 31st, although he was not permitted to state what the conversation was. One of the early questions asked on the cross-examination was this: "This man Penosky that you have reference to, is that the same Penosky who has been dismissed from the police department?" The court sustained an objection to the question on the ground that it was not a proper cross-examination, but, upon a statement of the district attorney that it was asked for the purpose of identifying the officer, the question was voluntarily reframed, thus: "Do you know whether or not Mr. Penosky is at the present time connected with the police department?" Over objection, the court permitted an answer, which was, merely: "I don't know." A few questions later, still referring to Penosky, the district attorney asked: "Did you ever see him in the county jail?" Appellant's counsel not only objected to this question, but asked the court to strike it out and to instruct the jury to disregard it. The court ruled adversely, however, and the witness answered: "I did not." After some further cross-examination on other matters appellant referred, in an answer, to something as having occurred "after I was held up." The district attorney then asked a few questions which brought out answers fixing the time when the alleged holdup happened, and showing that appellant had not reported the occurrence to the police station, or to the sheriff, or to the district attorney, but only to Penosky, a policeman with whom he was acquainted. These questions were shortly followed by this: "Q. Now, tell the jury—I presume you would like to do so—all about this holdup." Appellant then detailed his story of the event.

[3] In our opinion, the errors of the trial court, committed during the direct examination of appellant, were not cured by the cross-examination, although their injurious effect was perhaps minimized by it. The jury was given to understand that it was not the right of appellant to tell the story of the alleged holdup. This was plainly shown by the remarks of the district attorney during the direct examination, when he unjustly charged counsel with an attempt, by indirection, to get forbidden matters before the jury, and by the continued rulings of the trial judge, especially as that officer felt it necessary to notify counsel that he had been consistent in his rulings, and that he would continue to be so. Not only was this wrongful impression left with the jury, but the impression must also have been created upon that body, when appellant was finally permitted to tell the story of the holdup, that the permission was granted as a matter of grace by the prosecution. Also, early in the cross-examination, the trial court overruled the very proper objections to the questions as to Penosky's standing as a police officer, and as to whether

appellant had ever seen Penosky in jail, thus condemning in advance any evidence in which that individual might figure. And, further, and finally, the prosecutor cross-examined appellant upon the holdup story, and in some degree discredited it before it had ever been heard by the jury. From all these circumstances it manifestly appears that the story finally reached the jury under very different auspices than those which would have fostered its fall from the lips of appellant on his direct examination. He was entitled to the impression which it might have created when coming to the jury in that natural and legitimate way, shaken though it might have been upon timely and orderly cross-examination or upon the production of opposing testimony. When it finally got to the jury, it doubtless possessed little of the weight which it might otherwise have been accorded by that body.

[4, 5] One Saul Finkel testified that Blum asked him to tell appellant that "if I see him I will cut him up." Finkel said that Blum made this request the latter part of August. Finkel also testified that he conveyed Blum's message to appellant. One Isidore Goldfein testified that late in August Blum said to him, speaking of appellant, "I will kill him if I get ahold of him. I will cut him up." Goldfein further testified that he repeated Blum's statement to appellant. Appellant sought to prove by Finkel that he heard Goldfein and by Goldfein that he heard Finkel, make his communication to appellant. An endeavor also was made to prove by Goldfein's wife that she heard her husband make his communication. Objection was made to each of these items of corroboration on the ground that the evidence was immaterial, and that it was hearsay, and the objections were sustained. Each of these rulings was error. The proffered evidence plainly was material. There was evidence in the record that appellant shot Blum in repelling an assault which the latter made upon him. In connection with this evidence it was proper for appellant to show that Blum had threatened his life or to do him great bodily harm, and that the threats had been repeated to him. 30 Cal. Jur. 66, 191. The corroborative evidence offered from the lips of Finkel, Goldfein, and Mrs. Goldfein was not hearsay. One need not be a party to a conversation in order to relate it. If he has heard the conversation, that is enough. People v. Fitzpatrick (Cal. App.) 247 P. 601.

[6] Appellant endeavored to prove by three or four witnesses that the general reputation of Blum in Los Angeles, in which city he lived, and in which he was shot by appellant, for peace, quietude, and as to his being dangerous, turbulent, and bloodthirsty, was bad. Each of the witnesses testified that he knew Blum; that he knew other persons in Los Angeles who were acquainted with that individual; and that he knew what Blum's general reputation was in the respects mentioned. In each instance the district attorney then asked, and was granted by the court, the right to conduct what is termed in the record a voir dire examination. The prosecutor then asked each witness a variety of questions as to the sources of information, etc., upon which he proposed to testify concerning Blum's reputation, and at the end of his examination the prosecutor objected that there was no sufficient foundation for the testimony as to reputation, and the objection was sustained. The Attorney General seeks to justify this unusual procedure upon the ground that one who is asked to testify to reputation is an expert witness, and that all such witnesses may be examined by opposing counsel, touching their qualifications, before being permitted to state their opinions. There is no such rule as to witnesses of the character now under consideration, and the Attorney General cites no authority to support his position. Each of the witnesses whose testimony was offered by appellant to prove Blum's reputation was shown to be qualified to answer before the question as to reputation was put to him. The questions preliminarily addressed to each witness were similar in form to those usually put to witnesses who are called to impeach other witnesses on the ground that their general reputation for truth, honesty, and integrity is bad, under a practice which is supported by a mass of authority. See People v. Hickman, 113 Cal. 80, 45 P. 175. For a general statement of the rules affecting the examination of impeaching witnesses, see, also, note to Allen v. State, 73 Am. Dec. 771, and note to Lodge v. State, 82 Am. St. Rep. 26, although we do not mean to say that all the rules there stated are applicable in California. The practice under which evidence as to reputation is received, when the question of reputation is in issue, follows that which applies when the attempt is made merely to impeach a witness because of bad reputation. The existence of such a practice is vouched for by the Attorney General in his brief. We think the witnesses should have been permitted to answer as to the reputation of Blum in the respects mentioned in the preliminary questions addressed to them. The next step would have been for the prosecutor to minimize or destroy, by cross-examination, the weight of their testimony by such questions as he put to them upon his so-called voir dire examination.

[7] Two other witnesses were called to testify to the reputation of Blum. It was objected as to each of them that he was not shown to be qualified by the questions put to him by appellant's counsel, and the objection was sustained in each instance. One of these witnesses testified that he had kept a hotel at a certain place for about six months;

that he had lived in the same neighborhood most of his life; that he got acquainted with Blum while he kept the hotel, and saw him "about twice" in the neighborhood; that he knew a few people that knew Blum when they saw him; and that he talked with "various people in the city of Los Angeles and in the neighborhood in which the name and general conduct and character" of Blum was discussed. The question as to Blum's general reputation was then put to the witness. The court erred in sustaining the objection to the question.

[8] The other witness referred to in the last preceding paragraph testified that he had known Blum 16 or 17 years; that he first saw him in Los Angeles "3 years ago"; that Blum then went away, and was gone for a year and a half, and then returned; that he had after that known him in Los Angeles for 8 months; that during that period he saw Blum "lots of times"; that he was not acquainted with people who knew Blum in Los Angeles; and that he had heard discussed Blum's reputation in Los Angeles in the respects stated above. The witness was then asked if he knew Blum's general reputation in Los Angeles. Upon objection being made, the following occurred.

> "A Deputy District Attorney: He said he never knew anybody that knew Barney Blum in the city of Los Angeles.
> "The Court: Was that your answer to the question that you never knew anybody that knew him?
> "The Witness: Oh, no; there is a lot of people who knew him.
> "The Court: Did you know anybody that knew him?
> "The Witness: Yes, I knew him."

The question was then read, to which the witness had already answered that he knew no one who knew Blum, when the following transpired:

> "Counsel for defendant: Did you understand that question? A. I do understand it now but I didn't understand it then. Q. You didn't understand it then? A. No, sir."

The witness was then asked if he knew Blum's reputation in Los Angeles in the respects already mentioned, objection was interposed, and the objection was sustained. The ruling was error. If we grant, without deciding, that the final result of the record is that there was no showing whether or not the witness knew any one who knew Blum—and the record indicates no more than that—we know of no rule which forbids a witness to testify to the general reputation of an individual merely because he knows no one who knows him. It would seem that one may know the general reputation of A. in a community without knowing any one who knows A., if he knows A. himself. He cannot know of his own knowledge that others are acquainted with A. unless he has seen them in his presence, but he nevertheless may have heard many discuss A.'s reputation who actually know him.

[9] Appellant takes exception to an instruction given to the jury by the trial court, to the effect that "self-defense is not available as a plea to one who, by prearranged duel, or by consent, has entered into a deadly mutual combat in which he slays his adversary." There was no evidence upon which to base such an instruction, and it was error to give it. We think, however, that the error could not have been harmful.

[10] It is contended that a deputy district attorney who aided in the prosecution of appellant was guilty of misconduct during the trial. The alleged misconduct occurred during the final argument addressed to the jury. The record shows the following:

> "A Deputy District Attorney: 'Oh,' they say, 'Would you loan $150 on a watch and chain?' Let me ask you something. Think about this, will you? If you knew that a watch and chain had been obtained in the commission of a holdup by a pal of yours, and you knew that that man wanted to skip town, and he didn't have the money to skip town, and you knew that if he was here he would be caught or arrested and prosecuted for robbery, and you had the money, would you loan him $150 on a watch and chain?"

Immediately upon these remarks being made to the jury appellant objected to them, whereupon the court stated that "it is a matter of argument." Appellant then assigned the remarks as misconduct, and asked the court to instruct the jury to disregard them. The trial judge merely responded: "You have your assignment." The remarks were misconduct, and the court's refusal to instruct the jury as requested was error. The testimony showed that appellant had taken a trip to Vancouver, British Columbia, soon after the time when, as he testified, Blum had made him the victim of a "holdup." There was nothing in the evidence which even remotely justified the argument made by the district attorney to the effect that appellant had "skipped town" because he himself had obtained a watch in a "holdup." This is what is meant by the remarks of the prosecutor, a fact attested more strongly by the context than by the excerpt itself which we have taken from the argument. The lending of $150 mentioned in the prosecutor's remarks referred, of course, to the loan claimed by the prosecution to have been made by Blum to appellant.

[11] During his address to the jury the counsel for appellant, Mr. Allender, referred, for the purposes of illustration, comparison, and argument, to various criminal cases in which he had represented the defendants. During the closing argument for the prosecution a deputy district attorney had this to say:

"Do you recall the character of the men that Mr. Allender has been representing since 1892 up to the present date, 33 years? Highway robbers, murderers, men of the underworld and he is now defending Alpine. Do you not see back of this case, ladies and gentlemen, the operation of the underworld? Do you not see some peculiar interest on the part of Goldfein, Finkel, and Fisher?"

We must pause here to remark that these individuals were witnesses who took the stand in behalf of appellant, and who were, apparently, his friends. After his remarks above quoted, the deputy district attorney commented on certain activities of Finkel after appellant's arrest, and which aided him in his defense, and also to activities of one Berg, another witness for appellant, in the same direction. He also alluded to the circumstances, as to which there was evidence, that appellant had known Blum before the time when appellant testified that Blum took his watch from him, and that appellant had been seen with Blum. The prosecutor also referred to one Snyder, a man who had been mentioned in the testimony as an acquaintance of both appellant and Blum, but who was not a witness.

A statement of these matters is necessary to the understanding of a second point made by appellant to the effect that the deputy district attorney was guilty of misconduct. After referring to the matters above mentioned, the deputy proceeded:

"You remember when those threats were made [that Blum would kill appellant], according to Finkel, Fisher, and Goldfein, on the 30th, the 31st, and the 1st, the shooting on the 2d, the arrest on the 2d, Finkel was there, and not one single word out of Finkel, not one single word from the mouth of the defendant when the officers were taking the statement of the defendant to the effect that threats had been made to Finkel, Goldfein, and Fisher. He says they were communicated to him. They say that they communicated the threats to him; they were fresh in his mind at that time, and yet not one single word. I will tell you why. See if it is not logical and reasonable. Assuming that Barney Blum is a hi-jacker, that Paul Gibbons [also a witness] is a hi-jacker, that Snyder is a hi-jacker, that Goldfein and Alpine have been going around in a Nash with Blum and Snyder. Are they members of the underworld? I am asking you if they get Harry Alpine to go up there on the 2d day of September, 1925, and get rid of Barney Blum in order to destroy evidence which they thought he had in his possession, and which, if he 'squawked,' would send the whole bunch of them to the penitentiary. * * *"

Later the deputy said to the jury:

"How would you like to meet him [appellant] in a dark alley, or down a dark street, you ladies, unattended by an escort, or even attended by a strong escort? How would you like to meet Fisher, Goldfein and Finkel on a lonely street in a dark place unaccompanied and unattended, or even accompanied and attended by an escort? You saw their type upon the stand. You have seen hi-jackers during the time you have been sitting in this courtroom day after day and week after week. Do Finkel and Goldfein and Fisher look like innocent little business men to you? Draw your own conclusions."

No part of these outbursts was objected to immediately, but they occurred near the end of the argument of the deputy. Shortly before he actually concluded, and at the opening of a session after a noon adjournment had been taken, the record shows the following:

"Mr. Allender: If the court please, at this time I object to the statement that has been made by [the prosecutor] to the jury just prior to adjournment, in which he referred to Mr. Sol Finkel, Mr. Goldfein, and Mr. I. Fisher as being members of the underworld, hi-jackers, and that it wouldn't be safe for any member of the jury to meet any one of these men in a dark alley at night. I object to that statement on the ground it is not supported by any evidence, or warranted by any evidence in this case, and assign it as misconduct, and I ask the court to instruct the jury to disregard it.

"The Court: As I stated before, it is a matter of deduction that counsel is making during his argument, and that the objection will be overruled, and your assignment is pretty late, but I will allow the assignment."

From this the court did not intend to say that he would instruct the jury as was requested, for he gave no such instruction, but only that he would allow the assignment to be presented. The remarks of the deputy district attorney to which appellant took exception constituted misconduct of an extreme type, and the trial judge erred in not instructing the jury to disregard them. They did not present a legitimate argument upon the evidence before the jury, and, moreover, they constituted an impeachment of appellant's witnesses in a manner not contemplated by the law.

Misconduct is charged as to the following showing of the record made during the closing argument:

"A Deputy District Attorney: I am asking you as reasonable people and reasoning human beings, Alpine leaving the state of California, after being held up by Barney Blum, because he was afraid Barney Blum was going to kill him, or Alpine borrowing $150 from Barney Blum and fleeing the state of California because of a robbery the man had committed.

"Mr. Allender: If the court please, I am going to make an objection to that statement, and I protest against declarations of that kind from a deputy district attorney closing the case, upon the ground that it is unwarranted by the evidence. There is no evidence to sustain it at all. I assign it as misconduct before this jury, and request your honor to instruct the jury to disregard it.

"The Court: It is a matter of deduction made during the course of the argument, and you have your assignment."

Here, again, there was misconduct upon the part of the prosecutor and error by the trial judge.

Other claims of error are made by appellant, but we find it unnecessary to consider them.

As required by the provisions of section 4½ of article 6 of the Constitution, we have examined the entire cause, including the voluminous report of the evidence. We have even read the entire arguments of counsel, covering 300 pages of typewritten record. From our examination we are of the opinion that the errors complained of have resulted in a miscarriage of justice. It is quite likely that the conviction of appellant was because of the errors and misconduct that are shown by the record. But two witnesses, in addition to appellant himself, testified to specific facts casting light upon the question whether Blum was the aggressor in the encounter which cost his life, and their testimony indicated that he was. In addition to this direct testimony there was circumstantial evidence both in favor of and against the accused. From the standpoint of the prosecution the most that can be said is that the evidence as a whole was quite evenly balanced, but it may be doubted whether that can be said. In venturing these observations, we can speak only from the showing made by the record. The jury had an opportunity to observe the demeanor of the witnesses, and may have had reason to return the verdict which was found, irrespective of the error and misconduct which were committed during the trial. As to this, of course, we can say nothing. From the mere record, as we read it, the errors may very easily have turned the scale in favor of the prosecution.

Judgment and order reversed.

We concur: CRAIG, J.; THOMPSON, J.

Opinion of Supreme Court in Bank, Denying Hearing.

PER CURIAM. The petition for a hearing in this court is denied. We are not to be understood, however, as approving that portion of the decision of the District Court of Appeal wherein it is apparently held that a so-called voir dire examination of a character witness would constitute error.

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81 Cal. App. 471

MACLAY RANCHO REALTY CO. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5403.)

(District Court of Appeal, Second District, Division 2, California. Feb. 23, 1927.)

1. Discovery 🔑85—Statute authorizing court to order inspection of writings afforded judicial discretion in passing on application therefor (Code Civ. Proc. § 1000).

Code Civ. Proc. § 1000, authorizing court to order either party to give to other right to inspect books and records, *held* to afford trial court judicial discretion in passing on any application therefor.

2. Discovery 🔑97(4)—Trial court, in passing on application for inspection of writings, was not bound to accept, as final, averments of affidavits in support of motion therefor (Code Civ. Proc. § 1000).

Trial court was not bound to accept, as final, averments of defendant's affidavits in motion for order allowing its inspection of books, but might determine facts from other matters before it, since Code Civ. Proc. § 1000, afforded trial court judicial discretion in passing thereon.

3. Appeal and error 🔑920(1)—On appeal from order denying right to inspect writings, all intendments are in favor of validity of trial court's orders (Code Civ. Proc. § 1000).

On appeal from court's denial of order to permit defendant to inspect plaintiff's books under Code Civ. Proc. § 1000, all intendments are to be indulged in favor of validity of trial court's order.

4. Mandamus 🔑42—Writ of mandate will not issue commanding that order for inspection of writings be granted, in absence of abuse of discretion in its refusal (Code Civ. Proc. § 1000).

Though facts warranted order granting leave to inspect writings under Code Civ. Proc. § 1000, writ of mandate commanding that order be granted will not issue, in absence of abuse of discretion.

Application for writ of mandate by the Maclay Rancho Realty Company to compel the Superior Court of California in and for the County of Los Angeles and W. C. Doran, Judge, to issue an order granting permission to inspect and copy items of account. Writ denied.

Marshall Stimson and Noel C. Edwards, both of Los Angeles, for petitioner.

R. M. Widney, of Pacoima, for respondents.

CRAIG, J. On or about July 7, 1925, one A. B. Widney commenced an action in the superior court of Los Angeles county against the Maclay Rancho Realty Company, a corporation, for moneys alleged by the complaint and amendments thereto to be due to the plaintiff from the defendant therein through the subdivision and sale of certain real property under a contract in writing between the parties, dated June 1, 1923.

It appears that the defendant took the plaintiff's deposition, which was filed on September 11, 1925, and that on the 18th a demurrer to the complaint, motion to strike, and demand for bill of particulars were filed; that on September 28th an amended complaint was filed; and that on October 8th the demurrer to the complaint was sustained, and the motion to strike was denied. On January 20, 1926, the plaintiff filed bills of particulars, numbered 1 and 2, and entered the default of the Maclay Rancho Realty Company to his amended complaint. On the next day the realty company filed a demurrer to said amended complaint, notice of motion to strike therefrom, and a demand for bill of particulars. On January 25, 1926, a stipulation extending the defendant's time to plead, an answer, and a cross-complaint were filed, together with a motion to vacate the default, which latter was thereafter granted, and Widney interposed an answer to the cross-complaint heretofore mentioned.

The bill of particulars numbered 1 was furnished pursuant to the demand of the realty company, who objected thereto, and demanded a second bill, which also was furnished. Each such bill of particulars consisted of more than 70 pages, and is claimed to have contained receipts and disbursements by the plaintiff for the defendant's account, covering transactions extending over a period of about two years, under their contract, as shown by the plaintiff's books and records.

By its cross-complaint the defendant realty company demanded an accounting "of all the collections, dealings and transactions from the commencement thereof and the money received and paid to the plaintiff and paid by the plaintiff to the defendant respectively."

On April 5, 1926, the defendant realty company, petitioner herein, gave notice of motion, supported by affidavit of its counsel, for an order allowing its inspection of "the books of account, cash books, ledgers containing the entries of receipts, and disbursements made and set forth in the bills of particulars dated October 12, 1925, and January 18, 1926, pertaining to transactions between the plaintiff and the defendant." The motion was heard on April 15th, and was denied, with permission to renew it, counsel having stated that the moving documents were incomplete, and requested such permission. The second motion for inspection was heard on April 22d, and it also was denied. On the 26th day of April the defendant again moved the same court for an order permitting inspection of the plaintiff's books and records, which motion was heard on April 29th, and likewise denied. Each of these motions was made upon the ground "that the books are in the possession of the plaintiff, and that they contain evidence relative to the merits of the action and the defense therein"; that such evidence was material; and that the defendant could not safely proceed to trial without the inspection requested; and was based upon "the records and files in this action." It further appears that in each of its rulings the court considered the pleadings, affidavits, and bills of particulars theretofore filed, as above recited.

The defendant, Maclay Rancho Realty Company, petitions this court for a writ of mandate commanding that the trial court issue an order granting it permission to inspect and take copies from the books of the plaintiff Widney of "entries showing moneys paid out or received by said A. B. Widney for the Maclay Rancho Realty Company, * * * in connection with the contract which is the subject of the above-mentioned action." An alternative writ was issued, and a referee was appointed to take evidence and to report his findings upon the issues of fact involved in this proceeding. Pursuant to such appointment the referee heard the evidence and argument of the respective parties and rendered an exhaustive report wherein he found, among others, the facts heretofore stated.

During the hearing before the referee it was stipulated, and the latter found, that "said bills of particulars were made from the books of the plaintiff in said action; that such books are the books of which the defendant therein demanded an inspection; and that the items called for in the inspection of said books are the items therein which are set forth in said bills of particulars." Counter affidavits of counsel for the plaintiff in the main action, which appear to have been filed with, and the referee finds to have been considered by, the court below, recite that "there are no books, contracts, or other papers or documents in plaintiff's possession containing any other information than that furnished to said defendant and its attorneys"; and that the defendant "has an itemized statement from plaintiff of all of the accounts between plaintiff and defendant."

[1-4] It seems clear that section 1000 of the Code of Civil Procedure, by the provisions of which the petitioner claimed the right to inspect the books and records in question, affords the trial court judicial discretion in passing upon any application therefor. Possessing such discretion, the court was not required to accept the averments of the affidavits in support of the motion as final, but might conclude from other matters before it that in some particulars the facts were otherwise. This it apparently did. It may well have decided that under the circumstances appearing the inspection was not necessary to the preparation and proof of the petitioner's case. All intendments are to be indulged by us in favor of the validity of the trial court's orders, and, considering the situation as presented to it, the conclusion would be amply justified that petitioner had received full information concerning the accounts in controversy, and all of the information and data contained in the books sought to be inspected. No doubt, as argued by petitioner, the facts in this case might have warranted the making of the order requested, but it is elementary that, where the action is discretionary with the trial court, the writ here asked will not issue, unless the refusal of the trial court to act amounts to an abuse of discretion.

The referee found also that the motion of April 29, 1926, was submitted to, and decided by, the superior court upon the papers, records, and files in the cause, as well as upon the affidavits of Marshall Stimson and counter affidavits of R. M. Widney; further, that there was before the trial court upon such hearing "the records and papers on file in said cause as hereinbefore found, including the complaint, amended complaint, and second amended complaint of the plaintiff, the answer of the defendant to said second amended complaint and its cross-complaint, the deposition of A. B. Widney, plaintiff, the aforesaid two bills of particulars furnished to the defendant on the demand of the defendant, and the affidavit of counsel for the defendant and the counter affidavits of counsel for the plaintiff and J. B. Meikle which had been read and presented to the court and filed at the hearing of the second motion of April 22, 1926."

It is too obvious for argument that, since the greater part of the matters which the trial court considered are not before us, it is impossible for us to review the action of that court in determining the issues before it.

The peremptory writ of mandate is denied.

We concur: WORKS, P. J.; THOMPSON, J.

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81 Cal. App. 423

OLDS & STOLLER, Inc., v. SEIFERT.
(Civ. 5682.)

(District Court of Appeal, First District, Division 1, California. Feb. 21, 1927.)

1. Municipal corporations ⚷706(5)—Evidence held to show driver of automobile damaged in collision at street intersection was not negligent, and that defendant was negligent.

In action for damage to automobile in collision at street intersection, evidence *held* to show that assignor of plaintiff had right of way and was not wanting in due care, and that defendant was negligent.

2. Appeal and error ⚷1051(1)—Where automobile owner assigned claim to insurer, admission of purported policy, if error, held harmless, in view of owner's written assignment.

Where insurer of automobile against damage due to collision sued as assignee of owner after paying loss, admission of paper, purporting to be policy issued to owner, if error, *held* harmless, in view of written assignment which was alone sufficient to enable plaintiff to maintain action.

3. Damages ⚷159(5), 188(1)—Evidence of value of repairs to damaged automobile is admissible and sufficient prima facie to establish amount of damage, without allegation of value before and after accident.

In action for damage to automobile in collision, evidence of value of repairs is admissible and sufficient prima facie to establish amount of damage, though there was no allegation as to value of car before and after accident, since such difference in value is presumptively amount of costs of repairs.

4. Damages ⚷141—General allegation of damages, with prayer for stated amount, is sufficient.

General allegation of damages, with prayer for stated amount, is sufficient to authorize recovery for all damages that necessarily resulted from act complained of.

5. Damages ⚷113—Measure of damages is difference in value of damaged property immediately before and after injury or cost of repair if less (Civ. Code, § 3333).

Measure of damages, in absence of total destruction of property injured, is difference between value of property immediately before and immediately after injury, but, if property be capable of repair at expense less than diminution in value, damage is limited to cost of making repairs, in view of Civ. Code, § 3333.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Olds & Stoller, Inc., against E. D. Seifert. Judgment for plaintiff, and defendant appeals. Affirmed.

William H. Johnson, of San Jose, for appellant.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for respondent.

CASHIN, J. An action to recover damages for injuries to an automobile resulting from a collision. The owner of the injured automobile assigned his claim to plaintiff corporation, and, from a judgment recovered by the latter, the defendant appeals. The appeal is presented on the judgment roll and a bill of exceptions.

Appellant contends that the evidence was insufficient to justify the verdict of the jury; that the verdict was against law; that certain evidence was improperly admitted over objection, and that an instruction given the jury was erroneous.

The collision occurred in Santa Clara county at the intersection of Mountain View road, running east and west, with the San Francisco and San Jose highway, which runs north and south. At the time of the accident, the automobile owned by the assignor (hereinafter designated as the Buick car) was being operated by Mrs. Dorothy H. Weinstock. As this car, coming from the east along the Mountain View road, neared the intersection, appellant, who was driving a Stearns car, approached from the south along the highway mentioned. The testimony shows that the Buick car was stopped about 11 feet east of the paved portion of the highway, that a truck proceeding south along the highway was stopped by its driver to the north of the intersection, and that the latter signaled to Mrs. Weinstock to proceed. According to her testimony, after receiving the signal she looked to the south along the highway, and, seeing no approaching car in that direction, drove into the intersection at a speed of about 5 miles per hour; the collision with the Stearns car occurring near the center of the intersection. Two witnesses, who observed the movements of the cars immediately before the accident, testified that the Buick car was the first to enter the intersection, and that the Stearns car approached at a speed of about 35 miles per hour; one of the witnesses stating that the speed was not decreased when the intersection was reached. This testimony was corroborated in some degree by the fact that the Stearns car after the collision continued on its course for a distance between 30 and 40 feet, in the meantime striking the truck mentioned with sufficient force to throw the driver to the ground.

[1] Appellant contends that the physical condition of the cars after the accident shows that the Stearns car was struck by the Buick car, but we think it a fair conclusion from the evidence that the latter was struck in front by the side of the Stearns car in an attempt by appellant to avoid a direct collision. This evidence was sufficient to sustain the findings that the driver of the Buick car had the right of way (Vickerson v. Standard Auto Sales Co., 64 Cal. App. 287, 221 P. 392), was not wanting in due care and that the defendant was negligent (Whitworth v. Jones, 58 Cal. App. 492, 209 P. 60; Conner v. Dale, 63 Cal. App. 338, 218 P. 462; Commonwealth Insurance Co. v. Riverside-Portland Cement Co., 69 Cal. App. 165, 230 P. 995; Bauman v. Edgar, 72 Cal. App. 448, 236 P. 943).

[2] We find no merit in appellant's contention that the verdict was against law, nor, in view of the evidence, that the instruction complained of was erroneous. The complaint alleged that respondent, previous to the accident, issued its policy of insurance to the owner of the Buick car, agreeing to indemnify the latter against loss or damage due to collision; it being provided therein that, upon payment of the loss, the insurer should be subrogated to the extent of such payment to the owner's right of recovery, and that, following the accident, the loss was paid and the owner in writing assigned to respondent his claim against appellant. At the trial, respondent offered, and there was admitted in evidence, the assignment of the claim, with a paper which purported to be the policy mentioned. The owner was unable to testify that the latter document was the original policy, stating, however, that it was the document received as such from respondent. The written assignment of the claim was sufficient to enable respondent to maintain the action; and the admission of the purported policy over objection, if erroneous, was not prejudicial.

[3-5] The parties stipulated at the trial that the reasonable value of the labor and materials necessary to repair the Buick car was the sum of $587.45, this sum being the amount of the judgment. The stipulation was made subject to objections by appellant, who offered no evidence on the issue as to the damage; but he now contends that, there being no allegation in the complaint as to the value of the car before and after the accident, evidence of the value of the repairs was not admissible.

A general allegation of damages with a prayer for a stated amount, is sufficient to authorize the recovery of all damages that necessarily result from the act complained of. 5 Ency. of Plead. & Prac. p. 731; 8 Cal. Jur. "Damages," § 125, p. 885. The measure of damages, in the absence of the total destruction of the property injured, is the difference between the value of the property immediately before and immediately after the injury, provided, however, if the property be capable of repair at an expense less than the diminution in the value because of the injury, the damage is limited to the cost of making the repairs. Kincaid v. Dunn, 26 Cal. App. 686, 148 P. 235; Civ. Code, § 3333.

As held in Overpeck v. Rapid City, 14 S. D. 507, 85 N. W. 990, 991, the difference in the value of the property before and after the injury is presumptively the amount of the cost of repairs, and in Rhodes v. Firestone Tire, etc., Co., 51 Cal. App. 569, 197 P. 392, proof that repairs were necessary and their cost reasonable was held to be admissible and sufficient prima facie to establish the amount of the damage.

The evidence was sufficient to support the verdict, and, no prejudicial error being shown, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

81 Cal. App. 526

PEOPLE v. PATTON. (Cr. 959.)

(District Court of Appeal, Third District, California. March 1, 1927.)

Criminal law 🔑1182—Where appellant files no brief and makes no appearance at time set for oral argument, judgment of conviction will be affirmed (Pen. Code, § 1253).

Where transcript on appeal was filed, but appellant filed no brief and made no appearance at time case was called for oral argument, judgment of conviction must be affirmed under Pen. Code, § 1253, providing that judgment may be affirmed if appellant fails to appear, but can be reversed only after argument.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

D. R. Patton was convicted of incest, and he appeals. Affirmed.

G. B. Hjelm, of Twilock, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Stanislaus county of a felony, to wit, the crime of incest.

The transcript on appeal was filed in this court December 31, 1926. No brief has been filed in behalf of appellant. The cause was regularly placed on the March calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

81 Cal. App. 527

PEOPLE v. CHAFFIN. (Cr. 963.)

(District Court of Appeal, Third District, California. March 1, 1927.)

Criminal law 🔑1182—Where appellant files no brief and makes no appearance at time set for oral argument, judgment of conviction will be affirmed (Pen. Code, § 1253).

Where transcript on appeal was filed but appellant filed no brief and made no appearance at time case was called for oral argument, judgment of conviction must be affirmed, under Pen. Code, § 1253, providing that judgment may be affirmed if appellant fails to appear, but can be reversed only after argument.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

W. H. Chaffin was convicted of committing certain lewd and lascivious acts upon and with the body of a female child under the age of 14 years, and he appeals. Affirmed.

James L. Hare and J. G. Bruton, both of Woodland, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted in the superior court of Yolo county of a felony, to wit, the crime of committing certain lewd and lascivious acts upon and with the body of a certain female child under the age of 14 years.

The transcript on appeal was filed in this court January 14, 1927. No brief has been filed in behalf of appellant. The cause was regularly placed on the March calendar for oral argument. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

81 Cal. App. 588

O'KUNA v. SMALL CLAIMS COURT OF PALO ALTO TP., SANTA CLARA COUNTY, et al. (Civ. 5749.)

(District Court of Appeal, First District, Division 1, California. March 4, 1927.)

Courts 🔑176½—Writ of review held proper, where judgment was entered in small claims court, without notifying defendant until time for appeal had expired.

Where judgment was entered in small claims court without giving defendant notice thereof until after time for appeal had expired, writ of review was proper remedy to review such judgment; it being an exception to general rule that certiorari cannot be resorted to after expiration of time for appeal.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Petition for a writ of certiorari by Joe O. O'Kuna against the Small Claims Court of the Township of Palo Alto, Santa Clara County, and others. From a judgment dismissing the writ, petitioner appeals. Reversed.

Harrison & Harrison and Brobeck, Phleger & Harrison, all of San Francisco, for appellant.

Isabel L. Charles and Rodgers & Smith, all of Palo Alto, and E. L. Maxwell, of Mountain View, for respondents.

TYLER, P. J. Appeal by plaintiff from a judgment entered upon the sustaining of a demurrer to a petition for a writ of certiorari. There is no dispute as to the facts. They show, in substance, that on or about the 20th day of December, 1923, an automobile owned and driven by respondent Wagnon was damaged in a collision with an automobile driven by appellant. On January 5, 1924, Wagnon brought an action in the small claims court of the township of Palo Alto against appellant to recover the sum of $50, the amount of the alleged damage. The action came on for hearing before the respondent small claims court and respondent Isabel L. Charles as a justice thereof. Appellant objected to the jurisdiction of said court and of said justice, upon the ground that he did not reside in and was not a resident of the said township, but that, on the contrary, he was at all times a resident of the city and county of San Francisco. This fact was established without conflict at the trial. Notwithstanding such plea and evidence, respondent small claims court and the said justice thereof proceeded to try the case on its merits, and required appellant to testify therein. No judgment was rendered at the conclusion of the trial, but one was subsequently made and entered in favor of respondent Wagnon and against appellant for the sum claimed. Appellant had no knowledge whatsoever that judgment had been rendered in the action for more than five days thereafter, at which time his right of appeal had expired, when an execution was issued out of said court directed to the sheriff of the city and county of San Francisco, pursuant to which certain personal property belonging to appellant was seized, which the sheriff threatened to sell. Appellant thereupon immediately applied by petition for a writ of review to the superior court of Santa Clara county, alleging the foregoing facts and the lack of jurisdiction in the small claims court to render the judgment, and thereby sought to require the small claims court and the justice thereof to certify the records and proceedings in said action to said superior court, for the purpose of obtaining the annulment of the judgment. Upon the filing of this petition an order was duly made and filed, directing the issuance of the writ prayed for. The said justice of the small claims court and Wagnon filed a demurrer to the petition. The demurrers were sustained without leave to amend, and thereafter a judgment of dismissal of the writ of review was made and entered. From this judgment the present appeal is taken. It was respondents' contention below, and is here, that, conceding lack of jurisdiction in the small claims court and the justice thereof, petitioner was not entitled to a review, because the judgment of the small claims court was appealable. The lower court was of a like opinion.

The general rule may be stated to be that certiorari will not lie where the petitioner has the right of appeal. However, there are cases where, on account of unusual circumstances, writs of review lie, although there has been at one time a right of appeal. An exception to the rule that certiorari cannot be resorted to after the time for appeal has expired may be found in instances where no notice of judgment has been had until after such time has elapsed. The principle is acknowledged in Elder v. Justice's Court, 136 Cal. 364, 68 P. 1022. In that case it was held that, where a petitioner had no knowledge of the recovery of a judgment until after his time for appeal had expired, certiorari was a proper remedy to review the action of the court. This case was decided at a time when the statute in relation to rendition of judgments in justices' courts contained no provision as now exists for notices to parties of rendition of judgment. The provisions of the statute relating to small claims court contain no provision for such notice. The case last cited is on all fours with the instant case, and is here controlling. See, also, Olcese v. Justice's Court, 156 Cal. 82, 103 P. 317. We are of the opinion, therefore, that the lower court erred in dismissing the petition for writ of review, and in refusing to examine the proceedings of the small claims court and its justice to determine whether said proceedings were without jurisdiction.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

81 Cal. App. 484

PEOPLE v. DOMENIGHINI. (Cr. 1333.)★

(District Court of Appeal, First District, Division 1, California. Feb. 25, 1927. Rehearing Denied March 25, 1927. Hearing Denied by Supreme Court April 25, 1927.)

1. Criminal law ⟹563—Elements of "corpus delicti" are certain facts forming its bases and the existence of criminal agency as cause.

The two elements of the "corpus delicti" are (1) certain facts forming its bases, and (2) the existence of criminal agency as the cause of them.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus Delicti.]

2. Criminal law ⟹562—To justify conviction, jury must believe every act necessary to offense was committed by defendant.

Jury must be satisfied beyond a reasonable doubt, in order to convict a defendant, of the existence of every fact necessary to constitute the offense with which he is charged, and that he was the perpetrator.

3. Criminal law ⟹534(1)—Facts corroborating extrajudicial confession of accused may be proved by circumstantial evidence.

It is sufficient if the facts necessary to corroborate an extrajudicial confession are proved by circumstantial evidence; it being enough that the evidence show prima facie a criminal agency.

4. Criminal law ⟹535(2)—Full proof of crime, aside from extrajudicial confession, is not necessary to justify conviction, though confession alone is insufficient.

Although evidence of an extrajudicial confession of one accused of crime will not war-

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★Hearing denied by Supreme Court.

rant conviction unless corroborated by other proof, full proof, independent of the confession, is not required, it being sufficient that facts are shown which, with the confession, show defendant guilty.

5. Criminal law 🔑535(2)—Evidence of corpus delicti held to support extrajudicial confession and sustain conviction for lewd act committed on child (Pen. Code, § 288).

Evidence *held* to show elements of the corpus delicti necessary to support a conviction for committing a lewd and lascivious act upon a child under Pen. Code, § 288, without relying on defendant's extrajudicial confession.

6. Criminal law 🔑489—Sustaining objection to question asked witness on cross-examination held no error, though question was proper, where witness had, in effect, previously answered question.

Though question asked expert medical witness on cross-examination was proper as testing her competency, yet where she had, in effect, previously answered the question, sustaining an objection to it was not error.

7. Witnesses 🔑282½—Sustaining objection to question held proper, where witness had previously testified that she could not remember facts asked.

Where witness had previously testified that she could not remember facts asked in question on cross-examination, sustaining objection to the question held proper.

8. Criminal law 🔑406(3), 516—Defendant's admission of being diseased did not import guilt of sex crime, and was not a confession, and was admissible, though not voluntary.

Evidence that one on trial for committing a lewd act on a child had admitted having a disease with which the child was found infected was *held* properly admissible, since it did not itself import guilt, and so was not a confession, though admission was not voluntary.

9. Criminal law 🔑517(4)—Extrajudicial confessions of accused are admissible upon prima facie proof of the corpus delicti.

Upon prima facie proof of the corpus delicti, extrajudicial statements, confessions, or admissions of one accused of crime are admissible in evidence.

10. Criminal law 🔑538(3)—Extrajudicial confessions of accused may be considered with other evidence in determining proof beyond reasonable doubt.

In determining whether the elements of a crime are proven beyond a reasonable doubt, the jury may consider the extrajudicial confessions of the accused along with the other evidence in the prosecution.

11. Criminal law 🔑1170½(5)—Error in refusing to permit cross-examination of witnesses to show hostility toward accused held harmless.

One convicted of committing lewd act on a child *held* not prejudiced by court's error in refusing to permit cross-examination of two of state's witnesses to show their hostility to accused.

12. Criminal law 🔑1171(6)—Attorney's statement concerning defendant infecting child, and that, were child his, defendant would not be on trial, held not reversible error.

District attorney *held* not guilty of such misconduct as to require reversal of conviction of defendant for committing lewd act on a child, because he referred to defendant's infecting child with disease, and said that, if it were his child, the defendant would not be on trial for the offense.

13. Criminal law 🔑959—Refusal of trial court to give defendant additional time to present affidavits supporting new trial motion held not abuse of discretion.

The trial court *held* not guilty of abuse of discretion in refusing to allow defendant additional time to present affidavits in support of his motion for a new trial.

Campbell, Justice pro tem., dissenting.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Frank Domenighini was convicted of committing a lewd act upon a female child, under Pen. Code, § 288. He appeals. Affirmed.

William F. Herron, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. Appellant was charged by an indictment with a violation of section 288 of the Penal Code, to wit, a commission of a lewd and lascivious act upon the body of a female child. He appeals from the judgment entered on a verdict of guilty and from an order denying a new trial, urging as grounds for reversal that the evidence, aside from the appellant's extrajudicial statements, was insufficient to prove the corpus delicti, that certain rulings by the trial court were erroneous, and that its statements and those by the attorneys for the prosecution, made during the course of the trial, constituted prejudicial misconduct. The evidence, aside from appellant's extrajudicial confession, shows that the child was about 3 years of age, and appellant, who boarded with her parents, occupied a room in their dwelling. On the day the crime is alleged to have been committed, appellant was present in the room mentioned, and, as may fairly be inferred from the evidence, he claimed to be ill, and was occupying a bed therein. The parents were absent, and the child had been left in the care of her grandmother, who had come from her home to lend this assistance. The grandmother testified that during the day, the exact hour not appearing from the evidence, she heard the child crying in appellant's room, and that in reply to her question as to the cause he stated that the child was crying for a piece of chewing gum. It was further testified by her parents that during the evening of the following day the child was restless, unable to sleep, and complained of irritation in her private parts, which, on examination, showed an inflamed condition; that on the third day the child was taken to a physician, whereupon she was found to be infected with gonorrhœa. The grandmother was unable to state definitely whether the first occurrence described happened on Monday or Tuesday, further testifying that the first examination was made on the evening of the day during which the child visited appellant's room. Sufficient appears, however, from her testimony, with that of the parents, to support the conclusion that the visit was made on Monday, and the examinations on the following Tuesday and Wednesday, as stated by the parents. It was testified by the physician who made the examination that he found gonorrhœal germs to be present, and that the parts, which were inflamed, showed other symptoms of the disease, which he described, stating as his opinion that the disease was of recent origin. Other physicians testified as to the minimum period required for the development of the affliction after contact, one, Dr. Kruse, testifying that such period in the case of a child of tender years might be 24 hours, and the others stating the minimum to be 48 hours or more, depending upon physical conditions.

[1-4] With reference to the first point urged for a reversal, it may be said that the two elements of the corpus delicti are (1) certain facts forming its bases; and (2) the existence of criminal agency as the cause of them. People v. Vertrees, 169 Cal. 404, 146 P. 890. To justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense and to identify the defendant as the perpetrator; but, as held in People v. Jones, 123 Cal. 65, 55 P. 698, the evidence of the criminal act need not be of that conclusive character in order to justify the admission of an extrajudicial confession, and, although such confession cannot warrant a conviction unless corroborated by proof aliunde of the corpus delicti, yet full proof thereof independent of the confession is not required; it being sufficient that there are corroborating facts which, with the confession, show the existence of an offense of which the defendant is guilty. And such facts may be shown by circumstantial evidence (People v. Alviso, 55 Cal. 230; People v. Wilkins, 158 Cal. 530, 111 P. 612); it being sufficient that the evidence show prima facie a criminal agency (People v. Jones, supra; People v. Wagner, 29 Cal. App. 363, 155 P. 649; People v. Alba, 52 Cal. App. 603, 199 P. 894).

[5, 6] We think that the facts directly proved, with the inferences reasonably to be drawn therefrom, were sufficient to meet the requirements of the rule stated. That the child was in the room with appellant was shown, and that the latter was then in bed is a fair inference from the testimony. This, with the crying of the child, its physical condition found on the first examination, which might reasonably be said to have been due to contact more or less violent with appellant's person, and the condition shown by the second examination, together with the testimony that infection might have developed within the elapsed period, sufficiently corroborated appellant's statement that an offense had been committed of which he was guilty. This statement, which was voluntary, was made to the child's mother on the Wednesday following the day of the alleged commission of the offense. According to her testimony, which was not disputed, appellant stated, in substance, that at the time alleged he placed his private parts against those of the child, and that an emission occurred, further stating, "I done it, and I want to spend the last penny to cure your baby." Following this statement, the child was taken to a physician, who, after the examination, notified the police. Appellant, however, had in the meantime disappeared, but during the following month surrendered himself to the officers. We do not deem further discussion upon the point necessary, as we are of the opinion that the evidence, aside from appellant's confession, was sufficient to establish the corpus delicti. Complaint is made that the court restricted the cross-examination of Dr. Kruse on the question of the presence of meningococcus germs in vaginal discharges. The witness, having stated that such germs were not to her knowledge found therein, and that her statement was based on her experience and reading, was asked whether she had read any medical works stating that they were so found. While, as held in Fisher v. Southern Pacific, 89 Cal. 399, 26 P. 894, such cross-examination for the purpose of testing the competency of the witness as an expert is proper, here, as in Griffith v. Los Angeles Pacific Co., 14 Cal. App. 145, 111 P. 107, the witness had testified in effect that she had read nothing which was contrary to her conclusion, and the ruling was not therefore erroneous.

[7] Objections were sustained to questions asked the grandmother of the child as to the time when appellant arose on the day of the alleged commission of the offense, and whether its parents had then returned. The rulings of the court were proper, in view of the previous statement by the witness on cross-examination that she was unable to remember.

[8] The court, over objection by appellant and after rejection of offered testimony by the father of the child that appellant had confessed the crime to him—it being shown that the alleged confession was not voluntary—permitted the witness to testify that appellant on that occasion admitted that he was

suffering from gonorrhœa. The ruling of the court is assigned as error. This evidence was properly admitted. The fact stated did not of itself import guilt, and hence was not a confession. People v. Miller, 122 Cal. 84, 54 P. 523; People v. Knowlton, 122 Cal. 357, 55 P. 141; People v. Wilkins, 158 Cal. 530, 111 P. 612; People v. Fowler, 178 Cal. 657, 174 P. 892.

[9, 10] Appellant next complains of the rejection of his proposed instruction as to the proof of the corpus delicti. An instruction given by the court included the substance of that offered; but it is urged that the jury was erroneously told therein that they might consider the extrajudicial statements in determining whether the elements of the crime charged were proven beyond a reasonable doubt.

[11] While expressions in the cases cited by appellant tend to support his contention, it is held in People v. Selby, 198 Cal. 426, 245 P. 426, that upon prima facie proof of the corpus delicti the extrajudicial statements, admissions, or confessions of the accused may be admitted in evidence; and, having been so admitted, may with the other evidence be considered by the jury in its determination whether or not all the elements of the crime and the defendant's connection therewith have been established beyond a reasonable doubt. The instruction given correctly stated the rule thus established. Objections to questions asked on the cross-examination of the mother and father of the child as to facts which, if true, tended to show hostility toward appellant, and further questions as to the past history of both witnesses, were sustained, and these rulings are complained of. These questions were proper on cross-examination, and should have been allowed. We cannot say, however, that the act of the court in restricting the cross-examination injuriously affected the substantial rights of the defendant.

[12, 13] The same may be said of the claim that the district attorney was guilty of misconduct in stating to the jury that the child was a sufferer from an infection from which she would never recover, and that, if it were his child, the defendant would not be on trial for the offense. Nor is there any merit in the contention that the trial court was guilty of misconduct, or that its refusal to give defendant additional time to present affidavits in support of his motion for a new trial was an abuse of discretion. Other points do not require consideration.

In conclusion, it may be said that from a consideration of the entire case, including the evidence, we are of the opinion that the errors complained of have not resulted in a miscarriage of justice.

The judgment and order appealed from are affirmed.

KNIGHT, J. I concur.

CAMPBELL, Justice pro tem. I dissent. I am of the opinon that there is not sufficient evidence to establish the corpus delicti. The only evidence remaining, after eliminating not only the extrajudicial admissions and the confessions of the defendant, but also such evidence as tends to connect the defendant with the crime when established, is that the child cried in defendant's bedroom; that she complained of an inflammation, and that she was subsequently found to be suffering from a venereal disease; that none of those residing in the house, unless it be the defendant, were infected with such disease, and which disease all the experts who testified agree in the case of a female child is more usually contracted by accidental infection than by direct contact, as from bed linen, towels, soap, sponges and lavatory seats. This evidence at best but casts a suspicion upon the defendant, and proves mere opportunity. The proofs of mere suspicious circumstances and of opportunity to commit a crime are never sufficient to justify a conviction (People v. Robbins, 171 Cal. 466, 154 P. 317), and a fortiori to establish the existence of a crime.

In the majority opinion, People v. Jones, 123 Cal. 65, 55 P. 698, is relied upon as authority holding that the evidence is sufficient to establish the corpus delicti. It is true that in the Jones Case the court uses this language, quoted by Mr. Justice Clifford from Greenleaf on Evidence in U. S. v. Williams, 1 Cliff. 24, Fed. Cas. No. 16707:

> "Full proof of the body of the crime, the corpus delicti, independently of the confession, is not required, says Nelson, C. J., in People v. Badgley, 16 Wend. 59, by any of the cases; and in many of them slight corroborating facts were held sufficient."

If the court in the Jones Case intended to vary the rule which has had the sanction of the courts of this state from the beginning of judicial pronouncement on the question that the extrajudicial statements, admissions, and confessions of an accused are not admissible until the corpus delicti has been established, such holding has been brushed aside, and the time-established rule reaffirmed in People v. Vertrees, 169 Cal. 404, 146 P. 890, where the court holds that:

> "While slight proof of the corpus delicti has in many cases been properly held a sufficient basis for the admission of such confessions, it is nevertheless true that the confessions and admissions of the defendant cannot be used to establish any necessary element for the commission of the crime. * * * It has been held in this state that, although all of the elements of the crime charged must appear in the proof of the corpus delicti, it is not necessary that the evidence of the criminal act should be of the conclusive character required for conviction before the confession may be admitted in evidence. * * * But no authority has been cited which justifies *the use of the confession*

itself to prove one or more of the necessary elements in the commission of the crime that would be wholly lacking without such confession." (Italics mine.)

See, also, People v. Simonsen, 107 Cal. 346, 40 P. 440; People v. Tapia, 131 Cal. 651; 63 P. 1001; People v. Frank, 2 Cal. App. 285, 83 P. 578; People v. Frey, 165 Cal. 144, 131 P. 127.

It is evident that People v. Jones was not called to the attention of the court when it was considering the Vertrees Case. If it had been, the court would doubtless have disagreed with the language quoted that "full proof of the body of the crime, the corpus delicti, independently of the confession is not required," or would have declared it to be mere dictum, which it appears to be, as it was not necessary to a decision of the case, there being sufficient evidence to establish the corpus delicti independent of the confession, and in fact the court so stated:

> "In the case before us I think the evidence, though weak and unsatisfactory in particulars capable of more explicit statement, is sufficient to justify the admission of the confession."

The language of Mr. Justice Clifford, quoted in People v. Jones, is also quoted in People v. Selby, 198 Cal. 435, 245 P. 426. So also does the court in the Selby Case quote with approval from People v. Rowland, 12 Cal. App. 7, 106 P. 428:

> "It is of course, a well-established rule of law that the confession or extrajudicial admissions of a party accused of crime cannot be considered for the purpose of proving the corpus delicti, or, in other words, of proving the elements necessary to constitute the crime with which he is charged."

The question with which the court in the Selby Case was primarily concerned, when quoting the language of Mr. Justice Clifford to the effect that full proof of the body of the crime independently of the confession is not required, was concerning an instruction refused which was in effect that the jury could not consider the confession of the accused until the corpus delicti had been established to a moral certainty and beyond a reasonable doubt. It is clear that the language of Mr. Justice Clifford, quoted in the Selby Case from the Jones Case, was not intended by the court to establish a new rule in this state; otherwise the court would have expressly so stated and not cited with approval the Rowland Case, which is supported by the unanimous authority on the question in this state and which is in direct conflict therewith.

It is apparent that in the instant case the elements of the commission of the crime are utterly lacking without the admissions and confession of the defendant. These, under the rule stated in People v. Vertrees, supra, and which is supported by the other authorities cited, cannot be used to supply the defects of proof of any essential element of the crime. The infection from which the child was suffering was only one of the elements of the corpus delicti; it is like the fact of death in a homicide case, which, as is said in People v. Simonsen, supra, does not establish the corpus delicti, but only the corpus. The second essential element—that is, the criminal agency from which the infection resulted—was supplied wholly by the statements of the defendant, testified to by the parents of the child.

Shorn of the statements, admissions, and confession of the accused and his disappearance and flight—which can avail no more than his admissions to establish the corpus delicti, being but a circumstance tending to connect the defendant with the commission of the crime and to authorize the inference of guilt, the corpus delicti being proven (State v. Poe, 123 Iowa, 118, 98 N. W. 587, 101 Am. St. Rep. 307; 8 R. C. L. 192)—there remains only suspicion and opportunity. If opportunity be held to be sufficient to establish the fact that a crime has been committed, but few would be immune from prosecution and the indignity of being forced to make a defense in a criminal court.

It is my opinion that the case should be reversed for lack of proof of the corpus delicti.

81 Cal. App. 579

BURT v. FORREST. (Civ. 5552.)★

(District Court of Appeal, First District, Division 2, California. March 4, 1927. Hearing Denied by Supreme Court May 2, 1927.)

1. Chattel mortgages 🔑282—Foreclosure proceedings held not invalidated by failure to find value of property (Code Civ. Proc. § 726).

In action for accounting and foreclosure, failure to find as to value of property *held* not error, since such finding would not obviate necessity of foreclosure and sale to satisfy judgment, in view of Code Civ. Proc. § 726, and would not affect bids.

2. Pledges 🔑57—Pledgee may foreclose right of redemption by judicial sale under direction of competent court (Civ. Code, § 3011).

Instead of selling property pledged, pledgee may foreclose right of redemption by judicial sale under direction of competent court, in view of Civ. Code, § 3011.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by J. S. Burt against George M. Forrest, in which defendant filed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Franklin P. Bull, of San Francisco, for appellant.

★Hearing denied by Supreme Court.

Olin L. Berry, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to obtain an accounting and a judgment in foreclosure on the amount found to be due. The defendant appeared and answered and also filed a cross-complaint. The plaintiff answered the cross-complaint, and a trial was had before the trial court sitting without a jury. The trial court made findings of fact in favor of the plaintiff and caused a judgment to be entered in accordance therewith. The defendant has appealed from the judgment under section 953a of the Code of Civil Procedure.

Under a different set of pleadings the litigation was before this court in the case entitled Forrest v. Burt, 67 Cal. App. 564, 227 P. 949. The facts are fully set forth in the case as there reported.

[1] In their pleadings both parties alleged that the equitable title to the Quality Electric Motor Company rested in the defendant. The trial court so found. The appellant does not attack that finding. He does not contend that plaintiff's complaint was insufficient or that the findings failed to cover all of the allegations of the plaintiff's complaint. The defendant does not contend that he either pleaded or proved a cause of action in conversion, nor as for a breach of trust. However, standing on the allegations of his cross-complaint, he complains because the trial court made no finding on the appellant's allegation "that the value of the assets, property, and business of said Quality Electric Motor Company is now in excess of the sum of $36,000." In this connection the appellant contends that the trial court should have found the value thereof, that the trial court should have ascertained the amount of the advances which had been made for the account of the appellant, and that it should then have deducted such advances from the value of the assets and have ordered a lien in favor of the appellant, on appellant's property, for the balance $8,000 more or less and allow the plaintiff to keep the property as his own instead of merely holding it as security. In that connection the appellant argues that, as he is impecunious, such procedure would have operated to protect him from possible depressed prices arising out of a foreclosure sale. In his briefs the appellant cites no authorities supporting the procedure contended for. We know of none. If the proof showed that the title rested in the appellant, the trial court was bound to so find. In connection with that finding, another finding, regarding the value of the assets, would have been immaterial. The existence or nonexistence of a finding as to the value of the assets would not, standing alone, obviate the necessity of entering a decree of foreclosure and ordering a sale of the assets at a public sale for the purpose of satisfying the judgment. Code Civ. Proc. § 726. Moreover, there can be no possible injury to either party in failing to make a finding as to the value of property which is about to be sold at public sale. Such a finding would neither increase nor decrease the bids that would thereafter be made.

In short, the appellant made a contract by which he tied up his own properties to secure advances made for his benefit. Having failed to redeem them, he complains of the hardships which will be the natural results of his own acts, and seeks to pass the burdens to the person who was his benefactor. Because the trial court refused to entertain such contentions, the appellant alleges error. The point is without merit.

[2] Appellant's opening brief was filed March 26, 1925. Respondent's brief was filed April 8, 1925. Appellant's reply was filed July 22, 1925. Thereafter, on August 18, 1925, without leave of court, appellant filed a document, "Supplemental Brief," in which, for the first time, he made the contention that the property was held in pledge, that, when a pledge is due, the pledgee may sell the property without foreclosure, etc. Conceding that the point is good, it is equally clear that the procedure adopted by the respondent is supported by authority (Civ. Code, § 3011; Farmers' & Merchants' Bank v. Copsey, 134 Cal. 287, 289, 66 P. 324), and that the procedure followed by the respondent has resulted in no prejudicial error to the rights of the appellant

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

81 Cal. App. 558

PEOPLE v. PEDEL. (Cr. 1384.)

(District Court of Appeal, First District, Division 1, California. March 3, 1927.)

1. Robbery 🔑24(1)—Evidence held to support conviction for robbery of second degree.

Evidence *held* sufficient to support conviction for robbery of second degree on theory that defendant knocked prosecuting witness down and took his money and wallet, though no testimony showed that defendant actually took them.

2. Robbery 🔑27(6)—In prosecution for robbery, evidence held not to warrant instruction as to sudden snatching of property.

In prosecution for robbery, evidence *held* not to warrant instruction as to sudden snatching of property, where defendant knocked prosecuting witness down and took money and wallet from pocket.

3. Robbery 🔑27(1)—Requested instruction that sudden snatching of property from owner's hand, without violence and without putting him in fear, is not robbery, and that owner's fright on account of theft is immaterial, held erroneous.

Requested instruction that sudden snatching of property from hand of owner, without violence and without putting owner in fear, is not robbery, and fact that owner is frightened on account of theft is immaterial, if theft is not in consequence of fright, *held* erroneous.

4. Larceny 🔑19—Requested instruction that sudden intentional snatching of property from owner constituted grand larceny held erroneous.

In prosecution for robbery, requested instruction that, if there was no force or violence but sudden snatching of property from complaining witness, which was done intentionally, defendant was guilty of grand larceny *held* erroneous.

5. Robbery 🔑1—Premeditation is not element of robbery.

Deliberation or premeditation is not element of crime of robbery.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Pedro Pedel was convicted of robbery of the second degree, and he appeals. Affirmed.

James Wesolo, of Oakland, for appellant.
U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

PARKER, Justice pro tem. Defendant, Pedro Pedel, was charged by information with the crime of robbery. Upon trial before a jury he was convicted and the degree found to be robbery of the second degree. Thereafter defendant moved for a new trial and the motion was denied, whereupon the court pronounced its judgment.

The appeal rests upon three points, viz., first, that the evidence was insufficient to warrant the verdict of the jury; second, that the court erred in refusing to advise the jury to bring in a verdict of not guilty; third, error in the refusal of the trial court to give certain instructions requested by defendant.

[1] The evidence is wholly that presented by the prosecution, and in itself not inherently weak or improbable. The prosecuting witness was a Japanese, and he testified that on October 27, 1926, he was proceeding unaccompanied along one of the public streets of Emeryville, in Alameda county, at or about the hour of 9:30 p. m. There was no one else on the street at that time in the immediate locality as far as could be observed. Suddenly and without warning, the prosecuting witness testifies, he was struck from behind, and upon turning was confronted by defendant, whom he identified at the trial and before trial. Upon turning he was again struck, at which time he shouted for help. Receiving a third blow he collapsed to the sidewalk, practically unconscious. Prior to the assault the prosecuting witness had upon his person, in an inside pocket of his vest, a wallet containing a $50 bill and also a check book. When he regained consciousness after the assault, both the wallet, containing the money, and the check book were gone. In their place and stead he had numerous cuts and bruises on and about the head and face. He testified, further, that he had given no one permission to take any of his effects and that the same were taken against his consent.

A police officer, witness for the prosecution, testified that his residence was just across the street from the scene of the assault. About 9:30 or 10 o'clock p. m. of the night in question the officer was coming down the steps of his home, when he heard some one shouting and hollering. Upon looking he observed two people across the street who were apparently fighting or scuffling. He immediately started to the scene of the conflict, and, as he approached, one of the parties to the affray ran and the officer gave pursuit. The fugitive had gone approximately 200 feet when, coming to a fence, he attempted to jump or scramble over it. By this time the officer was upon him and apprehended him in the act of scaling the fence. The party so captured was the defendant. The officer returned with him to the place of the assault, where the prosecuting witness had remained, and, after a brief questioning, escorted both defendant and complainant to the city hall, a distance of 1½ blocks. The complaining witness appeared battered and bloodstained and stated his loss of the wallet, money, and check book. After locking up the defendant the officer returned to search for the missing property. Just on the other side of the fence, at the spot where defendant was stopped, the officer found a wallet containing a $50 bill and a check book. The wallet and check book were presently identified by complainant as being his property and on his person immediately prior to the assault.

On the day following the events narrated the defendant was confronted by the complaining witness, and at that time was identified by the latter and accused of the robbery. He made no denial or explanatory statement; in fact, he remained mute.

Incidental to the facts presented by the people it was elicited by counsel for defendant that on the night of the occurrence the complaining witness up to the hour of 9 p. m. was engaged in gambling at a Chinese gambling house, and that as spectators and patrons there were present quite a few Filipinos, watching the games if not participating in them. The defendant is a Filipino, and his counsel brought out the fact that he is of an appearance and stature similar to that of persons who were at the gambling house.

It is on this state of uncontradicted facts that appellant predicates his contention that the evidence is insufficient to justify the verdict; likewise, on the same facts, does he urge the error of the trial court in refusing to advise the jury to return a verdict of acquittal.

The argument of the appellant is that there is no testimony that the defendant actually took the money and wallet, and that no witness is presented who saw defendant in the act of making the physical transfer of the property alleged to have been taken. Suffice it to say that it is an elementary and fundamental principle of criminal jurisprudence that the law does not require demonstration. To insist upon the quantum of proof demanded by appellant would be ignoring this principle entirely and setting up a standard of proof unreasonable and dangerous. The evidence was sufficient to sustain the verdict, and the court properly refused to advise the jury to acquit.

In reading the instructions of the court it is readily apparent that, with the exception of three instructions hereinafter noted, everything asked by defendant and refused was sufficiently covered.

[2-5] The appellant requested, and the court refused to give in any form, these instructions, viz.:

> "You are hereby instructed that a sudden snatching of property from the hand of the owner without violence to him and without putting him in fear is not robbery, and the fact that the owner is frightened on account of the theft is immaterial, if the theft is not in consequence of the fright.
>
> "If you believe that there was no force or violence but a sudden snatching of property from complaining witness, and this was done intentionally, then you may find defendant guilty of grand larceny.
>
> "You are hereby instructed that flight of the defendant does not intend to prove deliberation or premeditation."

No error appears in the refusal to give these instructions or either of them. There are no facts in evidence warranting the giving of the first two, and, as a matter of law, neither one in the abstract correctly sets forth the law. As to the last instruction, it is clear that deliberation or premeditation is not an element of the crime of robbery.

There are other specifications of error in the admission and rejection of testimony, but all are based upon appellant's theory of the insufficiency of the evidence.

The judgment is affirmed, as is the order denying appellant's motion for a new trial.

We concur: TYLER, P. J.; CASHIN, J.

CITTI v. BAVA. (Civ. 5548.)★

(District Court of Appeal, First District, Division 2, California. March 1, 1927. Hearing Granted by Supreme Court April 28, 1927.)

1. Appeal and error 🔑1050(1)—Evidence 🔑213(1)—Evidence of defendant's attempted settlement with owner of colliding car held inadmissible and prejudicial, in passenger's action for injuries.

In action for injuries by passenger of automobile against owner and operator, testimony relative to settlement with owner of car with which defendant's car collided, made through alleged representatives of defendant, *held* clearly inadmissible and prejudicial to defendant's rights.

2. Evidence 🔑213(1)—Offer of compromise not accepted cannot be given in evidence (Code Civ. Proc. §§ 895, 2078).

Under Code Civ. Proc. § 895, defendant's offer of compromise to plaintiff, not accepted by plaintiff, cannot be given in evidence against defendant, and, under section 2078, such offer of compromise, if made, does not constitute admission that anything is due plaintiff.

3. Evidence 🔑213(4)—Admission of distinct fact during negotiations is admissible against party making it, although forming part of offer of compromise.

If clear admission of distinct fact is made during negotiations for settlement, such fact is admissible against party making it, although forming part of offer to compromise, but other admissions in negotiations for compromise are regarded as hypothetical admissions and are not admissible in evidence.

4. Negligence 🔑22½—Negligence of automobile driver in colliding with another car does not imply negligence toward passenger in his car.

Negligence of automobile operator in colliding with another car does not necessarily imply negligence toward passenger who was a guest, since legal responsibility of driver was entirely different toward him and other automobile lawfully traveling on public highway.

★Superseded by opinion of Supreme Court, 266 P. 954.

5. Trial 🔑127—Offering evidence in action for damages that defendant is indemnified against loss constitutes prejudicial misconduct.

During trial of action for damages, evidence that defendant has been indemnified against loss by surety company is not only inadmissible, but its offer on part of plaintiff is prejudicial misconduct.

6. Trial 🔑37—Erroneous admission by attorney that evidence of defendant's settlement with owner of colliding automobile was admissible if connected with defendant held not to render it competent.

In action for personal injuries in automobile collision by passenger against owner and operator of automobile, implied admissions by one of defendant's attorneys during objections to testimony, relative to settlement made by defendant with owner of colliding automobile, to effect that settlement would be admissible if it was connected with defendant *held* not to render such testimony competent or admissible, in view of proper objections and assignments of misconduct made by other attorney.

7. Witnesses 🔑286(1)—Nonresponsive statement by hostile witness on cross-examination does not justify redirect examination relative thereto.

Voluntary statement by hostile witness on cross-examination, which was not responsive to question, furnishes no justification for redirect examination relative to such matter.

8. Appeal and error 🔑1053(4)—Instruction to disregard testimony of settlement between defendant and owner of colliding automobile held too general to cure harmful effect.

Instruction requiring jury to disregard testimony in reference to settlement between defendant and owner of colliding automobile, if sufficient to have neutralized harmful effect of such testimony, nevertheless *held* too general, in that it did not include settlement between owner and insurance company, which was settlement contended for when bringing out testimony.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by F. Citti against Pietro Bava. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, and H. A. Gabriel, of San Jose, for appellant.

R. V. Bressani and D. T. Jenkins, both of San Jose, for respondent.

PRESTON, Presiding Justice pro tem. This is an appeal by the defendant, Pietro Bava, from a judgment entered against him upon a verdict of a jury in the sum of $6,000.

This action followed an automobile collision on the public highway leading from San Jose to San Francisco, and at a point about 10 miles north of the city of San Jose.

The defendant, Pietro Bava, owned and operated a six-passenger Haynes automobile. About 5:50 p. m. on September 26, 1922, he left San Jose, driving his automobile, and had with him in the car as his guests the plaintiff, F. Citti, R. Dei, and two other men. Both the plaintiff and Dei, also one Bonnetto, were in the rear seat of the automobile, with the plaintiff in the middle. They were all going from San Jose to San Francisco to attend a wrestling match to be held that night at Dreamland Rink at 8:30 p. m., between Strangler Lewis and one Gardini. When they reached the intersection of the road upon which they were traveling and a crossroad known as Fremont avenue, the Haynes car collided with a Ford car going easterly on Fremont avenue, driven by Louis Aftergut. All of the occupants of the Haynes car were more or less injured. The plaintiff suffered a fracture of the skull, which resulted in a partial paralysis, and cuts and bruises. Dei also suffered a ruptured intestine and received cuts and bruises. Both the plaintiff and Dei brought an action for damages against the defendant, Bava, and both cases were tried together and resulted in a verdict in favor of Dei for $4,000, and the plaintiff, Citti, for $6,000 as stated.

[1] R. Dei testified in part as follows:

> "Q. Did you tell Mr. Bava anything when you saw how fast he was going? A. I told him five or six or seven, or probably eight times, 'Bava, stop, you will kill us all.' Q. What did Bava say? A. He answered that 'I will bring you in an hour to San Francisco.' Q. At the time that you were approaching this crossroad, how many miles an hour was the automobile in which you were riding traveling? A. He was going from 55 to 60 miles. Q. Did anybody else say anything to him about how fast he was driving? A. Yes; Citti told him two or three times to stop, that he was going too fast and he wanted to get out, and I also repeated I wanted to get off, he would kill us all. Q. And what did Bava reply? A. This was the second time, he answered back that 'in three-quarters of an hour I will bring you to San Francisco,' and then he replied no more. Q. Was there any time that Mr. Bava was driving his car 20 or 25 miles an hour, from the time he left 594 W. San Carlos street up to the time of this accident? A. From the starting point of my residence where he picked me up, around to the hospital he went around 35 to 37 miles; from there out to Cupertino he went around 40, until he got to the corner and made the turn and then he went faster. Q. How far from the scene of the accident was the last time that you saw it (referring to speedometer)? A. I saw the speedometer the last time after he made the turn at Cupertino where the oil station was. He went around the corner 20 miles an hour or thereabouts, and immediately after he made the turn I saw the speedometer at 50 miles an hour. Q. And how far was that from the scene of the accident, half a mile, or a mile, or how far? A. It was about 3 miles. * * * Q. What time did this accident happen? A. It must have been around

5 or 6 or 7 minutes after 6 o'clock, along that time. Q. What is the distance from San Jose out to the place of this accident? A. I don't know exactly the distance, * * * maybe 9 or 8 miles from North Market street to the place of the accident."

The plaintiff, F. Citti, testified in part as follows:

"Q. After you had left Cupertino how fast were you traveling? A. He was going from 40 to 45 and 60 miles. Q. Did anybody, did you or anybody else say anything to Bava about the rate of speed that you were traveling? A. I told Bava myself three or four times to slow down, go slow, and this cook, called Dei, told him five or six times to go slow and slow. Q. And where, at what places, did you tell him this? A. Been telling him to go slow after he left the O'Connor Sanitarium when he started to go 35 and 45. Q. Did Bava make any reply? A. Bava didn't reply until after he made the turn at Cupertino, telling Dei or cook that 'in three-quarters of an hour to an hour I will take you to San Francisco.'"

The witness Forestiae, who was one of the parties in the Haynes automobile, riding in the front seat, on the right-hand side of Mr. Bava, the driver, testified in part as follows:

"Q. Now, from the time that Mr. Citti got in the car up to the time of this accident, that Mr. Dei got in the car, up to the time of this accident, did you ever hear either Mr. Citti or Mr. Dei say to Bava anything on that trip about the speed that Mr. Bava was driving the car? A. No; never heard them say anything. Q. Mr. Citti or Mr. Dei did they ever ask to get out of the car? A. No. Q. Did they ever ask Mr. Bava to stop? A. No. Q. Did they ever ask him to slow down? A. No. Q. Did Mr. Citti or Mr. Dei make any complaint to Mr. Bava about the way he was driving his car? A. No; they never complained. Q. Did you ever hear Citti or Dei say to Mr. Bava to slow down or he would kill them? A. No. Q. Did Citti or Dei make any such a statement to Mr. Bava? A. No, sir. Q. And what rate of speed was he going from the time that he made the turn in the road at Cupertino up before this accident? A. Was driving at the rate of 25, between 25 and 30 miles an hour. Q. Was there anything in the way that Bava drove his car to cause you alarm? A. No. Q. Now, he drove it carefully? A. Sure. Q. And at a slow rate of speed? A. Sure. Q. You were not alarmed in the least at the way Mr. Bava was driving his car, and he appeared to be driving it carefully and in a lawful rate of speed to the time of the accident? A. If there had been any danger I would have got out of the car. Q. And you didn't get out because there was not any? A. No, sir; I did not get out of the car. Q. There was no reason for anybody getting out? A. No. Q. No reason for anybody to complain about the way Bava was driving the car? A. No, sir. Q. Who reached the intersection first, the Haynes car or the Ford car? A. Mr. Bava's machine arrived at the crossing first."

Mike Bonnetto, another occupant of the automobile, testified in part as follows:

"Q. From the time that you got in the Haynes car up to the time and place of this accident, did you hear Mr. Citti or Mr. Dei say anything to Mr. Bava about the rate of speed that he was driving the Haynes car? A. No, sir. Q. Did you ever hear Dei or Citti say to Pete Bava to go slow? A. No. Q. Did you ever hear Citti or Dei tell Bava to stop and let them out? A. No. Q. Did you ever hear Dei or Citti say to Pete Bava that he would kill them? A. No. Q. Did you ever see Citti or Dei stoop and lean over between Bava and Guy Forestiae and look at the speedometer? A. No. Q. At the time of this accident and before the accident, did you have good hearing? A. Yes, sir. Q. And did you have good eyesight? A. Yes. Q. How fast did you drive from Dei's house to the Sanitarium? A. 20 miles. Q. And how fast from Cupertino to the place of the accident? A. About 25. Q. Which car reached the intersection first, the Ford or the Haynes car? A. The Haynes. Q. Do you know whether the Haynes ran into the Ford or the Ford ran into the Haynes? A. The Ford ran into the Haynes machine."

The defendant, Bava, also testified in part as follows:

"Q. And what was your speed as you went from O'Connor Sanitarium out to Cupertino and before you reached this Fremont avenue before this accident? A. About 25, 30 miles. Q. Well, as you were going across the intersection, how fast were you going? A. About 15 miles. Q. And did you observe the rate of speed that the Ford car was going? A. Yes; because I went outside of the road. I saw the Ford coming fast, and went outside to pass, but he lost his control, come hit me in the middle of my car. Q. Mr. Bava, from the time that Mr. Dei and Mr. Citti got in your Haynes car up to the time and place of this accident, did you even hear Mr. Dei say to you to go slower? A. No. Q. Did you hear him say stop or you would kill us? A. No. Q. Did you ever hear Dei or Citti speak in a loud voice asking you to slow down? A. No; never did. Q. Did Dei ever say to you, 'Bava, you will kill us all if you do go so fast'? A. No. Q. Did anybody in your Haynes car from the time you took Citti into the car up to the time and place of this accident, ever say anything to you about the speed of your car? A. No. Q. Did Citti ever say to you to go slower at any time? A. No. Q. Did Citti or Dei ever ask you or demand of you to let them off or let them out? A. No."

Mr. Louis Aftergut, the driver of the Ford car, testified for the plaintiff, and his testimony was in part as follows:

"A. I was traveling toward San Jose on the Los Altos highway. * * * Q. Is it called the Fremont road, if you remember? A. I don't know the name of it. Los Altos road I know it by. Q. In what kind of a conveyance were you traveling? A. Ford. Q. Ford automobile, and you were proceeding from Los Altos toward San Jose? A. Toward Santa Clara. Q. To Santa Clara, in an easterly direction, that is? A. Well, whatever way. I don't know what direction it is. Q. At that time did you have any accident? A. Yes. Q. What was the accident? A. Another machine ran into me. Q. Whose machine ran into you? A. I can't pronounce that, Bava. Q. Pietro Bava's machine, and about what time was it that his machine ran into you? A. Oh, about 6 o'clock. Q. Will you please tell this jury just how it happened? A. Well, I was traveling toward Santa Clara, and Bava was coming from Cupertino toward Sunnyvale and met on the crossing there. Q. How fast was Bava going? A. In my estimation he was doing between 45 and 50. Q. And how fast were you traveling at the time? A. About 20. Q. And what happened to his machine, did it hit yours, or did his run into yours? A. He hit me. Q. What part of the machine did he hit? A. Somewhere near the middle on the right side. Q. What did he do to your machine? A. Wrecked it in general. Q. Now, Mr. Aftergut, when you saw Bava's machine approaching, did you make any attempt to avoid the accident? A. I did. Q. What attempt did you make? A. Turned with him. Q. By that you mean you turned in the direction of Sunnyvale? A. Yes. Q. What did he do? A. I don't know what he done. Q. After his machine hit yours what happened to it, his machine? A. I didn't see it until I got out of mine; then it was stopped. Q. And where was it stopped? A. Down the highway toward Sunnyvale. Q. How far down? A. Oh, about 150 feet or so. Q. And what was the condition of his automobile? A. Oh, was not much left of it from what I could see, * * * the car was setting on the highway straight up."

Other testimony was offered and received in evidence by both the defendant and plaintiff, but the foregoing is sufficient to show the conflicting character of the testimony.

The appellant contends that the court erred in admitting evidence offered on behalf of plaintiff concerning a settlement made with Louis Aftergut, the owner and driver of the Ford automobile involved in the collision. As has already been stated, Mr. Aftergut was called as a witness for the plaintiff, and, in the course of his direct examination by Mr. Jenkins, one of the attorneys for plaintiff, the following proceedings were had:

"Q. Did Mr. Bava ever make any claim to you that it was your fault? A. No.

"By Mr. Reardon (One of the Attorneys for Defendant): Object to that as incompetent, irrelevant, immaterial.

"By the Court: He has answered it.

"Q. Did Mr. Bava ever settle with you for your damages?

"By Mr. Reardon: We object to that as incompetent, irrelevant, immaterial.

"By Mr. Gabriel (also Associate Counsel for Defendant): Unless it is shown Mr. Bava himself did it, if you can show that.

"Q. Did anybody settle with you for the damages; that can be answered 'Yes' or 'No,' and I will find out who.

"By Mr. Reardon: Object to that as incompetent, irrelevant, and immaterial.

"By Mr. Gabriel: We are not bound by anybody's actions and unless they can show that Mr. Bava—

"By the Court: I presume that would be so, Mr. Jenkins.

"By Mr. Jenkins: Well, first of all, if he answers 'No,' that ends it; if he answers 'Yes,' I have to connect it up with Mr. Bava if I can. I am entitled to find out.

"By Mr. Gabriel: If you will promise to connect Mr. Bava.

"By Mr. Jenkins: I will promise to do my best.

"By Mr. Gabriel: That is different.

"By the Court: We will overrule the objection. Answer that question whether or not he has been settled with by anybody. A. What is the question?

"Q. Have you been settled with by anybody for your damages? A. I have.

"Q. And who settled with you?

"By Mr. Reardon: Same objection, your honor.

"By Mr. Gabriel: We object to that unless it was Mr. Bava.

"By Mr. Jenkins: Unless it will be subject to be stricken out unless we connect it to Bava.

"By Mr. Gabriel: I don't think counsel ought to put something in.

"By Mr. Jenkins: I proposed to put him on the stand and ask if he is not representing Bava.

"By Mr. Gabriel: I object, incompetent, irrelevant, and immaterial, any transactions this man may have had with anybody else is no concern of this action of Citti and Dei against Bava.

"By Mr. Jenkins: I propose to show Bava's agent or a man pretended to act for him settled.

"By Mr. Gabriel: Well, if you find that out, if you can connect that up you have a right to. I don't think it fair to give to the jury unless you can.

"By the Court: You may ask the question. A. Olds & Stoller Interexchange.

"By Mr. Gabriel: What is that? A. Olds & Stoller Interexchange.

"By Mr. Jenkins: Olds & Stoller Interexchange? A. Something like that.

"By Mr. Reardon: Same objection.

"Q. Was it this man sitting here?

"By Mr. Reardon: Same objection, your honor. I ask to have all of this line of questioning on behalf of Mr. Jenkins assigned as misconduct and used principally, solely, and only for the purpose of trying to prejudice this jury against Pietro Bava, the defendant in this case, all these questions.

"By the Court: Well—

"Q. Was this settlement of Olds & Stoller by reason of any policy you held with Olds & Stoller?

"By Mr. Reardon: Same objection, assign it as misconduct.

"By the Court: Objection overruled. A. What is the question?

"Q. Was this settlement made with Olds & Stoller by reason of any policy you had with Olds & Stoller?

"By Mr. Reardon: Object and ask to have it assigned as misconduct.

"By the Court: Objection overruled; assignment denied.

"Q. Did you have a policy of Olds & Stoller on—a policy of insurance with which they settled with you? A. No.

"Q. It was not your policy? A. No.

"Q. Who was the man that settled with you?

"Mr. Reardon: Same objection.

"Q. Do you know?

"By the Court: I cannot see the objection is good at this time.

"Q. Who was the man that negotiated the settlement with you?

"By Mr. Reardon: Same objection, assign the same as misconduct, used for prejudicial purposes.

"By the Court: Objection overruled; assignment denied.

"Q. Mr. Curtaz here? A. Yes.

"Q. The gentleman who says he is an attorney in Mr. Abbott's office, one of the attorneys for the defendant here? A. I don't know whose office.

"By Mr. Reardon: This is leading and suggestive, coming ex parte from Mr. Jenkins himself.

"Q. Have you—did you give Mr. Curtaz the name of any other witnesses who were there?

"By Mr. Reardon: Same objection as incompetent, irrelevant, immaterial, not unless made in the presence of the defendant.

"By the Court: I think the objection should be overruled. A. Why, I don't think I did, but I don't remember. If I did, I don't remember.

"Q. You don't remember whether you did or not? A. I don't think I did, but I am not positive."

The plaintiff then produced as a witness Benjamin F. Curtaz, and in the course of his examination the following proceedings were had:

"Q. Are you the Mr. Curtaz who made the settlement with Mr. Aftergut? A. I am.

"By Mr. Reardon: Just a moment. I object to that as incompetent, irrelevant, immaterial, and not an issue in this case, if your honor please.

"By the Court: Objection overruled.

"By Mr. Reardon: I would like to have the objection go before the answer. Mr. Curtaz answered it a little quick.

"By the Court: Very well.

"Q. Who were you acting for at that time?

"By Mr. Reardon: Same objection.

"Q. You were in court at the last trial when Mr. Aftergut testified that it was Bava that settled with him, weren't you? A. I was. Q. And you didn't contradict that statement at that time?

"By Mr. Reardon: I object to that as argumentative and incompetent and immaterial as to anything that transpired at the last trial, if your honor please, in reference to Mr. Aftergut or any dealings that Mr. Aftergut had.

"By the Court: Well, the objection is not good. A. That was not his testimony.

"Q. What was his testimony, you have it, * * * please tell me what his testimony was, what was it?

"By Mr. Reardon: I submit the testimony is the best evidence, if your honor please. I think this is all argumentative, incompetent, irrelevant, and immaterial. This is an action brought by Citti and Dei against Pietro Bava, and any issues or dealings with Mr. Aftergut is not an issue in this case. Mr. Aftergut is not a defendant or plaintiff; they don't sue him in this case; he is not made a party to this action.

"By the Court: Objection overruled.

"Q. What did he testify to then? A. You have the answer there. Q. Do you know what he testified to?

"Mr. Reardon: Object as not the best evidence. A. I do. * * * Read the record I think is the best way to do.

"Mr. Jenkins (reading): 'Q. Have you been reimbursed by the defendant for your damages? A. I have.' Reading from page 7, you heard this witness testify to this: 'Have you been reimbursed by the defendant for your damages? A. I have.'

"By Mr. Reardon: Objected to as incompetent, irrelevant, immaterial, ask to have it assigned as misconduct.

"By the Court: The objection is overruled.

"By Mr. Reardon: If it can be understood I object to all this line of testimony as being utterly incompetent, irrelevant, immaterial as to any dealings or transactions that Mr. Aftergut may have had. I won't make the objection so often, and is used for prejudicial purposes and misconduct.

"By the Court: It may be so understood.

"Q. You heard Mr. Aftergut testify in response to my question, 'Have you been reimbursed by the defendant for his damages?' Answer: 'I have.' A. I heard that and what followed. Q. You heard that, and you did not contradict it, did you? A. No; what follows contradicts that, in my opinion. Q. Did Pietro Bava discuss the terms with you? A. I don't remember. Q. (Reading): 'Did this gentleman here, Mr. Curtaz, make the settlement with you? A. He did. Q. Did you make a statement to these gentlemen of the facts of the accident? A. I don't remember whether I did or not.' Q. It was you who made the settlement, was it not? A. It was. Q. And at that time didn't volunteer that Bava had not made any settlement with you? A. You didn't ask me. Q. You didn't at that time testify or infer from anybody that the settlement was not made with Bava, did you? A. No; I didn't. You didn't put me on the stand. Q. And you let the jury believe at that time that Bava had made the settlement?

"By Mr. Reardon: Same objection, assign it as misconduct.

"By the Court: Same ruling. A. No."

During the cross-examination of this same witness, the following proceedings occurred:

"By Mr. Gabriel: Now, if the court please, we move to strike out all the testimony with reference to any settlement with Aftergut on the ground it has not been connected up with Bava.

"By Mr. Jenkins: I think that is right, your honor.

"By the Court: Let the motion be granted.

"By Mr. Gabriel: Ask the jury be instructed to disregard all testimony in reference to any settlement made with Aftergut in this action.

"By Mr. Reardon: We also want the record to show, if your honor please, that—

"By the Court: Let's get at one thing at a time. Ladies and gentlemen, the court has granted the motion on the part of the defendant to strike out all testimony with reference to a settlement between Mr. Bava and Mr. Aftergut who was a witness here yesterday and who was involved in this collision, and the court instructs you to disregard any testimony as to any such settlement."

During the redirect examination of R. Dei, a witness for plaintiff and also a plaintiff himself, the following proceedings were had:

"Q. What insurance man was it with her (referring to wife of defendant)?

"By Mr. Reardon: I object to that, incompetent, irrelevant, immaterial, and I assign counsel asking such a question as misconduct.

"By the Court: What do you say about it?

"Mr. Jenkins: I am entitled to know who was with her.

"By Mr. Reardon: I ask that that question be stricken out, incompetent, irrelevant, immaterial, and assign it as misconduct, asked for the purpose of trying to prejudice this jury against this defendant, Pietro Bava.

"By the Court: Objection overruled.

"Q. Who was the man that was with her, if you know? A. That man that is writing there (indicating). Q. Mr. Curtaz? A. I don't know his name.

"By Mr. Reardon: I ask that this be assigned as misconduct on the part of counsel. It is done for the purpose of prejudicing the jury against the defendant, and that is all he is using it for.

"Q. Did they have a paper for you to sign at that time? A. This man came near the bed there, and Rosie came alongside of the bed also, with a paper to put in my hand, and the nurse informed them not to talk to me long because I couldn't stand to be talked to. Q. By 'this man' who do you mean? A. The man with the glasses on his eyes (indicating Mr. Curtaz).

"By Mr. Reardon: We ask that the answer be stricken out as incompetent, irrelevant, and immaterial; not responsive to the question.

"By the Court: I think we will let it stand."

All this testimony was clearly inadmissible and highly prejudicial to the rights of the defendant.

[2] In the first place, any offer of compromise from the defendant himself to Citti, the plaintiff, which was not accepted by Citti, could not be given in evidence against the defendant (section 895, Code Civ. Proc.) and such an offer of compromise, if made, would not be an admission that anything is due Citti (section 2078, Code Civ. Proc.).

[3] With reference to admissions made in negotiations for a compromise between the litigants themselves, we think the correct rule is this: If a clear admission of a distinct fact is made in the course of negotiations for a settlement, such fact is admissible in evidence against the party making it, even though it forms a part of an offer to compromise, but all other admissions in negotiations for a compromise are regarded as hypothetical admissions, from which it is not proper to draw any inference of liability, and are therefor not to be received in evidence. Smith v. Whittier, 95 Cal. 279, 30 P. 529; Scott v. Sciaroni, 66 Cal. App. 577, 226 P. 827; Dunlap v. Montana Tonopah Mining Co. (C. C.) 192 F. 714; Wigmore on Evidence, vol. 2, § 1061; Truman v. Sutter-Butte Canal Co. (Cal. App.) 244 P. 923.

The plaintiff in this case, however, did not seek to show by this testimony that the defendant had in fact made any admissions of negligence, or had made any statement from which negligence might be inferred, to plaintiff or any one else, but, on the other hand, sought to show that a settlement had been made with Aftergut by Bava, or the insurance company, for any damages that Aftergut claimed.

If it be a fact that the defendant, or the insurance company, settled with Aftergut, and paid him a sum of money, this fact should certainly not prejudice the rights of the defendant in the present action, and could be no evidence that Aftergut's demand was well founded, or that the defendant was guilty of negligence in the case at bar.

It is very often a wise thing, however unfounded a complaint may be, for a person to pay a sum of money and buy his "peace" and thereby rid himself of the annoyance and trouble incident to litigation. Peace to some people is so desired that they seek it, even at the sacrifice of their legal rights, and in such a case the purchase of peace is not to be taken that the purchaser was at fault, but merely that he is willing to sacrifice his legal rights and pay a sum of money to quiet the complainant and avoid trouble and litigation.

[4] Furthermore, if it be conceded that the defendant here was negligent in colliding with Aftergut, it would not necessarily follow that he was negligent towards the plaintiff in this action. The plaintiff was a guest of the defendant, and Aftergut was traveling upon a public highway, where he had a legal right to be. Therefore the two cases are entirely different as far as legal responsibility goes, and not depending altogether upon the same facts or the same rules of law.

[5] This court and the Supreme Court have many times declared it to be the law in this state that, during the trial of an action for damages, evidence that the defendant has been indemnified against loss by a surety company is not only inadmissible, but its offer on the part of the plaintiff is prejudicial misconduct. Roche v. Llewellyn Iron Works Co., 140 Cal. 563, 74 P. 147; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700; Arnold v. California Portland Cement Co., 41 Cal. App. 427, 183 P. 171; De Liere v. Goldberg, Bowen & Co., 30 Cal. App. 612, 159 P. 197; Dameron v. Ansbro, 39 Cal. App. 298, 178 P. 874.

It has also been held that even in the examination of jurors upon their voir dire such questions are highly improper. Dameron v. Ansbro, supra; Pierce v. United Gas & Electric Co., supra; Arnold v. California Portland Cement Co., supra.

[6] The respondent attempts to justify the admission of this testimony upon the implied admissions or statements made by one of the attorneys for the defendant in some of his objections to the testimony, to the effect that it would be competent evidence if it could

be shown that the defendant, Bava, made the settlement with Aftergut, but, as we have already seen, it would not be competent evidence even if the settlement with Aftergut was connected up with the defendant, Bava. Certainly these erroneous admissions on the part of one of the attorneys for defendant would not make the objectionable testimony competent or admissible in the face of timely, full and proper objections and assignments of misconduct made by the other attorney for defendant.

[7] Respondent contends that defendant's attorney, in the cross-examination of the witness Dei, opened the door for the redirect examination above set forth, by propounding the following questions:

> "By Mr. Reardon: How long after the accident was it that Rose Bava called to see you in your room in the O'Connor Sanitarium? A. I don't remember exactly * * * must have been five, six, or seven days. Seems to me I saw Rose Bava once in my room. Q. At the O'Connor Sanitarium? A. Yes; at the hospital, with the insurance man with her."

There is no merit in this contention. The only part of this answer that is responsive to the question is "Yes"; the balance was a voluntary statement by a hostile witness, and should have been stricken out by the court, and furnished no justification for this redirect examination.

[8] Respondent also seeks to avoid the harmful effect of this testimony upon the ground that the questions were asked in good faith to try to connect the defendant, Bava, with the settlement, and also on the ground that the court instructed the jury during the cross-examination of the witness Curtaz as follows:

> "Ladies and gentlemen, the court has granted the motion on the part of the defendant to strike out all testimony with reference to a settlement between Mr. Bava and Mr. Aftergut, who was a witness here yesterday and who was involved in this collision, and the court instructs you to disregard any testimony as to any such settlement."

These questions may have been asked by plaintiff's attorney in good faith under the erroneous belief that they were proper. However, it is plain that they were well calculated to, and did, no doubt, have a very prejudicial effect upon the minds of the jurors. This admonition of the court was regarding the settlement between Mr. Bava and Mr. Aftergut. The record does not disclose, neither is it contended, that there was any settlement made with Aftergut by Bava; the only settlement contended for was between Aftergut and the insurance company, and it will be noticed that the cautionary instruction by the court did not advise the jury to disregard the settlement entered into between the insurance company and Aftergut. There was no cautionary instruction to the jury to disregard the evidence concerning the matter of an insurance settlement altogether. The instruction also might well have been understood by the jury as referring only to the testimony of Aftergut and not to the testimony of Dei or Curtaz.

Moreover, we doubt very seriously whether this instruction could have entirely blotted from the minds of the jurors the harmful effect of all this testimony, for the reason that the court had previously on many occasions overruled the strenuous objections of defendant's attorney, thereby stamping with approval this objectionable and highly prejudicial testimony.

When the knowledge once reaches the jury that a defendant in a personal injury case is protected by insurance, human experience teaches us that this knowledge almost invariably has the effect of inducing the jury to reach a verdict for the plaintiff in a close case, and has the tendency in any case of making the damages larger than they would have been under the same facts had not the fact that the defendant was indemnified against loss been injected into the case, and the court in most cases is helpless to correct its evil effect by instructions. In the case at bar, conceding that the harmful effect of this testimony could have been completely neutralized by prompt and vigorous action on the part of the trial court, yet the instruction given to the jury was too general for this purpose.

The respondent finally contends that the trial court denied a motion for a new trial, based upon the admission of the evidence discussed, and the misconduct of plaintiff's attorney, and thereby determined that no prejudice was suffered by the defendant by reason of any of the matters to which we have referred, and relies upon the majority opinion in the case of Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538. Our answer to this contention is this: If the only objection raised was that of the misconduct of the attorney, and a motion for a new trial upon that ground had been denied by the trial court, we would be inclined to agree with counsel that the judgment should not be disturbed upon that ground alone, but, when the misconduct of counsel and the erroneous admission of testimony in this case, coupled with the fact that the evidence adduced upon the question of defendant's negligence is very contradictory, are all considered, we are firmly of the opinion that all these matters, taken together, had a strong tendency to divert the minds of the jurors from the real issues in the case, and caused them to at least render a verdict for a larger amount in favor of the plaintiff and against the defendant than they otherwise would have done. It is not at all improbable that the jury may have returned a verdict in favor of the defendant, had not these prejudicial matters been injected into the case by plaintiff, as the evidence, if believed by the jury, would have been ample to sustain such a verdict.

We conclude, therefore, that there was a miscarriage of justice in this case, and the judgment should be reversed, and it is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

R. DEI, Plaintiff and Respondent, v. PIETRO BAVA, Defendant and Appellant. ★

(Civ. 5549.)

(District Court of Appeal, First District, Division 2, California. March 1, 1927. Hearing Granted by Supreme Court April 28, 1927.)

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, and H. A. Gabriel, of San Jose, for appellant.

R. V. Bressani and D. T. Jenkins, both of San Jose, for respondent.

PRESTON, Presiding Justice pro tem. This case was tried with the case of F. Citti v. Pietro Bava (Cal. App.) 254 P. 299, and the facts in the case are identical with the facts in that case, except as to the extent of plaintiff's injury and the amount of damages awarded by the jury.

Therefore, for the reasons stated in the opinion in the case of F. Citti v. Pietro Bava, Civil No. 5548, 254 P. 299, filed this date, the judgment appealed from is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

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81 Cal. App. 546

MUTUAL BEN. LIFE INS. CO. v. CLARK et al. (Civ. 3192.) †

(District Court of Appeal, Third District, California. March 1, 1927. Hearing Denied by Supreme Court April 28, 1927.)

1. Gifts ⚷47(1)—One claiming gift of proceeds of life policy has burden of proving elements establishing completed gift.

One claiming proceeds of life insurance policy as gift has burden of proving every element necessary to establish completed gift by clear and convincing evidence, whether it be considered gift inter vivos or causa mortis.

2. Insurance ⚷213—Insured's intention in assigning policy should be given effect, if it does not contravene public policy or statute.

It is the duty of court to ascertain intention of insured in assigning policy, and give that intention effect, provided it does not contravene public policy or any statute.

3. Gifts ⚷15—In determining validity of gift, intent with which delivery was made is essential element to be considered.

In determining validity of gift, intent with which delivery was made is always important and essential element to be considered, since, unless donor intends to divest himself completely of control and dominion over property, gift is incomplete and ineffectual.

4. Gifts ⚷15, 18(1)—Gift requires intention to give and delivery of thing given.

There can be no gift without an intention to give, and a delivery, either actual or constructive, of thing given.

5. Gifts ⚷55—Distinction between "gift causa mortis" and "gift inter vivos" is that former is subject to donor's revocation.

The only distinction between a "gift causa mortis" and a "gift inter vivos" is that former, being in its nature testamentary, is subject to donor's revocation while he lives.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Causa Mortis; Gift Inter Vivos.]

6. Gifts ⚷28(3)—Assignment of life policy, effective in event assignee survived insured, and reserving right to revocation, held invalid as gift (Civ. Code, §§ 1146–1148).

Under Civ. Code, §§ 1146–1148, relative to gifts, assignment of life insurance policy, reserving right in insured to cancel assignment without notice, and effective only in event assignee survived insured, *held* of no binding force, since it was at most an attempted testamentary disposition of proceeds of life policy, and was not executed under formalities required by law.

7. Insurance ⚷587—Attempted assignment of life policy held not to work change of beneficiary.

Attempted assignment by insured of life insurance policy *held* not to have worked a change of beneficiary, where policy requirements as to assignments were not complied with.

8. Insurance ⚷199—Contract for insurance is chose in action, and subject to transfer or assignment.

Contract made by insured with insurance company for benefit of insured is a chose in action, and capable of being transferred or assigned.

9. Insurance ⚷586—Beneficiary of life policy is not party to contract, and interest, where right to change beneficiary is reserved, is mere expectancy of uncompleted gift.

Beneficiary of life insurance policy is not a party to the contract, and is not owner thereof, and, where policy reserves right in insured to change beneficiary, interest of designated beneficiary prior to insured's death is that of mere expectancy of uncompleted gift, subject to revocation.

10. Insurance ⚷587—Insured must follow provisions of policy in making change of beneficiary.

Insured has no absolute right to change beneficiary under policy requiring change to be

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★Superseded by opinion of Supreme Court, 266 P. 956.

†Hearing denied by Supreme Court.

made in certain manner, and, in order to make change of beneficiary, provisions of policy in that regard must be followed out.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Action in interpleader by the Mutual Benefit Life Insurance Company against Jennie E. Clark, as executrix of the will of William Carter Clark, also known as William C. Clark, deceased, and Eva Powell. Judgment for defendant first named, and defendant last named appeals. Affirmed.

W. A. Dow, of San Francisco, for appellant.

Fitzgerald, Abbott & Beardsley, of Oakland, for respondent.

PRESTON, Justice pro tem. The plaintiff, Mutual Benefit Life Insurance Company, a corporation, brought this action in interpleader to compel the defendants to litigate between themselves their respective claims to the proceeds of a life insurance policy upon the life of William C. Clark, deceased.

The case was tried by the court sitting without a jury, and the court decided that the proceeds of said policy belonged to the estate of William C. Clark, and that Eva Powell had no interest therein. From the judgment following this decision Eva Powell prosecutes this appeal.

The material facts are briefly these: William C. Clark was for many years a prominent attorney in Oakland, Cal. He was never married, and resided with his unmarried sister, Jennie E. Clark, who is now the executrix of his will, the principal beneficiary thereunder, and the respondent in this action. The appellant, Eva Powell, was a single woman, and she and William C. Clark had been friends for a great number of years, having been intimately associated in Sunday school, church, and other religious work, but she was not related to him in any way. There is also a suggestion in the record of a courtship attempted to be carried on by Mr. Clark and discouraged by Miss Powell, but no proposal of marriage or engagement is shown by the record. Mr. Clark lived at all times in Oakland, Cal., and Miss Powell formerly lived in Oakland, or Berkeley, Cal., but for about four years after the date of the assignment here in question, and up to the time of the death of Mr. Clark, Eva Powell lived in New York and Chicago.

On the 22d of March, 1904, the plaintiff herein, Mutual Benefit Life Insurance Company, issued a policy of insurance upon the life of said William C. Clark in the sum of $5,000, "payable to William C. Clark, his executors, administrators and assigns."

On December 10, 1917, William C. Clark signed in duplicate in the San Francisco office of the insurance company, upon a printed form furnished him by the company, an assignment of the policy to Miss Eva Powell, the appellant herein. Both copies were sent to the home office of the company in Newark, N. J. The duplicate was retained by the company at the home office, and the original was indorsed as follows: "Received by the Mutual Benefit Life Insurance Company, Newark, New Jersey, Dec. 17, 1917. I. Wm. Johnson, Secretary," and returned to the San Francisco office, and by that office mailed to William C. Clark at Oakland, and the letter of transmittal from the San Francisco office to Mr. Clark stated that the assignment should be attached to the policy for future reference.

William C. Clark died in the city of Oakland on the 20th of September, 1922, leaving a last will and testament, in which he appointed his sister, Jennie E. Clark, executrix thereof, and also made Jennie E. Clark the principal beneficiary thereunder.

This life insurance policy and the original assignment remained in the possession of Mr. Clark until his death, and was found after his death by his sister, Jennie E. Clark, in a safe deposit box in an Oakland bank, and to this policy was attached by a wire clip the assignment above mentioned. There was also found in this safe deposit box a letter written by William C. Clark and addressed to his sister, Jennie E. Clark, in which he stated that he had assigned the policy to Miss Eva Powell, and that, if she did not want to keep it, she could indorse it back to Jennie E. Clark. This letter was destroyed by Jennie E. Clark, and the exact language could not be proven.

The policy was never seen by the appellant; neither did she ever see or hear of the assignment during the lifetime of the insured. No mention of the policy, or the proceeds thereof, was made by William C. Clark in his will. Neither did his executrix, Jennie E. Clark, make any mention of this policy, or the proceeds, in the administration of his estate. There was no consideration of any kind for the assignment, which is the entire basis of appellant's claim.

Under these facts appellant contends that William C. Clark made her a complete and valid gift inter vivos of the proceeds of said life insurance policy.

The law has rightly said that a donor must do certain essential things to make a complete and valid gift. Let us, therefore, see what these requirements are, and see if they have been complied with in the case at bar.

[1-3] The burden of proof in this case is upon the appellant. It is the policy of the law to receive with caution a claim to a gift asserted for the first time after the death of the alleged donor. Therefore it was incumbent upon the appellant to prove every element necessary to establish a completed gift by clear and convincing evidence, and this degree of proof is required, whether it be a gift inter vivos or causa mortis. Sullivan v.

Shea, 32 Cal. App. 369, 162 P. 925; 28 Cor. Jur. 670; Freese v. Odd Fellows' Savings Bank, 136 Cal. 662, 69 P. 493; Denigan v. Hibernia Savings & Loan Society, 127 Cal. 137, 59 P. 389; Humble v. Gay, 168 Cal. 516, 143 P. 778. The rule is also well established that it is the duty of the court to ascertain the intention of the insured and give that intention effect, provided it does not contravene public policy or any statute. Waring v. Wilcox, 8 Cal. App. 317, 96 P. 910; Bogart v. Thompson, 24 Misc. Rep. 581, 53 N. Y. S. 623; Union Mutual Life Insurance Co. v. Broderick et al., 196 Cal. 497, 238 P. 1034. It is also a settled rule that, in determining the validity of a gift, the intent with which the delivery is made is always an important and essential element to be considered. Unless the donor intends to divest himself completely of control and dominion over the property given, the gift is incomplete and ineffectual, and what the intention was is a question of fact to be determined by the trial court upon the facts and circumstances in the case. Estate of Hall, 154 Cal. 527, 98 P. 269; Union Mutual Life Insurance Co. v. Broderick, supra.

Section 1146 of the Civil Code defines a gift as a transfer of personal property, made voluntarily, and without consideration. Section 1147 of the same Code provides that a verbal gift is not valid unless the means of obtaining possession and control of the thing are given; nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee. Section 1148 of the same Code provides that a gift, other than a gift in view of death, cannot be revoked by the giver.

The delivery must be absolute, and this is true whether a gift be inter vivos or causa mortis; that is to say, the donor must not only part with the possession of the property intended as a gift, but must relinquish to the donee all dominion and control over it. 14 Am. & Eng. Ency. of Law, 1019; Knight v. Tripp, 121 Cal. 674, 54 P. 267; Beebe v. Coffin, 153 Cal. 174, 94 P. 766; Noble v. Garden, 146 Cal. 225, 79 P. 883, 2 Ann. Cas. 1001; Collins v. Maude, 144 Cal. 289, 77 P. 945; Pullen v. Placer County Bank, 138 Cal. 169, 66 P. 740, 71 P. 83, 94 Am. St. Rep. 19.

[4] It is not contended by the appellant that the alleged gift in question was made by William C. Clark in contemplation of impending death. Therefore the question of a gift causa mortis is not here involved, but only a gift inter vivos. This admission on the part of the appellant does not, however, change or alter the necessary requirements to render a gift complete. There can be no gift without an intention to give, and a delivery, either actual or constructive, of the thing given. Knight v. Tripp, supra. There must be both a purpose to give and the execution of this purpose. The purpose must be expressed, either orally or in writing, and it must be executed by the actual delivery to the donee of the thing given, or of the means of getting possession and enjoyment thereof. It is the fact of delivery that converts the unexecuted and revocable purpose into an executed and complete gift. Collins v. Maude, supra.

[5] The only distinction between a gift causa mortis and a gift inter vivos is that the former, being in its nature testamentary, is subject to the donor's revocation while he lives. The essential of delivery and the immediate surrender of all dominion and control over the subject of the gift is absolutely necessary in the one class of gifts as in the other. Falling short of such unconditional delivery, a gift is incomplete. If, however, the transfer of such dominion and control is postponed until the death of the donor, or to some other future date, it becomes thereby no more than an unexecuted and unenforceable promise to make a future gift. Hibberd v. Smith, 67 Cal. 547, 4 P. 473, 8 P. 46, 56 Am. Rep. 726; Daniel v. Smith, 64 Cal. 346, 30 P. 575; Zeller v. Jordan, 105 Cal. 143, 38 P. 640; Hart v. Ketchum, 121 Cal. 426, 53 P. 931; Pullen v. Placer County Bank, supra; Beebe v. Coffin, supra; Basket v. Hassell, 107 U. S. 602, 2 S. Ct. 415, 27 L. Ed. 500; Collins v. Maude, supra; Adams v. Merced Stone Co., 176 Cal. 415, 178 P. 498, 3 A. L. R. 928.

In the case of Pullen v. Placer County Bank, above cited, it was said:

> "A gift vests the donee with the absolute property in the thing given, and it is no longer subject to the control of the donor. If, on the other hand, the thing given remains under the control of the donor, or * * * is subject to his revocation, his gift is not complete."

The assignment in question is, in part, as follows:

> "For value received, I do hereby assign, transfer and set over unto Eva Powell, whose post office address is 2703 Dwight Way, Berkeley, California, the above named policy of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to be had or made by virtue thereof; to have and to hold unto the said Eva Powell in case she survives me, otherwise this assignment to be void. I hereby reserve the right to cancel this assignment without notice to or consent of the assignee."

[6] Therefore, conceding, but not deciding, that the sending to the home office of both copies of the assignment was a sufficient delivery, nevertheless, measured by the foregoing indisputable standards, the conclusion seems irresistible that the attempted gift from William C. Clark to appellant Eva Powell fell short of completion. It was the intention of the insured, manifested by the assignment, that it was to be effective only in the event that appellant should survive the in-

sured, and then only in the event the insured did not exercise the reserved right of revocation. The assignment was not absolute or irrevocable in any respect; it was, at most, an attempted testamentary disposition of the proceeds of a life insurance policy; and, not being executed with the formalities required by law, is of no binding force, and appellant can predicate no action thereon.

[7] There is no merit in the contention of appellant that the assignment worked only a change of the beneficiary. The policy in question gave to the insured the right to make an assignment and also the right to change the beneficiary. In order to change the beneficiary, it was incumbent upon William C. Clark to do something essentially different from what he did, for the policy provides:

> "The insured will be entitled at any time while this policy is in force and not assigned, upon return of the policy to Newark with the insured's written request for the appropriate indorsement of the policy by the company, to have the beneficiary changed."

Thus it will be seen that the policy itself provides that, in order to have the beneficiary changed, it was necessary first that no assignment be made; that the policy be returned to the home office; that the insured, in writing, request that the beneficiary be changed; and that the appropriate indorsement be made upon the policy showing the change of beneficiary.

[8] When a person places insurance upon his own life, he is the owner of the policy, and, when the policy is made payable to the insured, or to his estate, as is the case with the policy under consideration, it is undoubtedly a contract made by the insured with the insurance company for the benefit of the insured, and, as such, is a chose in action, and is capable of being transferred or assigned. If the insured assigns such a policy, he thereby ceases to be a party to the contract of insurance, and his assignee becomes the owner, and takes the place of the insured in the contract of insurance.

[9] Where the policy of insurance names a third person as beneficiary, the policy is then a contract made for the benefit of a third person, and the third person is called the "beneficiary." The beneficiary is not a party to the contract, and is not the owner thereof, and, where a policy of insurance reserves to the insured the right to change the beneficiary, the interest of a designated beneficiary, prior to the death of the insured, is that of a mere expectancy of an incompleted gift, subject to revocation at the will of the insured. Waring v. Wilcox, supra; Hoeft v. Supreme Lodge, etc., 113 Cal. 91, 45 P. 185, 33 L. R. A. 174; N. Y. Life Insurance Co. v. Daley, 25 Cal. App. 376, 143 P. 1033; Supreme Council, etc., v. Gehrenbeck, 124 Cal. 43, 56 P. 640; N. Y. Life Insurance Co. v. Dunn, 46 Cal. App. 203, 188 P. 1028; McEwen v. N. Y. Life Insurance Co., 23 Cal. App. 694, 139 P. 242; N. Y. Life Insurance Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61; Hopkins v. N. W. Life Assurance Co. (C. C. A.) 99 F. 199.

Therefore there is a vast difference between the assignee of the insured and a mere beneficiary in a life insurance policy. The rights of the owner of a policy and those of a beneficiary are essentially different. An examination of the policy here in question clearly shows this to be true. The policy provides that the owner shall have the following rights: (a) To surrender the policy for its cash or surrender value; (b) to surrender the policy for a paid-up policy; (c) to have the policy automatically extended from the date of default of premiums; (d) to borrow upon the policy up to the full surrender value; (e) to have the beneficiary changed; (f) to control the method of payment to the beneficiary; (g) to receive all dividends earned or to use them to apply on the premiums or to purchase additional insurance; (h) to change the policy into an endowment policy.

None of these rights is given to the beneficiary. They are matters with which the beneficiary, for whose benefit the policy may be written, has nothing to do, but all these rights go to the assignee of the policy, because the assignee becomes the owner of the policy and takes the place of the insured therein.

[10] As we have already stated, the policy provided how the beneficiary may be changed, and these requirements of the policy were not waived in this case, for the plaintiff alleged in its complaint in interpleader "that the beneficiary of said policy has never been changed." William C. Clark had no absolute right to change the beneficiary, but was only given such right by the policy itself, and, in order to change the beneficiary, he would have to carry out the provisions of the policy in that regard, which he did not do. McLaughlin v. McLaughlin, 104 Cal. 171, 37 P. 865, 43 Am. St. Rep. 83; Yore v. Booth, 110 Cal. 238, 42 P. 808, 52 Am. St. Rep. 81; Barboza v. Conselho, 43 Cal. App. 775, 185 P. 1028.

Moreover, the pleadings were drawn and the case was tried upon the theory that there was an assignment and not a change of the beneficiary. In the appellant's answer she alleged that she was the owner of the proceeds of the policy by virtue of an assignment, and her proof of death of William C. Clark was made upon the ground that she was an assignee of the proceeds of the policy. Therefore an incomplete assignment could not be used to effect a change of beneficiary, and did not comply with the terms of the policy as to change of beneficiary.

We conclude, therefore, that under circumstances thus shown, the findings of the court against the completeness of the attempted gift may not be disturbed, and that the judgment should be, and it is hereby, affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

81 Cal. App. 535

TILDEN v. TILDEN et al. (Civ. 4590.)★

(District Court of Appeal, Second District, Division 1, California. March 1, 1927. Rehearing Denied March 29, 1927. Hearing Denied by Supreme Court April 28, 1927.)

1. Husband and wife 🔑14(1), 133(1)—Finding that wife had title to lots conveyed to her alone and half interest in lots conveyed to her and husband held sustained by evidence (Civ. Code, § 164).

In wife's action against husband and others to quiet title, evidence *held* sufficient to sustain finding that conveyances to wife alone and to husband and wife gave wife title and half interest as tenant in common to respective properties, though consideration was paid by husband, in view of presumption of gift under Civ. Code, § 164.

2. Husband and wife 🔑49½(7) — Husband paying for conveyances to wife alone and to wife with himself was presumed to have made gift of entire property and half interest respectively (Civ. Code, § 164).

Husband who paid for two conveyances, one to wife alone and other to himself and wife, was presumed to have made gift of property in one case and gift of one-half interest in other, under Civ. Code, § 164, providing title to property conveyed to married woman alone is presumed to vest in her as separate property, and that on conveyance to husband and wife presumption is that wife takes party conveyed to her as tenant in common.

3. Husband and wife 🔑49½(8)—Finding that deeds to spouses as joint tenants, paid for by husband, were deeds of gift making spouses joint tenants, held sustained by evidence.

In wife's action against husband to quiet title, finding that deeds conveying land to husband and wife as joint tenants, paid for by husband, constituted deeds of gift making husband and wife joint tenants, *held* sustained by evidence.

4. Joint tenancy 🔑13—Joint tenant may convey his interest.

Joint tenant has right to convey his title and interest.

5. Husband and wife 🔑14(10)—Wife who was joint tenant with husband became tenant in common with person to whom husband conveyed his interest.

Where husband holding property with wife as joint tenant made conveyance of his interest therein to son, grantor's son and wife held as tenants in common and not as joint tenants, as conveyance by joint tenant destroys joint tenancy making tenancy in common.

6. Husband and wife 🔑217—Wife owning property could have title quieted as against husband without repaying amount of mortgages which husband voluntarily satisfied.

Where by deed of gift wife had acquired complete title, wife could have title quieted against husband without repayment of mortgage debts that husband had paid off after her acquisition of property, in absence of any agreement as to loan or payment of mortgages.

7. Stipulations 🔑14(4)—Power of attorney under which husband closed trust was immaterial in wife's action to quiet title under counsel's agreement that husband could not convey wife's interest thereunder without consideration.

In wife's action against husband and husband's son to quiet title to certain lots, statement of court that power of attorney given by wife to husband, under which husband made conveyance to his son, was immaterial, *held* not error, where power of attorney was not directly offered in evidence, and where parties agreed that husband could not use power of attorney to convey wife's community interest or separate property without valuable consideration, conveyance thereunder having been made for alleged purpose of closing a trust in which son was beneficiary.

8. Husband and wife 🔑49½(8)—Rejection of husband's testimony as to intention to give property to wife held error in wife's action to quiet title based on deeds of gift.

In wife's action against husband to quiet title based on deeds of gift which husband had made in wife's name, refusal to permit husband to state whether he had any intention to give property to wife *held* error.

9. Husband and wife 🔑49½(8)—Husband's intention to make gift by having property conveyed to wife should be determined from conduct.

Intention of husband in having property conveyed in wife's name should be determined from acts, declarations, and conduct at time of transaction, as such evidence may be more important than subsequent declarations that he did not intend to make gift.

10. Appeal and error 🔑1056(6)—Rejecting evidence of husband's intent in making deeds of gift to wife held not ground for reversal, where evidence would not have changed finding of gift.

In action by wife against husband to quiet title based on alleged deeds of gift from husband made in her name, error in rejecting evidence as to what husband's intention was at time of transaction *held* not ground for reversal, where answer to question would not have changed court's finding that deed of gift was intended, in view of declarations and conduct at time of transaction.

11. Husband and wife 🔑49½(8)—In wife's action against husband to quiet title, evidence held to sustain finding that wife went into possession on delivery of deeds of gift.

In wife's action against husband to quiet title, evidence *held* sufficient to sustain finding that

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★Rehearing denied. Hearing denied by Supreme Court.

on execution and delivery of deeds of gift to wife she went into possession of property.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Suit by Mary C. Tilden against B. E. Tilden, S. D. Tilden, Julia Kengla, and another. Judgment for plaintiff, and the two defendants first named appeal. Modified, and affirmed as modified.

William S. Corbin and James K. Wilson, both of Los Angeles, for appellants.

G. A. McElroy, of Los Angeles, and F. M. Bottorff, of Berkeley, for respondent.

CONREY, P. J. Plaintiff is the wife of defendant B. E. Tilden. Defendant S. D. Tilden is a son of B. E. Tilden by a former marriage. Plaintiff brought this action to quiet title to several parcels of real property in Los Angeles county. The several parcels are described in the complaint. The plaintiff alleged that she is the owner of 20 described lots in block 60 of the city of Santa Monica; that she is the owner of the south 155 feet of the east 173 feet of block 1 of Colegrove, in the city of Los Angeles; that she is the owner of lots 6 and 7 in block E of tract 342 in Los Angeles county; that she is the owner of lots 14, 15, and 16 in block D of the Beautiful Home tract in Los Angeles county.

The court by its decree determined that the plaintiff is the owner in fee simple, as her separate property, of the described parcel in block 1 of Colegrove, and also of the described 20 lots in Santa Monica; that the plaintiff, Mary C. Tilden, and the defendant B. E. Tilden are the owners, in the manner and under conditions to be hereinafter stated, of the three described lots in the Beautiful Home tract and lot 6 in block E of tract 342; that the plaintiff, Mary C. Tilden, and the defendant S. D. Tilden, as tenants in common, are the owners (an undivided one-half interest thereof to each) of lot 7 in block E of tract 342. The court further by its decree canceled and declared null and void, in so far as they attempted to convey the interest or estate of Mary C. Tilden in the described lands and premises, certain deeds of conveyance of the properties in controversy, which said deeds purported to be deeds of grant from Mary C. Tilden and B. E. Tilden to S. D. Tilden, and were signed by B. E. Tilden and also by Mary C. Tilden by B. E. Tilden, her attorney in fact.

There are in the record two other defendants, I. N. Minnick (sued as John Doe) and Julia Kengla, whose interests relate to said lot 6 in block E of tract 342. Minnick filed an answer showing a contract of sale of date February 28, 1921, of said lot 6 by B. E. Tilden to Mrs. Kengla and an assignment thereof by Mrs. Kengla to Minnick. Prior to the trial of this action, stipulations were filed relating to said lot 6, and relating to the lots in the Beautiful Home tract, whereby in settlement of certain matters in relation to sales of those lots, it was provided, among other things, that if the plaintiff's claim, relating to the property, should be sustained, then she should recover judgment against the defendants B. E. Tilden and S. D. Tilden in a stated proportion, which in the findings was filed at the sum of $159.51—which amount is included in the judgment.

The defendants B. E. Tilden and S. D. Tilden, by their answer to the complaint, denied ownership by the plaintiff of any interest in the lands described in the complaint, and alleged that the defendant S. D. Tilden is the owner and is entitled to possession of the said land. By a separate defense, these defendants alleged that S. D. Tilden is the owner of the 20 lots in Santa Monica under and by virtue of a deed dated March 16, 1921 (recorded March 22, 1921), executed by Mary C. Tilden, by her attorney in fact, B. E. Tilden, and B. E. Tilden; that S. D. Tilden is the owner of the parcel in block 1 of Colegrove by virtue of a deed in like form and of same date as the other deed last above mentioned; that S. D. Tilden is the owner of the lots 6 and 7 in block E of tract 342, and the lots 14, 15, and 16 in block D of the Beautiful Home tract by virtue of another similar deed from the same grantors; that said several pieces of land had been bought by B. E. Tilden for and with money of S. D. Tilden during his minority and put in name of Mary C. Tilden temporarily until S. D. Tilden became of age; that the general power of attorney from Mary C. Tilden to B. E. Tilden, of date January 3, 1914, "was made before we knew what property would be purchased, therefore no property could be described except one lot 6 in block E, which was joint tenancy. Also deed of March 4, 1914, lots 14, 15, and 16 in block D, Beautiful Home tract were joint tenants."

The answer set forth by copy the said power of attorney, and alleged that the same was in full force and effect at the time of the execution of said deeds to S. D. Tilden; and that the said deeds were executed pursuant to the agreement between the plaintiff, Mary C. Tilden, and defendant B. E. Tilden recited in said power of attorney. But there is not in said power of attorney any recital of agreement, other than the grant of power and authority to execute conveyances, etc., and to deal in real or personal property of the said Mary C. Tilden. It was further alleged that said power of attorney (dated and acknowledged on January 3, 1914), was recorded in the office of the county recorder of Los Angeles county on March 15, 1921.

The plaintiff and the defendant B. E. Tilden were married in the year 1912. Down to the time of the trial of this action in April, 1923, they continued to be husband and wife, and so far as the record shows they still are husband and wife. The several properties described in the complaint were acquired, as shown by the several deeds, as follows: Plaintiff's Exhibit 1, dated February 18, 1914, conveyed the lots in Beautiful Home tract to B. E. Tilden and Mary E. Tilden "as joint tenants, and not as tenants in common, and to the survivor of them." Plaintiff's Exhibit 2, dated December 9, 1915, conveyed the parcel in block 1 of Colegrove "to M. C. Tilden, a married woman." Plaintiff's Exhibit 3, dated March 22, 1913, conveyed lot 6 of block E in tract 342 to B. E. Tilden and Mary C. Tilden, "husband and wife, as joint tenants, and not as tenants in common, with the right of survivorship." Plaintiff's Exhibit 4, dated May 10, 1915, conveyed the 20 lots in Santa Monica "to M. C. Tilden, a married woman." Plaintiff's Exhibit 5, dated February 9, 1915, conveyed lot 7 of block E, tract 342, "to Burt E. Tilden and Mary C. Tilden, his wife." The evidence shows, and it is a fact without dispute, that the consideration for these several conveyances was paid by the defendant B. E. Tilden out of funds which were his separate property, unless, as the defendants Tilden contended at the trial, said funds in fact belonged to S. D. Tilden and were only held in trust for him by B. E. Tilden. The court found, however, that this alleged trust did not exist, and appellants do not now attack, or at least have not very definitely contended against, the validity of this finding. We assume, therefore, that there was no such trust.

[1, 2] The first point of appellants is that the evidence is insufficient to sustain the finding that B. E. Tilden gave to the plaintiff the Santa Monica lots, the Colegrove lot, or a one-half interest as tenant in common in the lot 7 in block E of tract 342. It is conceded that without evidence other than the deeds, a presumption of gift of these properties by the husband to the wife would exist under section 164 of the Civil Code. That section, as it existed at the time when the several properties were acquired as above stated, in part read as follows:

> "All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration. * * *"

It is further conceded to be true, not only that Mrs. Tilden paid nothing for these conveyances made to her, but also that S. D. Tilden paid nothing for any of the conveyances made to him other than that, as has been mentioned, he insisted at the trial that he received them as beneficiary of a trust.

The argument of counsel for appellants, in advancing their claim that the evidence is insufficient to sustain the finding referred to in the preceding paragraph, lays much stress upon "the probabilities as to the truth" of the testimony of Mrs. Tilden, and upon sundry matters which, while they were important in the trial court where the conflicting evidence had to be weighed and considered, are not very helpful to the consideration of an appeal. In addition to the presumption of gift to which we have referred, there was evidence tending to prove that the deeds to Mrs. Tilden were deeds of gift. Mrs. Tilden testified that at about the time when the Santa Monica lots were conveyed to her, Mr. Tilden said to her that he carried comparatively no life insurance and "that he was giving me this property to protect me in case of his sudden death and against the vindictive nature of Mrs. Tilden and Sam." The Mrs. Tilden mentioned in that statement was the mother of defendant S. D. Tilden. Plaintiff also testified that in earlier conversations her husband had stated that he would give her things from time to time for the same purpose of protection to her; that in December, 1915, and at other times, he made practically the same statements to her; that her husband, as well as herself, frequently referred to the Santa Monica and Colegrove properties as her property. Prior to the commencement of this action there was pending in a court at Chicago, Ill., a separate maintenance suit by the plaintiff, Mary C. Tilden, against said defendant B. E. Tilden. It was proved here that in an affidavit filed in that action, said defendant declared that from time to time he had purchased and caused to be conveyed to her various parcels of real property therein mentioned and described, which included the 20 lots in Santa Monica. Notwithstanding the fact that much of the testimony presented by the plaintiff was contradicted by other evidence introduced by the defendants, the attack upon the finding in question must fail, because the finding is sustained by sufficient evidence.

[3] The second point of appellants is that the evidence is insufficient to sustain the finding that B. E. Tilden gave to the plaintiff any interest in lot 6 in block E of tract 342, or the lots in the Beautiful Home tract. These are the parcels which were conveyed to the plaintiff and defendant B. E. Tilden as joint tenants. Based upon this finding and the additional fact that B. E. Tilden had conveyed to the defendant S. D. Tilden his interest in said premises, the court decreed that the plaintiff, Mary C. Tilden, and the defendant B. E. Tilden, as joint tenants with the right of survivorship, and not as

tenants in common, are the owners of said parcels of land, "and that the defendant S. D. Tilden has no right, title or interest in and to said premises, except such right, title or interest of the said B. E. Tilden as was heretofore conveyed to the said S. D. Tilden by the said B. E. Tilden, to wit: The joint tenancy interest of said B. E. Tilden, and that the defendant I. N. Minnick has no estate or interest whatever in and to the interest of the plaintiff in said lands or premises, except such rights in and to the above-described lot 6 in block E, tract 342, as may have been created by reason of the stipulation now on file in the above-entitled action, and that the defendants B. E. Tilden, S. D. Tilden and I. N. Minnick, each and every one of them, be and they hereby are debarred and forever enjoined from asserting any claim whatever in or to the lands or premises adverse to the aforesaid interest of the plaintiff therein." The said stipulation is attached to and made part of the findings. It contains provisions under which presumably the interests of Minnick are protected, by conveyance of the lot, made or to be made to him by all of the Tildens, and by substitution of the purchase money paid by him, so that said purchase money will be applied in accordance with the stipulation. Minnick is not appealing from the judgment. In view of the evidence hereinbefore mentioned, we are satisfied that the deeds conveying the lots in the Beautiful Home tract and the lot 6 in block E of tract 342 were deeds of gift whereby the plaintiff and the defendant B. E. Tilden became the owners as joint tenants of those lands.

[4, 5] Appellants' third point relates to the lands last above mentioned, and error is assigned in that the court attempted to preserve for the plaintiff an interest in these lots in joint tenancy with the right of survivorship, after the conveyance by B. E. Tilden of his interest therein to his son. In this respect we think that the decree is erroneous. As joint tenant of the property, B. E. Tilden had a right to convey his own title and interest therein to his son. The effect of such conveyance was such that thereafter the property belonged to Mary C. Tilden and S. D. Tilden as tenants in common. Hilborn v. Soale, 44 Cal. App. 115, 185 P. 982; Green v. Skinner, 185 Cal. 435, 197 P. 60. The stipulations to which we have referred contemplated that sales of all of this joint tenancy property should be completed, and the proceeds in money should be divided in accordance with the agreements of the parties. But as the record does not show a completion of those transactions, it will be necessary to direct a modification of the judgment.

Appellants' fourth point covers certain details of the same matters of evidence referred to under the first point, and does not require extended notice. We are satisfied that the evidence as a whole was sufficient to establish an executed gift to the plaintiff, regardless of the fact that certain items of evidence discussed by appellant might not alone be sufficient for that purpose.

[6] The fifth point is in effect that because certain items of the property given were subject to mortgages existing when the properties were acquired, and because thereafter the mortgage debts were paid by B. E. Tilden, that, therefore, the court erred in its decree herein by failing to require that the plaintiff repay to B. E. Tilden the amounts of said incumbrances, as a condition to granting her any relief as to those lots. One of the mortgages covered the Santa Monica lots, and the other the lot in block 1 of Colegrove, both of which, according to the decree, were given in entirety to the plaintiff. On this point the case is no different than it would be if the husband as owner had by his own deed conveyed the property directly to his wife at a time when it was incumbered by mortgage and had afterwards removed the incumbrances. By the deed of gift the wife had acquired complete title. There is no evidence or claim of a loan to her by B. E. Tilden, or that in paying the mortgage debts he was acting pursuant to any agreement with his wife. Under these conditions, if he voluntarily caused the mortgages to be satisfied, we are not aware of any reason or authority under which she could be required to repay the money to him as a condition to the granting of a decree establishing her title as against his subsequent adverse claim, or that of any person claiming under him. The authorities cited by appellant do not appear to sustain any such proposition.

The next three points of appellant relate to alleged errors of the court in rulings excluding offered evidence: (a) Error in excluding power of attorney; (b) error in excluding evidence of intention of B. E. Tilden in relation to conveyances to his wife; (c) error in exclusion of evidence as to sale of lot 3, in block D of Beautiful Home tract, which lot was not involved in this action, but was conveyed to B. E. Tilden and Mary C. Tilden in the same deed by which they acquired lots 14, 15, and 16 in that block.

[7] It seems to be conceded that the power of attorney was not directly offered in evidence, but appellant claims to have been deterred from making such offer by a statement in which the court declared that the document was immaterial in the case. The judge said that he made this statement in view of the stipulation of the parties that the purpose of the deed transferring property to S. D. Tilden was the closing or purported closing of a trust in which the son was beneficiary. It further appeared in the course of the discussion that the court and counsel for defendants were in agreement that a husband cannot by use of power of attorney convey

community property or the wife's separate property without a valuable consideration. On the record thus made, we are satisfied that the court committed no error in relation to said power of attorney.

[8-10] The alleged error in excluding evidence of intent relates to a question asked of B. E. Tilden as a witness, inquiring whether at the time when the lot 6, in block E of tract 342 was placed in the name of B. E. Tilden and Mary C. Tilden, he had any intention to give it to his wife, and two further questions inquiring whether at any time he gave or intended to give any of this property to his wife. The witness was permitted to state that he did not tell his wife that he was going to give or had given the property to her. We are of the opinion that the rejected evidence was admissible, and that its exclusion was erroneous. Such seems to have been the opinion of the Supreme Court as expressed in Gilmour v. North Pasadena Land, etc., Co., 178 Cal. 6, at page 9, 171 P. 1066. See, also, Potter v. Smith, 48 Cal. App. 162, 169, 191 P. 1023. It also appears, however, that the question of the alleged donor's intention should be determined from his acts, declarations, and conduct at the time of the transaction; and such evidence easily may be more important and convincing than his subsequent declaration that he did not intend to make such gift. In view of all of the evidence produced in this case, we are satisfied that even if these questions had been answered, and B. E. Tilden had testified that he did not intend to make these gifts to his wife, such testimony would not have changed the findings which were made by the court. For it was manifest throughout the trial that he was contending that he had never intended to make such gift or gifts.

Upon the alleged error in relation to the exclusion of evidence as to the sale of said lot 3, we think the reply is sufficient that B. E. Tilden was permitted to testify that said lot 3 was exchanged for Chicago property, which was acquired in joint tenancy.

[11] Finally, appellants contend that the evidence is insufficient to sustain the finding that on the execution and delivery of the deeds to plaintiff, she went into possession of the Santa Monica and Colegrove properties. But it appears that Mrs. Tilden did testify that she had possession of that property after it was deeded to her and continued in possession thereof; that the property was rented and that she had been receiving the rentals thereof. It may be true that, as testified by B. E. Tilden, her collection of the rents did not begin until after these controversies arose, and it may be that for a time Mr. Tilden attended to the renting of the property and the collections of rent. This, however, is consistent with the theory of agency on his part quite as much as with the theory that he was acting in his own behalf. We think the evidence is sufficient to sustain the finding—if any finding of fact on that evidentiary matter was necessary.

It is ordered that the judgment be modified in that part thereof relating to lots 14, 15, and 16, in block E of the Beautiful Home tract, and lot 6 in block E of tract 342, by striking out the words, "the plaintiff, Mary C. Tilden, and the defendant B. E. Tilden, as joint tenants with the right of survivorship and not as tenants in common," and substituting therefor the words, "the plaintiff, Mary C. Tilden, and the defendant S. D. Tilden as tenants in common."

As thus modified, the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

200 Cal. 348

RUSSELL et al. v. RAMM. (S. F. 11348.)

(Supreme Court of California. Jan. 31, 1927. Rehearing Denied Feb. 28, 1927.)

1. Brokers 🔑86(5)—Evidence held to make prima facie showing that proposed purchasers were ready, able, and willing to complete transaction.

In real estate brokers' action for commissions on sale of real and personal property, evidence *held* to make prima facie showing that proposed purchasers were ready, able, and willing to complete transaction.

2. Brokers 🔑84(2)—In real estate brokers' action for commissions, defendant had burden of overcoming prima facie showing that proposed purchasers were ready, able, and willing to complete transaction.

In real estate brokers' action for commissions, defendant, on plaintiffs making prima facie showing that proposed purchasers were ready, able, and willing to complete transaction, had burden to overcome such showing, either by cross-examination or affirmative proof.

3. Brokers 🔑54—In action for commissions, proposed purchaser's actual present ability to carry out contract in advance of execution of formal contract need not be shown.

In real estate brokers' action for commissions, it need not be shown that would-be purchaser have purchase price on hand in money or that he had consummated a loan on his available properties or securities in anticipation of the execution of a formal contract of purchase as would enable him to comply with its terms in advance of its execution.

4. Pleading 🔑252(2)—Original complaint is superseded and nullified by amended complaint.

An amended complaint supersedes and wholly nullifies the original complaint.

5. Appeal and error 🔑667—Judgment roll containing defective amended complaint may not be impeached by showing that essential averments were unintentionally omitted.

Judgment roll, containing an amended complaint lacking in essential averments, cannot be impeached by showing that omission of such averments which were in fact included in original complaint was unintentional and inadvertent.

6. Pleading 🔑253—Plea to original complaint will be treated as plea to amended complaint if applicable and responsive thereto.

A plea to an original complaint will be treated as a plea to an amended complaint, if applicable and responsive thereto; otherwise it will be treated as a nullity.

7. Pleading 🔑403(3)—In broker's action for commissions, inadvertent omissions of essential averments in amended complaint held cured by answer.

In real estate brokers' action for commissions, where amended complaint contained in judgment roll on appeal was lacking in essential averment that plaintiffs had produced a purchaser ready, able, and willing to purchase, which averment had been made in original complaint, but inadvertently omitted from amended complaint, *held* answer expressly denying that plaintiffs had procured party willing, able, and ready to purchase on terms specified cured defect in amended complaint.

8. Trial 🔑82—Objection to evidence on ground of insufficiency of complaint to raise issue should be specific, where complaint contains allegation from which essential fact is necessarily to be implied.

Where complaint does not fully set forth matters essential to a statement of the cause of action intended, but contains an allegation from which the essential fact is necessarily to be implied, an objection to evidence on the ground that complaint is insufficient to raise issue should be specific.

9. Judgment 🔑18(3) — Judgment in action, tried on issues tendered by answer to original complaint, held effective, though amended complaint inadvertently lacked essential averments.

Where action for brokers' commissions was indisputably tried on issues tendered by answer to original complaint containing all essential averments, judgment was not affected by a fatal infirmity, though amended complaint, filed after proof, inadvertently omitted essential averments.

10. Brokers 🔑86(1)—Evidence held to sustain findings for plaintiffs in real estate brokers' action for commissions.

In real estate brokers' action for commissions on real and personal property, evidence *held* sufficient to sustain findings for plaintiffs.

11. Appeal and error 🔑1002, 1011(1)—Decision on facts by jury or trial court on conflicting evidence is conclusive on courts of review.

Where evidence addressed pro and con to the issue or issues is contradictory, a decision of the jury or trial court on the facts is conclusive and binding upon courts of review.

12. Brokers 🔑63(2)—Property owner refusing to sell cannot, in brokers' action for commissions, set up any defense except inability of proposed purchaser to purchase, unless it was one of terms of brokers' contract.

Where owner of property refuses to sell to purchaser procured by broker on any ground other than the inability of the proposed purchaser to purchase, the owner cannot, in an action against him by broker for compensation, successfully set up such ground as a defense, unless it was included in agreement between owner and broker as one of terms or conditions which must be met or complied with before broker had earned or was entitled to compensation.

13. Brokers 🔑61(3) — Refusal of property owner's wife to join in sale does not impair brokers' right to commissions.

That property owner's wife refused to join him in transfer of properties to proposed purchaser does not in the least affect or impair brokers' right to compensation promised them for securing purchaser.

14. Brokers 🔑49(3) — Proposed purchaser's offer held unconditional, though execution of contract of sale was conditioned on owner's furnishing certificate of title.

Offer to purchase property *held* unconditional as affecting brokers' right to commission, though proposed purchasers demanded, as a condition to the execution of the contract of sale, that purchaser furnish them a certificate of his title.

15. Brokers 🔑49(3)—Offer to purchase with $34,000 down payment, accompanied by $1,000 payment to broker, held compliance with terms of listing contract requiring down payment of $35,000.

Where owner's terms to brokers required down payment of $35,000, *held* an offer to purchase on a down payment of $34,000, accompanied by payment to broker of $1,000 as a guaranty of good faith, was compliance with terms of listing agreement as affecting brokers' right to commission.

16. Brokers 🔑40—Listing contract, naming owner, held to sufficiently describe lands as "60 acres located one mile from Dinuba."

Brokers' listing contract or memorandum of agreement, naming owner and describing property as "60 acres located one mile from Dinuba," *held* not so vague and ambiguous as to render uncertain the lands to which it related.

17. Vendor and purchaser 🔑22—Rule as to particularity of description required in executory contracts is liberal in favor of their sufficiency.

Rule as to particularity of description required in executory contracts to convey lands is extremely liberal in favor of their sufficiency.

18. Evidence 🔑417(12)—Incomplete but consistent description in executory contract to convey, may be completed by extrinsic parol evidence.

Where description in executory contract to convey land, though incomplete, is consistent so far as it goes, it may be completed by extrinsic parol evidence, provided a new description is not introduced.

19. Frauds, statute of 🔑156—Defense of statute must be pleaded and proved, where noncompliance does not appear from face of complaint.

Defense of statute of frauds, to be available, must be pleaded and proved, where it does not appear from face of complaint that statute has not been complied with.

20. Brokers 🔑82(4)—Unpleaded defense that listing agreement did not satisfy statute of frauds held not available.

In action for brokers' commission, defense that listing contract or memorandum of agreement did not meet requirements of statute of frauds *held* not available in absence of pleading of such defense.

Waste, C. J., dissenting.

In Bank.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by A. E. Russell and another, doing business under the firm name and style of Russell & Newton, against Charles H. Ramm, to recover broker's commissions on the sale of land and personal property. On a hearing granted after the judgment of the District Court of Appeals affirming on appeal the judgment of superior court for plaintiffs. Judgment of the superior court affirmed.

Rehearing denied; WASTE, C. J., dissenting.

Short, Lindsay & Woolley, of Fresno, Leroy G. Smith, of Dinuba, and W. M. Conley, Philip Conley, George Cosgrave, and Lindsay & Conley, all of Fresno, for appellant.

Harris & Hayhurst, of Fresno, for respondents.

RICHARDS, J. [1] The petition for a hearing herein, after decision by the District Court of Appeal in and for the Third Appellate District, was granted chiefly for the reason that the opinion of Mr. Justice Hart therein did not refer to or sufficiently distinguish the decision of this court in the case of Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673, from the case at bar. We are of the opinion that both as to the facts and the principles of law involved the cases are easily distinguishable. In the case of Merzoian v. Kludjian, supra, it affirmatively appeared that the purchaser, who had been procured by the broker as one ready, able, and willing to purchase the property in question, had neither the money, nor the property, nor the credit, which would suffice to enable him unaided to complete said purchase according to the terms of his contract. In the case at bar a quite different situation is presented. The proffered purchasers were two brothers, named Fred W. and H. W. Moore, both of whom had made a written offer to purchase the Ramm properties, by the terms of which they were to make and did make a deposit of $1,000 at the time of such offer and were to pay "$34,000 additional when you shall furnish certificate or abstract of title from which it shall appear that you can convey good title; * * * it being understood that at the time of such payment of $34,000 formal contract of sale is to be executed." The foregoing offer was verbally accepted by the seller; it being understood that a more formal contract was thereafter to be executed. Fred W. Moore was called and examined as a witness for plaintiff with respect to the readiness, ability, and willingness of himself and his brother to complete their proposed purchase of said properties. He testified that he had resided for several years at Dinuba, where the Ramm properties were situated, and was familiar with said properties, and was also on sufficiently familiar terms of acquaintance with the owner thereof to call him "Charlie," from which fact it might well be inferred that the owner was equally familiar with the properties and financial standing of his neighbors, the proposed purchasers, and for that reason did not urge their inability to complete the transaction as his ground for repudiating the same. The witness testified that he and his brother had made an offer in writing to purchase said properties; that they were buying the same together; that they were ready, able, and willing to purchase said properties, and were able to raise the $35,000 in cash required for the first payment thereon; that they had considerable property at Dinuba, and also had considerable of the money in bank; that the witness himself had over $15,000 in bank, and that, while he did not know how much his brother had he knew they were able to take care of the deal; that he had several personal interviews with the seller, going over the properties and checking up on the personal property which was to go to with the land, as a result of which a formal contract of purchase was drawn, which provided that at the time of the execution and of the production of a sufficient abstract or certificate of title the said installment upon the total purchase price was to be paid; that such formal contract when so drawn was submitted to the seller and was read by him; but that the latter refused to execute the same or to go further with the transaction, giving as his sole ground therefor that his wife would not sign the papers; that both the witness and the agent pursued the seller for several days thereafter in an effort to persuade him to go on with the transaction; and that his sole objection to doing so was that his wife would not sign the papers.

[2, 3] We are of the opinion that the plaintiff by the foregoing evidence sufficiently made a prima facie showing that the proposed purchasers of the properties in question were ready, able, and willing to complete the transaction had the seller not repudiated the same. We are also of the opinion that the plaintiff, having made this prima facie showing, the burden was cast upon the defendant to overcome the same, either by developing upon cross-examination that the purchasers' money and property in possession, admittedly considerable, was insufficient to enable them to command adequate credit to complete the negotiations; or by making affirmative proof to the same effect in defense of the plaintiff's asserted cause of action. The defendant, Ramm, who was living and present at the time of the trial, did neither of these. Upon cross-examination of the purchaser, counsel for defendant made no inquiry into the extent of his properties or those of his brother beyond the inquiry as to the amount of the money of each in bank, and offered no evidence upon that subject in aid of his defense. The plaintiff's prima facie showing was not therefore broken down; and, this being so, it furnished a sufficient basis for the finding of the trial court in the plaintiff's favor upon that issue. As to the principles of law laid down in Merzoian v. Kludjian, supra, it may be conceded that these were correct as applicable to the facts of that case, but the rule therein declared, which would require a would-be purchaser of property to make a showing, either that he had the purchase price on hand in the form of money or that he had consummated such a loan upon his available properties or securities in anticipation of the preparation and execution of the formal contract of purchase as would enable him to comply with its terms in advance of its execution, would be to lay down too drastic a rule governing business transactions of the kind presented in the instant case. With respect to the other features of this case, treated in the decision of the District Court of Appeal, we are satisfied with the disposal of the same as embraced in the opinion of Mr. Justice Hart, and we accordingly adopt the same. Said opinion reads as follows:

"Subsequent to the trial of this case the defendant, Charles H. Ramm, passed away and his widow, Pearl E. Ramm, was duly appointed administratrix of his estate.

"The plaintiffs, duly licensed real estate brokers and engaged in the town of Dinuba, Tulare county, in the business of selling and buying and also negotiating the sale and purchase of real estate for and in behalf of other parties, brought this action to recover from defendant's intestate the sum of $3,250, which the complaint alleges constituted the sum total of commissions earned by plaintiffs for procuring purchasers of a certain tract of land of 60 acres and certain personal property belonging to defendant. The complaint alleges that, on or about the 5th day of February, 1920, at said town of Dinuba, the defendant, by an instrument in writing, appointed plaintiffs to sell said land and personal property for the total sum of $120,000. The memorandum of agreement is by the complaint expressly made a part thereof. It reads as follows:

" 'Dinuba, Calif. Jan. 5, 1920.

" 'I hereby appoint Russell & Newton my agents, with exclusive right to sell the property described on the reverse side of this sheet, for the sum of $120,000 one hundred twenty thousand dollars to be paid as follows, to wit: Cash on 40 ac $20,000 on 20 ac 15,000.00, payments of terms on 40 ac $2,500.00 each year & on 20 ac $1,000. each yr until paid with privilege of paying more at any time or any less amount hereafter authorized by me and to receive deposit on same.

" 'I agree to furnish deed and abstract, or certificate of title *showing clear title in me to date*, and should Russell & Newton sell such property, or be instrumental in selling the same, I agree to pay them 5 per cent. commission on the above named selling price $10,000 and bal 2½ per cent. commission of the consideration for which said property is sold over and above the purchase price above specified. This authorization is to remain in full force and effect 5 days and thereafter until revoked by me in writing.

" 'Russell & Newton shall be entitled to commission, as above set out, on any sale made to parties to whom they may have shown or exhibited this land during the term of this agreement, even though said sale is not consummated until after the term hereof, and I agree to pay such commission in such event.

" 'Name: Chas. H. Ramm.'

"On the reverse side of said writing are the following notations:

" 'Name: Charles Ramm
" '60 acres $120,000
" 'Located one mile from Dinuba [Description of personal property omitted.]'

"The complaint, construing said writing, alleges that Ramm agreed to pay them for procuring a purchaser of said properties 5 per cent. upon $10,000.00 of the purchase price and 2½ per cent. on the balance thereof. The complaint proceeds:

" 'V. That within 5 days from the making and signing of said memorandum by said defendant, these plaintiffs procured purchasers for said land, to wit: Fred W. Moore and H. H. Moore, who were and are ready, able, and willing to perform said contract to be sold to said purchasers according to the terms set forth in said memorandum of agreement, and said purchasers then and there offered to purchase said land for said price of $120,000, according to said terms; that these plaintiffs and said purchasers demanded of defendant that he sell said land to said persons according to the terms of said agreement, and then and there offered to do and perform said agreement in every particular according to the terms thereof.

" 'VI. That said defendant then and there refused to sell said lands to said persons according to the terms of said agreement, or at all, and ever since said date has failed and refused, and now fails and refuses to sell said land upon any terms, or to carry out or perform said agreement.

" 'VII. That, by reason of said premises, said plaintiffs have earned as their commissions in procuring said purchasers for said land the sum of $3,250, and defendant has become, and is indebted to these plaintiffs in said sum of $3,250, and that plaintiffs have demanded of said defendant that he pay to them said sum, but to pay the same or any part thereof, defendant has failed and refuses, and still fails and refuses.'

"The answer admits paragraph 1 of the complaint alleging that plaintiffs are duly authorized real estate brokers and dealers in real estate, admits paragraph 2, alleging the appointment of plaintiffs by defendant as his agents to negotiate the sale of the properties referred to in the memorandum of agreement, and also admits the allegations of paragraph 4, explaining the terms of the authorization to sell, but specifically denies paragraphs 5, 6, and 7 hereinabove presented.

"The cause was tried by the court sitting without a jury. The findings are general and are to the effect that all of the allegations of each and all of the paragraphs of the complaint are true, and that 'each and all of the allegations and denials' of paragraphs 1, 2, 5, 6, and 7 of the answer are untrue. Accordingly, the plaintiffs were awarded judgment in the sum of $3,250, with interest, etc., and from said judgment the defendants appeal upon a record prepared in accordance with the provisions of section 953a of the Code of Civil Procedure.

"The point first pressed is that an amended complaint, which is in the record, utterly fails to state a cause of action for the relief sought, because it contains no averment that the plaintiffs procured a purchaser of the properties, referred to in the memorandum of agreement and described in said amended complaint, ready, willing, and able to purchase the same. The consideration and the disposition of this point will require an explanation of the circumstances under which the so-called amended complaint found its way into the case.

"It will be observed that neither in the memorandum agreement nor in the complaint is there a specific description of the real property which it was claimed by plaintiffs that defendant had authorized them to sell. On the close of their case (that is, after they had completed the introduction of all the testimony they intended to present in their original case) the plaintiffs rested, and the defendant did likewise (that is, he then announced that he had no testimony to offer as in rebuttal of the case made by the plaintiffs). Thereupon one of the attorneys representing the plaintiffs stated to the court that, in view of certain facts which had been developed by the evidence introduced in support of the complaint, he desired to move the court for leave to file an amendment to the complaint so that the pleading of plaintiffs would conform to the proof as made, referring particularly to the evidence disclosing a description by metes and bounds of the real property referred to in the memorandum agreement, and at the same time submitted or read to the court a draft of the proposed amendment, and addressed the court relative thereto as follows: 'If the court please, before the matter of argument, in view of certain testimony that has been introduced, we will ask at this time for leave to amend the complaint in this particular: Immediately after paragraph 3 we would ask to amend by adding this paragraph, we will call it 3½.' The proposed amendment contained a specific description of said real property by metes and bounds and the averment that defendant was, at and prior to the execution of the agreement upon which this action is predicated, the owner of said property. Counsel for defendant promptly objected to the allowance of the amendment on certain grounds; one of the grounds being that defendant had not been served with notice of the application for leave to file the proposed amendment, notice being necessary, since, as the argument proceeded, 'there is nothing here that the defendant is the owner of or ever was the owner of any of this land, and we will have to deny these allegations if the amendment is allowed, and try the case over again.' To which counsel for plaintiffs replied by offering to 'stipulate that they (the allegations of the proposed amendment) be deemed denied,' but counsel for defendant refused to yield assent to that proposition. Thereupon the court stated: 'Well, I think the court, in any event, will reserve the ruling upon this application until we have more time to consider it. I recollect nothing you put in evidence about sandy soil. I recollect nothing in evidence about sandy soil'—the proposed amendment having described the soil of the real property concerned herein as being 'sandy.'

"The case was thereupon 'submitted on briefs to be filed in 10, 10, and 5 days.' The reporter's transcript or record contains nothing further in relation to the application to amend the complaint as indicated. In other words, there is nothing in said transcript or record indicating that the court ruled on the application, either allowing or disallowing it. The judgment roll, however, embodies, among the other papers constituting the same, not an amendment to the complaint but what purports to be an amended complaint. After stating that it has been filed by leave of the court first had and obtained, 'for the purpose of making said complaint conform to the proofs,' it reavers paragraphs 1, 2, 3, and 4 of the complaint, omits paragraph 5 of said original pleading, and numbers as paragraph 5 the averments as to the description and ownership by defendant of the real property as they were substantially proposed as an amendment to the complaint, to be numbered 'paragraph 3½,' as hereinabove indicated. The said paragraph 5 is followed by paragraphs 6 and 7, containing the precise allegations of the paragraphs likewise numbered in the original complaint. The amended pleading was not signed by either of the attorneys for the plaintiffs nor either of the latter, but was verified by the plaintiff Russell on the 27th day of October and filed on the following day, which was 10 days after the day (October 18th) on which the trial of the cause was commenced and completed.

[4] "Upon the record as it is thus presented, the defendant, notwithstanding that the reporter's transcript does not directly or expressly show that the court granted the application to file the amended, or amendment to the complaint, invokes the presumption, upon the clerk's certificate of the judgment roll, of which the purported amended complaint is made a part, that said amended pleading was filed by leave of the court, and further invokes the rule that the amended complaint supersedes and wholly nullifies the original complaint. Kuhland v. Sedgwick, 17 Cal. 123; Barber v. Reynolds, 33 Cal. 497; Mecham v. McKay, 37 Cal. 154; Osment v. McElrath, 68 Cal. 466, 470, 9 P. 731, 58 Am. Rep. 17; Pfister v. Wade, 69 Cal. 133, 138, 10 P. 369; Schneider v. Brown, 85 Cal. 205, 206, 24 P. 715; Collins v. Scott, 100 Cal. 446, 34 P. 1085; Ralphs v. Hensler, 114 Cal. 196, 45 P. 1062; Whitehead v. Sweet, 126 Cal. 67, 58 P. 376; Schlake v. MacConnell, 69 Cal. App. 207, 230 P. 974.

[5] "The situation here, upon its face, is rather unique. It is difficult to work out any sound reason for the filing of the amended complaint a number of days after the trial had been completed, or, for that matter, for filing it at all, upon any other theory than that said pleading was intended merely to function as an amendment to the original complaint to the extent only of making the complaint conform to the evidence disclosing the exact description of the real property referred to in the memorandum of agreement. We think it probable that such was the sole purpose of the amended pleading, since it is not conceivable that counsel for the plaintiffs would file an amended complaint pretermitting allegations contained in the original complaint which, it may be assumed not only from their recognized learning in the law but from the fact that they did insert such allegations of fact in their original pleading, counsel well knew were absolutely necessary to the statement of a cause of action for the relief herein sought. Indeed, we do know, from the proceedings relative to the matter occurring on the close of the taking of testimony, that, in point of fact, the purpose of the plaintiffs was merely to add to the complaint as originally filed another paragraph (to be numbered 3½, as was then suggested) whereby an accurate description of the real property involved therein as it was revealed by the evidence would be set forth in that pleading. We have no doubt that the omission of paragraph 5 of the original complaint from the amended complaint was unintentional and an inadvertence. These considerations, however, cannot affect or successfully be set up, so far as this court is concerned, in impeachment of the judgment roll as it was certified by the clerk, or, in other words, as against the presumption that the amended complaint, as it itself declares, was filed by and upon the permission of the trial court previously granted, nor can they interrupt the operation of the rule that said amended pleading supersedes and thus has forced from the judgment roll the original complaint. But, with these propositions in mind, we are still of the opinion that the essential issues of fact in an action of this character were, nevertheless, herein sufficiently presented and, as so presented, were tried and adjudicated. We have the right to presume that a copy of the amended complaint was duly served on the defendant. At all events, we have it from the record of the proceedings of the trial that the defendant knew that there was a motion made at the close of the plaintiff's case for leave to amend the complaint, and that, so far as the record shows to the contrary, was still pending and undisposed of at the time the cause was ordered to be submitted upon briefs to be subsequently filed by the respective counsel. Notwithstanding all this, no demurrer or answer to the amended complaint was filed. The answer to the original complaint, however, is included within the judgment roll here, and we may assume, if not presume, that defendant was content to let the original answer stand as the answer to the amended complaint.

[6] "The rule, as generally approved by the authorities, is that 'a plea to the original declaration will be treated as a plea to an amended declaration, if applicable and responsive thereto.' Of course, if the answer or plea be not responsive to the complaint or declaration, then it will be treated as a nullity. See 31 Cyc. pp. 460, 461, and cases cited in the footnotes. That the answer is responsive to the amended complaint here, there can be no doubt. As pointed out above, the amended complaint contains all the allegations of the original complaint, save and except that expressly and directly asserting that plaintiffs procured purchasers of the properties who were ready, willing, and able to purchase the same. Its allegations may then thus be summarized: That defendant, in a writing subscribed by him, authorized the plaintiffs to negotiate the sale of the properties on certain terms and conditions and for a specified compensation to plaintiffs; that the real property (specifically described) was that referred to in the memorandum of agreement, and 'that said 60 acres was the real property intended by the parties to said agreement as the property for which the said plaintiffs were to obtain a purchaser as mentioned in said written agreement.' Then follows paragraph 6, declaring, 'that said defendants then and there refused to sell said lands to said persons according to the terms of said agreement,' etc. This allegation in paragraph 6 is, of course, entirely too vague and uncertain to justify the declaration that it properly states the fact which it was necessary

to allege to state a cause of action, viz.: That the plaintiffs, within the time specified in the agreement, procured a proposed purchaser or proposed purchasers of the properties ready, willing, and able to purchase the same 'according to the terms of said agreement,' but the allegation does sufficiently imply that they had procured such purchasers to justify the conclusion that the answer to the original complaint is, in that vital particular, as manifestly it is in the other essential particulars, 'responsive to the amended complaint.'

[7, 8] "Treating, therefore, said answer as an answer to the amended complaint, we have this situation, viz.: That defendant admits the execution of the written agreement and that thereby he authorized plaintiffs to negotiate the sale of the properties, within the time named, upon the specified terms and conditions, but expressly denies that plaintiffs procured, at the time and upon the terms and conditions specified in the agreement, a party willing, able, and ready to purchase the properties. Thus the answer came to the aid of the amended complaint and cured its defective allegation as to the procurement by plaintiffs, within the time and upon the terms and conditions set forth in the agreement, of purchasers of the properties ready, willing, and able to purchase the same upon said terms and conditions. Slaughter, Adm'x, etc., v. Goldberg, Bowen & Co. et al., 26 Cal. App. 318, 324, 325, 147 P. 90. Moreover (still regarding the amended complaint and the answer to the original as the only pleadings in the case), the action was tried upon the theory that the issue as to the procurement of the purchasers of the properties by plaintiffs within the specified time and upon the stipulated terms and conditions was squarely presented and tendered by the pleadings. The evidence addressed to the proof of that fact was offered and received without objection. It is true, that, on a few occasions, objections were interposed by defendant to testimony offered by plaintiffs to support the allegation of the complaint that such purchaser or purchasers were so procured, but the objections were not specific but upon the general grounds that the testimony was 'irrelevant, immaterial, and incompetent.' Where, as is true of the amended complaint here, a complaint attempts to set forth matters essential to the statement of a cause of action but does not fully measure up to that indispensable requirement, and yet contains an allegation from which an essential fact is necessarily to be implied, the objection to evidence upon the ground that such issue has not been raised in the complaint should be specific (Boyle v. Coast Imp. Co., 27 Cal. App. 714, 720, 151 P. 25), or, in other words, such objection in such case should be as specific as an objection to a complaint by demurrer upon the ground of uncertainty or ambiguity, etc.

[9] "But another answer to the contention that the judgment is affected by a fatal infirmity in that it is without the support of a complaint which states a cause of action, for the reason that the amended complaint, which supplanted the original, does not contain the essential allegation of the procurement of a purchaser, etc., lies in the indisputable fact that the action, as the court in its findings expressly declared, was tried upon the issues tendered by the answer to the original complaint, and, as seen, one of the issues so directly tendered involved the question whether the plaintiffs, within the time specified, procured a purchaser or purchasers willing, ready, and able to purchase the properties upon the terms and conditions upon which plaintiffs were authorized to negotiate the sale of the same. Thus it is perfectly clear, from whatever viewpoint the situation as to the pleadings and the trial may, with legal propriety, be considered, that the question whether the plaintiffs performed the agreement on their part or the services called for thereby was submitted as one of the issues to be tried and adjudicated and which was in fact tried and adjudicated as fully and completely as if the amended complaint had never been introduced into the judgment roll and the pleadings stood only as they were originally filed.

[10] "The point next urged for a reversal is that the findings are not supported by the evidence. The point is without merit. As already stated, the only testimony or evidence presented at the trial was that introduced by plaintiffs, the defendant having rested his case on the proofs so made. As above pointed out, the fact that the defendant's intestate conferred upon plaintiffs authority to obtain a buyer of the land and personal property referred to in the written memorandum mentioned within the time and on the terms and conditions specified in said writing for the compensation also specified therein, was and is admitted. It also stands admitted that, at the time the transactions involved herein took place, the plaintiffs were regularly licensed real estate brokers. The evidence shows that Charles H. Ramm, at all of said times, resided upon a 60-acre tract of land situated approximately one mile north of the center of the town of Dinuba; that he owned 40 acres of said land and was then buying the remainder thereof (20 acres) from his father; 20 acres of the tract were planted to grapes of the Malaga variety and a like number of acres thereof to grapes of the Emperor variety. A dwelling house of 6 rooms was standing on the east 20 acres, on 12 acres of which grapes of the Emperor variety, 4 years old, were growing, and on 4½ acres of which plum trees were growing. It appears that the proposition to vest plaintiffs with authority to negotiate the sale of the properties was first suggested by defendant's intestate, he having said to them that, on account of ill health, he desired to dispose of the ranch; that, after the said proposition was so made, Newton, one of the plaintiffs, accompanied Mr. Ramm to the ranch, and, after inspecting the properties and thus learning what properties, other than the ranch itself, were to be sold through plaintiffs, he (said Newton) immediately proceeded to look for a purchaser of said properties; that he found and took to the ranch certain prospective buyers, and among these were two parties by the names of Fred Moore and Harry Moore, brothers; that the Moores were pleased with the ranch and requested plaintiffs to furnish them with a detailed description of the land and all the other property which was to be embraced within the sale; that Newton thereupon made another visit to the ranch to obtain that information, and, securing it from defendant's intestate, presented it to the Moores. It was further shown that, on several different occasions thereafter, Newton took Mr. Fred Moore to the ranch; that, on one of these occasions, both Newton and said Moore had a conversation with Ramm regarding the personal property which it was intended should 'go with the place,' and also as to the terms upon which it could be purchased. It was shown that it was

on the occasion of one of these visits that Newton made out the broker's agreement (attached to and made a part of both the original and amended complaint), and which was then signed by Mr. Ramm on his ranch, authorizing plaintiffs to procure a purchaser of the properties. On the last occasion, on which Newton and Fred Moore visited the ranch, the former had in his possession said Moore's check for the sum of $1,000, the same to be used as a deposit upon the purchase price of the place. Newton stated to Ramm that he had said check in his possession, and tendered it to Ramm, who, thereupon, addressing Newton, said: 'You are my agent—you hold the check.' On the same occasion, Fred Moore said to Ramm, 'I bought your ranch, and I want to see the stuff that goes with the place, tools and all;' to which Ramm replied, 'All right;' and thereupon took Newton and Moore over the premises and pointed out the tools, horses, and other articles of personal property which were to be included within the sale. It was further shown that on the Monday succeeding the visit to the ranch by Newton and Moore last spoken of, Ramm went to Newton's office and left with the latter a complete list of the tools that were to go with the ranch on the sale thereof. Several days later, in accordance with a previous understanding between the parties, the plaintiff, Newton, Ramm, and the two Moores, met at the office of Attorney Green, in Dinuba, for the purpose of preparing an agreement of sale. At that meeting, said Green made memoranda of the details of the agreement or the sale with a view of committing the same to writing, but, before he had completed the preparation of the contract, Ramm was called to the telephone and immediately thereafter left the lawyer's office, with the understanding that he, with the Moores and Newton, would again meet at said law office and complete the contract by the execution thereof by Ramm and the Moores. This meeting was subsequently held, and at that time the contract, already prepared, was signed by the Moores. Said proposed contract or writing constituted an offer to purchase the properties referred to in the writing, signed by Ramm, authorizing plaintiffs to sell said properties and contained a description of said properties; recited that the Moores had posted with the plaintiffs the sum of $1,000, 'as a guaranty of good faith'; that the proposed purchasers would pay to Ramm the additional sum of $34,000 when he had furnished to the said proposed purchasers a 'certificate or abstract of title from which it shall appear that you (Ramm) can convey good title, * * * it being understood that at the time of such payment of $34,000 formal contract of sale is to be executed, the balance of the purchase price in consecutive annual installments of $3,500, with interest thereon at the rate of 6 per cent. per annum, payable annually.'

"The above document was delivered to Ramm at said meeting. He read it and then stated that his wife would not sign the papers, and refused to proceed with the deal. Notwithstanding this turn in the negotiations, the Moores and the plaintiffs continued in their efforts to consummate the sale, and, to that end, endeavored on different occasions, without avail, to persuade Ramm to complete the transaction upon the terms and conditions upon which he had authorized plaintiffs to sell the properties.

"Green, the attorney above spoken of, testified and corroborated in all important particulars Newton's testimony, from which the above statement of the facts is taken.

"Fred H. Moore, one of the proposed purchasers, testified that he and his brother, the other proposed purchaser, had sufficient financial means with which to carry out the deal according to the terms and conditions upon which the plaintiffs were authorized to negotiate the sale of the properties and as specified in the written offer by the Moores to purchase the same.

"It was not shown, or any attempt made to show that, at any time during the negotiations between plaintiffs and Ramm or between the former, the latter and the Moores that the name of Mrs. Ramm was ever mentioned in connection with the proposed sale, nor was it shown, or any attempt made to show, that she was ever at any time requested to sign any papers in connection with the transaction. There is no testimony that Ramm objected to the form of the offer or the terms and conditions as set forth in the proposed agreement or offer by the Moores to purchase the properties, the only objection to proceeding with the transaction being, as shown, that his wife had stated she would refuse to sign any papers or documents looking to the consummation of the sale.

[11-13] "The above recital of the facts as they were disclosed by the testimony presented by the plaintiffs clearly confirms the statement heretofore made that the finding that the plaintiffs procured purchasers of the properties willing, ready, and able to purchase the same is evidentially well supported. There is no conflict in the evidence upon the vital facts essential to the support of the findings and the judgment in an action of this character. The testimony is not inherently improbable, or, upon its face, characterized by an intrinsic weakness which would justify this court in passing upon the weight thereof. The solution of that question was therefore the sole function of the court; it having been selected to try the questions of fact. The rule is too elemental and has been so often repeated in the decisions as to require the restatement thereof that, even where the evidence addressed pro and con to the issue or issues is contradictory, and there is thus produced therein a substantial conflict, the decision of the jury or trial court upon the facts is conclusive and binding upon the courts of review. For a much greater reason should this rule apply where, as here, the testimony is not inherently improbable, and, upon its face, is all one way and uncontradicted. The only ground upon which Ramm refused to carry out the proposition to sell the properties to the Moores was, not that the latter were not willing, ready, and able to purchase the same, but solely because his wife refused to join him in the sale and execution of the contract of sale. As seen, there is no testimony showing or even remotely tending to show that the consent of Mrs. Ramm to the sale or the requirement that she should join her husband in the execution of the contract of sale, or any of the preliminary negotiations or writings relative to the sale, was an element or factor in the contract between plaintiffs and Ramm, whereby the former were authorized to find a purchaser of the properties. Where the owner of property refuses to sell to the purchaser procured by the broker upon any ground other than that of the inability of the proposed purchaser to purchase, the owner can-

not, in an action against him by the broker for compensation, successfully set up such ground as a defense, unless the fact constituting that ground is included in the agreement between the owner and broker as one of the terms or conditions which must be met or complied with by the broker before he has earned or is entitled to compensation for his services. It follows that the fact that Ramm's wife refused to join her husband in the transfer of the properties to the Moores does not in the least affect or impair the right of the plaintiffs to the compensation which Ramm agreed to pay them for securing purchasers of the properties. Indeed, it is the general rule that the refusal of the wife of the owner to join in the conveyance of the property to the proposed vendee does not, itself, in a case of this character, operate to deprive the broker of his right to compensation. See Justy v. Erro, 16 Cal. App. 519, 522, 117 P. 575, and cases therein cited; Farrington v. McClellan, 26 Cal. App. 375, 383, 146 P. 1051; Goodrich v. Turney, 44 Cal. App. 516, 186 P. 806; Johnson v. Krier, 59 Cal. App. 330, 333, 210 P. 966; Freeman v. Creelman, 60 Cal. App. 14, 22, 23, 212 P. 56.

[14, 15] "The contention that, because the Moores demanded, as a condition to the execution of the contract of sale, a certificate of title to the real property from Ramm, their proposal to purchase did not constitute an unconditional offer to purchase the properties, and that for that reason the plaintiffs failed to procure in said Moores purchasers willing, ready, and able to buy said properties, is without merit. By the writing authorizing the plaintiffs to obtain purchasers of the properties Ramm expressly agreed to furnish to any proposed buyer a 'deed and abstract, or certificate of title, showing clear title in me to date.' It is argued that the provision in said writing means and was intended to bear no other meaning, that defendant agreed to furnish an abstract or certificate of title only when the deed was tendered and not before or at the time the contract of sale was executed. We cannot, as above intimated, yield our assent to that construction of said provision. If, as all the parties here seem to assume, the proposed contract was one of sale of the properties, then the execution thereof, which means that the cash payments required to be made at the time of the execution of the contract on the purchase price were then and there to be made, would operate to consummate the sale, and, obviously, before the contract was executed, the purchasers would be entitled to receive from the defendant duly authenticated evidence of his title to the properties. Such a situation, indeed, would clearly come within the language of the provision as it is construed by counsel for defendant. And we can perceive no reason for holding that the provision was not intended as well to apply to a contract for the sale of the properties, since it does not expressly or definitely fix the occasion on which the certificate of title is to be furnished. But it is further insisted that there was failure on the part of the Moores to offer to purchase 'upon the terms of the agreement,' in that they offered therein to pay 'cash down' on the first payment the sum of $34,000 only, whereas the agreement authorizing plaintiffs to sell the property called for a cash payment of $35,000. The written proposal of the Moores to purchase the properties specifically set forth, as has above been pointed out, the offer to make the initial payment as follows: 'One thousand dollars, which we have posted with Russell & Newton, as a guaranty of good faith,' and '$34,000 additional, when you (Ramm) shall furnish certificate or abstract of title,' etc. Thus clearly and unambiguously an offer of the cash payment of $35,000 on the consummation of the sale, as called for by the agreement between Ramm and plaintiffs, was submitted by the Moores, and we are at a loss to understand why a contention that such offer was not submitted is here urged. Our conclusion, on this branch of the case, is that the offer submitted by the Moores to purchase the properties was in all respects in accord with the terms and conditions of the listing agreement, or, in other words, constituted a direct offer to purchase upon such terms and conditions.

[16] "Lastly, it is contended that the description of the real property as it is given in the listing contract or memorandum of agreement between plaintiffs and Ramm is so vague and ambiguous as to render uncertain the particular tract or tracts of land to which said agreement related. The answer to this contention is that which is given in each of the following comparatively recent cases dealing with a like contention: Goodrich v. Turney, 44 Cal. App. 516, 186 P. 806; California Packing Corp. v. Grove, 51 Cal. App. 253, 196 P. 891; Tolosano v. Will, 62 Cal. App. 622, 217 P. 803. The cases of Goodrich v. Turney and Tolosano v. Will involved actions by brokers for the recovery of compensation for procuring purchasers of land owned by the defendants. The Packing Corporation Case was an action to recover an amount alleged to be due from defendant for his failure to deliver certain fruit in pursuance of the terms of a written contract. In the case of Goodrich v. Turney the description of the land proposed to be exchanged by defendant for land owned by another party was as follows: 'An undivided one-half interest "in lots 423 and 424 of Fairmead Colony Tract No. 3, in Madera County, as a tenant in common with" his wife.' In California Packing Corporation v. Grove the description was: '"The following orchards and lands leased or owned by the seller in the county of ——, state of California, to wit: Located ¾ miles southeast of Visalia." * * * Acres, 10. Present age, 6. Varieties of fruit, Tuscan peaches. Acres, 10. Present age, 6. Varieties of fruit, Phillips peaches.' In the case of Tolosano v. Will the property was described, as is stated in the opinion, 'as 40 acres located 12 miles West of Fresno; also that 36 acres of said land are planted to Thompson grapes, 4 years old, and 4 acres of alfalfa; that there is situated upon the property a house of three rooms, a barn, a tank house, a windmill, and an electric plant. The number of sweat boxes, picking boxes, horses, farming tools, and implements upon the premises were also stated.' These descriptions were held to be sufficient in written instruments involving transactions of the character of the one here or in executory contracts relating to the transfer of real property, and in none of them was the description of the real property more definite than that of the real property in the listing card in this case. Furthermore, it appears without contradiction in this case that one of the plaintiffs here, prior to the preparation of the listing card, or the signing of any agreement or authorization by

Ramm, visited the premises in question and that the latter pointed out to him the precise real and personal property which he desired to put in the hands of plaintiffs to be sold. It further likewise appears that one of the Moores, before offering to purchase the properties, visited the premises, and that Ramm not only showed him the real property which he had employed plaintiffs to secure a purchaser for, but also called his attention to the specific articles of personal property which were to be included in and go with the sale. It was not shown or pretended at the trial that Ramm owned any other real property situated one mile north of and from Dinuba. Moreover, the amended complaint, as we have seen, purports to describe the real property by township, range, and sectional subdivision, and the same is admitted to be correct by the failure of the answer to controvert it either generally or specifically. From all these considerations it is clear that nobody connected with the transaction was at any time misled or under any misapprehension or uncertainty as to the particular properties referred to in the listing card.

[17, 18] "It is the settled rule in this state 'as to particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that, where the description, so far as it goes, is consistent but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete.' Marriner v. Dennison, 78 Cal. 202, 20 P. 386.

"In Macknight, Adm'r, etc., v. Davitt, 37 Cal. App. 720, 174 P. 77, in which the action was by a broker to recover commissions for negotiating the sale of certain lands, it is said: 'Much greater liberality is allowed in construing and curing defective descriptions in broker's contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part, and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances.' See Maze v. Gordon, 96 Cal. 61, 30 P. 962; Proulx v. Sacramento Val., etc., Co., 19 Cal. App. 529, 534, 126 P. 509.

[19, 20] "Some suggestion is made in the briefs as to the insufficiency of the written memorandum of agreement to meet the requirements of the statute of frauds in such cases. The reply to any such suggestion is that the statute of frauds is not set up by the defendant, the rule being that in order that the defendant in any case may avail himself of the benefit of said statute, where it does not appear from the face of the complaint that the statute has not been complied with, it is necessary that it should be pleaded and proved. Furthermore, in this case the execution of the written memorandum was not denied and was introduced in evidence without any attempt to impeach it upon any ground. Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 112 P. 454; Broder v. Conklin, 77 Cal. 330, 19 P. 513."

The judgment is affirmed.

We concur: SHENK, J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

WASTE, C. J. I dissent. The respondents herein instituted this action in the superior court of Fresno county against Charles H. Ramm, deceased, to recover commissions in the sum of $3,250 alleged to have been earned by them as real estate brokers. Trial was had before the court without a jury, and judgment was entered in favor of said respondents as prayed for.

It appears that on January 5, 1920, the appellant's intestate authorized the respondents in writing to sell a tract of 60 acres of land situate in Tulare county, with the personal property thereon, for the sum of $120,000. Said written authorization provided that $35,000 of said purchase price was to be paid by the purchaser in cash and the remaining $85,000 was to be liquidated at the rate of $3,500 per annum with interest at 6 per cent. The commissions to be received by the respondents in the event of a sale was consummated were also provided for in the authorization of sale.

On this appeal it is contended by the appellant, among other things, that the respondents failed to produce a purchaser or purchasers "ready, *able* and willing" to buy the property on the terms fixed by the owner. The respondents, on the other hand, urge that the purchasers procured by them were "ready, *able*, and willing" to purchase the property on the terms specified, but that the appellant's intestate refused to convey to said purchasers.

The rule is that, to entitle a broker to commissions under a contract or written authorization of the character of that here involved and where, as here, no sale has been actually consummated, it is incumbent on him to prove that he found a purchaser or purchasers, not only ready and willing, but also *able* to buy the property on the terms prescribed by the owner. Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673; Mattingly v. Pennie, 105 Cal. 514, 39 P. 200, 45 Am. St. Rep. 87; Tashjian v. Krikorian, 55 Cal. App. 160, 202 P. 956. It follows, therefore, that the respondents' right of recovery is dependent upon their having procured a purchaser *able* to buy the property on the terms fixed by the owner.

All of the evidence touching upon the financial ability of the purchasers found by the respondents was given by Fred W. Moore, who testified that he and his brother, H. H. Moore, had signed a written offer wherein and whereby they had agreed to purchase the tract of land then owned by appellant's intestate for the sum of $120,000, of which amount $35,000 was to be paid in cash; that he had sufficient money in the bank against which a check for $1,000 given by him to the respondents as a deposit might be drawn; that he "was able to buy it and go through with all my obligations"; that he and his brother were "buying it together"; that they were able to pay for the property; that he (the witness) had "considerable" property. On cross-examination the witness testified that he and his brother were "able to raise" the $34,000 required to complete the initial cash payment; that they "had considerable of it in the bank"; that he had about $15,000 in the bank, but that he did not know "what my brother had, but we were able to take care of the deal"; that he would not be required to raise the $34,000 necessary to complete the initial cash payment, as he "knew my brother would take care of half of it, his half of it"; that he did not intend or expect "to take care of more than half"; that they had "everything arranged to take care of the deal"; that he did not "remember" just how he was to raise the $2,500 needed to complete his half of the initial cash payment; that he was going to borrow said amount from "somebody" and give his note therefor; that he did not "remember just how he was figuring on raising it now."

The cases passing upon what constitutes ability to pay on the part of a purposed purchaser involve such a variety of circumstances that it is difficult to deduce any fixed rule from them. It is my opinion, however, that the evidence set forth in narrative form above is insufficient to support the findings and judgment in favor of respondents. In other words, the respondents have failed to satisfy the burden resting upon them of proving that they had produced a purchaser or purchasers having the *ability* to buy the property upon the terms fixed by the owner.

The evidence clearly establishes that the witness, Fred W. Moore, intended and expected only to furnish one-half of the purchase price of $120,000 and but one-half of the initial cash payment of $35,000. Assuming, without deciding, that the evidence sufficiently shows that said witness was financially able to care for and pay his one-half of the purchase price and initial cash payment, there still remains a hiatus in the chain of proof for there is an utter lack of evidence tending to show or establish that the witness' brother, H. H. Moore, was financially able to care for and discharge his one-half of the obligation in the event a sale was consummated.

The law will not presume the existence of the purchaser's financial ability; the burden is upon the broker to establish that fact. It is declared in Merzoian v. Kludjian, supra, that:

> "It was a part of plaintiff's case in chief to show that [the purchaser] was ready, able, and willing to make the purchase, and this could be done by proof either that he had the funds in hand, in whole or in part, or that he *commanded* resources upon which he could obtain the requisite credit." (Italics added.)

The statement of the witness, Fred W. Moore, that he and his brother "were able to take care of the deal" was but the expression of an opinion on the part of said witness and is too indefinite and conjectural to satisfy the burden resting upon the respondents or to establish the *ability* of H. H. Moore to proceed with the consummation of the sale so far as he personally was concerned. As already indicated, there is an absence of evidence tending to show the financial ability of said H. H. Moore, for the witness Fred W. Moore stated he did not know the nature or extent of his brother's assets. The evidence adduced is also insufficient to establish the ability of the witness Fred W. Moore to care for and discharge the entire financial burden in the event a sale was consummated. His testimony merely reveals that he had approximately $15,000 on deposit in a bank and "considerable" property. As declared in Merzoian v. Kludjian, supra, "he did not state whether he could have borrowed money on that property" nor is his testimony "at all certain as to his available assets." The witness, in fact, testified that he did not "remember" how and where he was to secure the nominal sum of $2,500 needed to complete and discharge his one-half of the initial cash payment. This being so, it may not reasonably be inferred that he was in a position to pay the entire initial cash payment or to discharge the full purchase price in the event a sale was consummated. Moreover, his testimony to the effect that he would have borrowed said $2,500 from "somebody" lends no support to a supposition that he might have borrowed sufficient to discharge the entire initial payment in the event of a sale, for the authorities in this state uniformly hold that a statement of the proposed purchaser evincing a confidence in his ability to borrow the money "from some one, without showing that there was any one legally bound to loan him this money, is insufficient to establish his financial ability to make this purchase." Tashjian v. Krikorian, supra.

The evidence in the instant case, when considered in a light most favorable to the respondents, is insufficient to establish that the purchasers produced by them were "ready, *able* and willing" to complete the sale.

200 Cal. 550

HERSHEY et al. v. RECLAMATION DIST. NO. 108 et al. (Sac. 3866.)

(Supreme Court of California. Feb. 28, 1927.)

1. Fraud 🔑49—Fraud must be affirmatively pleaded and proved.

Fraud is never to be presumed, but must be affirmatively pleaded and proved, or facts from which it is to be inferred must be of such character that no other reasonable conclusion may be reached but that of fraud.

2. Drains 🔑67—Assessment statutes, making method therein set forth of objecting to assessments exclusive, held constitutional (Pol. Code, § 3455, as amended and § 3462).

Provisions of Pol. Code, § 3455, as amended by St. 1917, p. 1197, and St. 1919, p. 604, and section 3462, providing that property owners be served with notice of hearings on assessments and plans of reclamation district, and requiring them to state objections thereto in writing or be concluded from thereafter asserting objections, *held* not to deprive property owners of constitutional right.

3. Constitutional law 🔑43(1)—Landowners failing to object to validity of statute or to request modification of assessment at time could not thereafter object (Pol. Code, § 3455, as amended, and § 3462).

Where landowners assessed for expenses of reclamation district under Pol. Code, § 3455, as amended by St. 1917, p. 1197, and St. 1919, p. 604, failed, after notice, to request modification or amendment of assessment as required by section 3462, or to raise question of validity of section 3455, they could not thereafter raise such questions.

4. Constitutional law 🔑43(1)—One receiving benefit from unconstitutional law is estopped from asserting its unconstitutionality.

One cannot deny the constitutionality of a law after having received and accepted benefits thereunder.

5. Statutes 🔑97(3)—Legislature may create reclamation districts by special acts.

Reclamation districts may be created by special acts of the Legislature.

6. Statutes 🔑97(1)—Irrigation districts may be created by special acts.

Legislature has the power to create irrigation districts by special acts.

7. Waters and water courses 🔑224—Legislature may merge reclamation and irrigation districts into one system.

The Legislature holds the power to consolidate into one system two established systems of bringing arid and swamp and overflowed lands into a state of productiveness.

8. Statutes 🔑148—A section of the Code may be amended by reference to its number.

Amendment to Code section may be made by reference to the number of the section amended.

9. Statutes 🔑123(7)—Title to act amending act under which reclamation district was organized held to give landowners in district notice of change in reclamation laws (Pol. Code, § 3455, amended by St. 1917, p. 1197).

Landowners in reclamation district *held* to have been given sufficient notice that irrigation plans were to be included in operations of reclamation district by St. 1917, p. 1197, amending Pol. Code, § 3455, which incorporated as part of its title the words "relating to swamp and overflowed salt marsh and tidelands."

10. Waters and water courses 🔑216—"Reclamation" is sufficiently broad to include irrigation.

The term "reclamation" is sufficiently comprehensive to include the irrigation of lands which are excessively arid.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Reclamation.]

11. Drains 🔑14(1)—Plans and estimates submitted by reclamation district trustees held sufficiently itemized.

Items set out in forming the plans and estimates submitted by trustees of reclamation district to reclamation board *held* to substantially comply with requirement as to segregation and itemizing of expenses.

12. Drains 🔑91—In absence of evidence to contrary, officers of reclamation district may be presumed to have computed interest legally in assessing landowners.

It may be presumed, in the absence of evidence to the contrary, that the officers of reclamation district, in estimates of costs, before making assessments on landowners computed interest at not more than legal rate.

13. Appeal and error 🔑1008(1)—Trial court's judgment as to whether computation of interest, in expense estimates by trustees of reclamation district, was on proper basis, could not be disturbed.

Trial court's judgment, after hearing evidence that the computation of interest by the officers of reclamation district in estimates of expenses, on basis of which assessments were made on landowners, was proper, *held* conclusive unless erroneous as a matter of law.

14. Waters and water courses 🔑231—Benefit from irrigation system held question of fact for trial court.

Benefits derived by plaintiff's lands from irrigation system in comparison to benefits derived by other lands in reclamation district *held* questions of fact to be determined by the district authorities in the first instance, and by the trial court finally.

15. Appeal and error 🔑1008(1)—Judgment of trial court as to whether losses occurring in management of irrigation operations, invalidated assessment could not be disturbed.

Though the appellate court may question certain expenditures and transactions in the management of reclamation district, it would not disturb the judgment of the trial court as to whether or not losses invalidated an assessment made on the landowners.

16. Drains ⊂⊃18—Courts will allow public officers charged with comprehensive scheme of reclamation much latitude in management, in absence of bad faith.

In the absence of bad faith on the part of public officers managing a complicated plan or scheme of reclamation, courts will allow such officers much latitude in management.

In Bank.

Appeal from Superior Court, Colusa County; George H. Thompson, Judge.

Action by Cornelia A. Hershey and Davidella Hershey, as administratrices of the estate of Ella L. Hershey, deceased, substituted for Ella L. Hershey, and others, against Reclamation District No. 108 and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

George Clark and Clark, Nichols & Eltse, all of Berkeley, for appellants.

W. H. Devlin and Devlin & Devlin, all of Sacramento, and Thos. Rutledge, of Colusa, for respondents.

SEAWELL, J. Ella L. Hershey, one of the original plaintiffs, having died, Cornelia A. Hershey and Davidella Hershey, as administratrices of her estate, have been substituted in her place and stead. This is an attack made by plaintiffs upon assessment No. 5 levied upon land situate within reclamation district No. 108, located in Yolo and Colusa counties, the easterly boundary line of which is the Sacramento river. The district comprises approximately 60,000 acres of land. Said reclamation district being within the Sacramento and San Joaquin drainage district, section 3455, Political Code, as amended (Stats. 1917, p. 1197, and Stats. 1919, p. 604), is made applicable to the proceedings taken by the trustees and officers of the district, which proceedings constitute the basis of the assessment sought to be invalidated by this proceeding. Plaintiffs' lands included within the limits of the district consist of approximately 2,500 acres and were assessed for both reclamation and irrigation purposes. The lands were assessed in two parcels, and were designated as tracts Nos. 9 and 10, respectively. Tract No. 9 contains 2,377 acres and was assessed in the sum of $163,175.55; No. 10 contains approximately 123 acres and was assessed in the sum of $467.25. The two parcels are contiguous. The action was brought against said reclamation district and its officers and 200 other owners in the district, numbered from 1 to 200, both inclusive.

The report to the board of supervisors upon which the assessment proceedings are based is dated March 1, 1923, and was filed with the board of supervisors of the county of Colusa on March 31, 1923. It contains the plan of reclamation and the estimates upon which the assessment is asserted. Judgment in the court below went against the plaintiffs, and this appeal is from the judgment as entered.

In addition to the formal allegations of the complaint, it is alleged that on March 1, 1923, the trustees of said district made an alleged order purporting to adopt certain plans and new, amendatory, supplemental, and additional plans for the reclamation and irrigation of lands within reclamation district No. 108, together with alleged estimates of the cost of past and contemplated reclamation and irrigation works of the district, including incidental expenses and alleged maintenance and repairs thereof, and that said plans and estimates contained statements that the improvements made were necessary to the reclamation and irrigation of the lands of the district. The complaint alleges the filing by the board of trustees of the requisite number of copies of the original plans and estimates with the board of supervisors of the county of Colusa, the certification and transmission of copies thereof to the state reclamation board, and the making of a purported order by the latter board approving the same and the subsequent making of a purported order by the board of supervisors of the county of Colusa appointing three commissioners of assessment to levy an assessment and apportion the same according to the benefits that would accrue to each tract of land; the making up of the assessment lists showing the amounts stated in said estimates; the fixing of the time when objections would be heard; the publication of notice thereof and the levying of the final assessment against plaintiffs' lands, which aggregated the sum of $163,642.80. Proceeding, the complaint alleges the filing of written objections to said assessments and the overruling of the same by the board of supervisors of the county of Colusa, which body then and there made an order approving and affirming said assessments. Thereafter the original list was filed with the county treasurer of the county of Colusa, and a certified copy was filed with the county treasurer of the county of Yolo. The objections to the assessment alleged to have been filed by plaintiffs with the board of supervisors are set forth in the complaint and constitute practically the balance of the pleading. First, a repudiation of any liability springing from the assessment was made upon the ground that the costs and expenses of the reclamation and irrigation project were not apportioned according to the benefits that had accrued or would accrue, but that said apportionment was, as to plaintiffs' lands, unequal, excessive, and unfair as compared with the assessments imposed upon the lands of others similarly subject to taxation. The assessment is also contested upon the grounds that the commissioners imposed upon plaintiffs' land charges amounting to about $20 per acre for costs and charges

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⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes theretofore incurred in the construction, operation, and maintenance of irrigation works and incidental expenses incurred in connection with such works and charges for interest on indebtedness incurred in constructing, maintaining, and operating said works and about $10 additional per acre for the construction of additional irrigation works and the maintenance thereof and for additional expenses to be incurred in connection with future works and the operation and maintenance thereof, which works have not benefited and will not benefit plaintiffs' lands. It was also made a ground of objection that the whole of said expenses incurred or to be incurred were for the benefit of lands other than the lands of plaintiffs and that plaintiffs' lands do not in any sense need irrigation; that the charges imposed upon said lands for irrigation works and irrigation expenses are disproportionate to the benefits that have or will accrue to the same; that said plans and estimates purport to show estimates of amounts expended and to be expended upon (a) the back levee of the district; (b) drainage works, including pumping plants; (c) power plants; (d) irrigation works and an irrigation system and the expenses of the construction, maintenance, and incidental expenses thereof; (e) incidental expenses of such works. It is also made a ground of written objection that said estimates were and are excessive and untrue and relate to things and represent and include expenses which were not made for the work of reclamation or the irrigation of the lands of said district and therefore there was no authority to incur the same. The court found that the foregoing objections pleaded were not filed with the board of supervisors, but others, less elaborate and specific, which are hereafter summarized, were filed.

Concluding this subject the complaint proceeds by alleging that the plans and estimates do not, upon the face of either, show such invalid charges, but they were known to the defendants and unknown to plaintiffs and can only be ascertained by bringing the defendants into court; that said plans and estimates as to certain items of reclamation and irrigation fail to show with any degree of certainty the nature of the work done of where the work, if done, was in fact done; that the commissioners in levying the assessment could not, in the case of the estimates or statements of expenditures relating to certain items [(a) to (e), inclusive], determine from said plans and estimates the nature or purpose of large amounts of expenses that were included in the total estimates for work done or to be done and said commissioners were compelled to ascertain from the engineer of the district the nature of work done or to be done in order to make said estimates; that said facts were not ascertainable from an inspection of the plans and estimates by the landowners and could only be known by a full and careful accounting and hearing in a court action; that the expenses complained of and charged against plaintiffs' lands are not shown in any plans or estimates showing the nature of the work; that plaintiffs' lands were assessed with large sums on account of interest accrued or thereafter to accrue on expenses incurred. It is claimed that it is impossible to ascertain from the face of the plans and estimates what periods of time are covered by said estimates of expenses on account of interest accrued or to accrue or to determine the amount that should have been included in said assessment as accrued or unaccrued future interest. It is alleged that a large amount of the various sums which go to make up the assessment consist of expenses that were not for maintenance or repair, but were expenses upon new, supplemental, and additional plans of reclamation and irrigation that were never adopted or made the plans of the district prior to the time said expenses were incurred; that large expenses were charged on plaintiffs' lands without being segregated or separately stated in said plans, and are mixed and confused with expenditures laid out on plans and estimates previously adopted; and that a large portion of the expenses contained in said estimates were incurred without the prior making, adopting, approving, or filing of any plans and estimates for said contemplated expenditures. This, it is alleged, applied particularly to the Knight's Landing power plant built and equipped at a cost of about $200,000, which was never of any benefit or use to plaintiffs' lands and which has since been discontinued. In general language objection is made to every item of reclamation and irrigation included in the estimated costs of construction, estimated maintenance costs, estimated drainage operation costs, estimated irrigation costs and incidental expenses, and all charges for maintenance or repair of such work. Large sums of money are alleged to have been expended and heavy expenses incurred on new, supplemental, and additional plans without the prior adoption, filing, or approving of the same, and said plans and estimates contain no showing as to when warrants were issued or the purpose thereof or as to the times of incurring said expenses. It is complained that the incidental expenses mentioned in the reports and estimates are grossly excessive and those claimed to have been incurred were not described, and, it is charged, the estimate was made in a lump sum for the purpose of concealing expenditures of moneys made in a manner not authorized by law. It is alleged that the plans and estimates were adopted by the trustees of the district pursuant to a purpose and plan to compel the commissioners of assessment to relieve the lands of the River Farms Company, a corporation, and others of heavy burdens that had been imposed upon their lands by reason of the adoption of plans of reclamation and irrigation that had proven unwise and had failed and which far exceeded in cost the estimate of the district engineer; that pursuant to said plan of favoritism said River Farms Company's lands were relieved of a large amount of said expense which was superimposed upon plaintiffs' land; that one of the trustees who voted to adopt the plans was president or manager of and a stockholder in said River Farms Company. Finally it is alleged that neither the board of trustees of said district, nor the state reclamation board, nor the board of supervisors of the county of Colusa, had jurisdiction to make any order or orders of any kind with respect to the plans and estimates referred to in said complaint, and said commissioners of assessment were without jurisdiction to make any assessment upon said lands of plaintiffs.

The prayer is that the court shall make and enter its decree setting aside, canceling, and annulling and holding to be invalid the assessment so made. The foregoing is a full and fair résumé of the material allegations of the complaint.

By their answer defendants aver the adoption by the board of trustees of said district, on or about May 1, 1923, of plans for the reclamation and irrigation of land in reclamation district No. 108, together with estimates of the cost of the work to be done, and already done, including maintenance and repair thereof. They aver that said plans and costs were necessary in the reclamation and irrigation of said lands. The approval of the plans and estimates by the reclamation board of the state of California and the acceptance of the same, the order of the board of supervisors approving the assessment, and the taking of the necessary steps in all stages of the proceedings required to give validity to the assessment, are pleaded. They deny that prior to the date of the hearing of the objections to said assessment the objections were made as alleged by plaintiffs, and allege that many objections set forth in the complaint were not contained in the written objections. Defendants aver that the commissioners in assessing plaintiffs' land apportioned the cost of reclamation works, including irrigation works in proportion to the benefits accrued or that would accrue upon each tract of land, and that the assessment levied upon plaintiffs' lands was not excessive or unequal as compared with other lands. They aver that no amount or sum was imposed upon plaintiffs' lands for or as charges theretofore incurred in the construction or operation or maintenance of irrigation works, or incidental expenses in connection therewith, or for interest on indebtedness incurred in constructing, maintaining, or operating such works, or any sum for the construction of additional irrigation works or the maintenance thereof or for incidental expenses to be incurred in connection with the future operation or maintenance of the same. It is averred that plaintiffs need irrigation and will be benefited by the works set forth in the plans. It is alleged that the plans and estimates were taken by the commissioners as an entirety and that the assessment was assessed against each tract of land in proper proportion to the benefits that have accrued or will accrue to the same, and that said assessment against each tract of plaintiffs' lands was made in one entire sum. They deny that any invalid charges were included in said assessment, and aver that said plans and estimates set forth with certainty the work done, its nature, and the cost and expenses of each piece of work and that said commissioners and all other persons could determine from said plans and estimates all things and matters of whatsoever kind necessary to the making of the assessments and which were included therein. They deny that the commissioners were compelled to or did rely upon the engineer for the information as to the nature of the work to be done. Deny that plaintiffs' lands were assessed with any sum on account of interest then accrued or to accrue on any expenses which had theretofore accrued. Uncertainty as to the period of time covered by interest charges, the rate charged, accrued, or to accrue is denied. It is averred that no estimate was made on plans or works of reclamation or irrigation which were adopted before the expenses were incurred and that all the work done as set forth in the plans and estimates was necessary and was done in accordance with the requirements of the same and was for the benefit of plaintiffs' lands. Favoritism shown or extended to the River Farms Company, or any landowner whatsoever, or unwise or improper action or conduct on the part of the district or its officers, is likewise denied. As a second defense the order of the state reclamation board made April 24, 1923, approving the plans and estimates of said reclamation district No. 108, and which has not since been vacated, annulled, or modified, is pleaded. For a third defense the order of the board of supervisors of the county of Colusa made December 6, 1923, approving the assessment attacked by the complaint, is set up as an estoppel against all objections not specifically made by the plaintiffs in their written objections filed with said board of supervisors.

The trial court made elaborate findings upholding the validity of the assessment. The proceedings, beginning with the plans adopted by the board of trustees of the district March 2, 1923, are set forth in chronological order. The written objections to the assessment of plaintiffs, as actually made, are set out in their numerical order. The first five objections challenge the jurisdiction of the board of supervisors, trustees of the district, and commissioners of assessment, respectively, to make the preliminary orders and perform the acts and duties necessary to lay the foundation of a valid assessment. No. 6 attacks the plans and estimates on the ground that they do not represent a fair or reasonable scheme of reclamation and were so devised as to prevent a fair apportionment of costs and expenses in proportion to benefits accruing to each tract of land. No. 7 protests against an attempt to impose upon plaintiffs' lands charges for an irrigation system, and complaint is made that no system had been devised for the irrigation of their lands and said lands have not been irrigated, and, further, the assessment was an effort to charge their lands and the lands of others with an expense due to the mistakes of those who originated the irrigation works and canal system. No. 8 rests upon the assertion that the plans are insufficient and do not adequately describe the work done or proposed to be done. The same objection is made as to the estimates of expenses. Objection is also made that the assessment contains large amounts imposed upon plaintiffs' lands for work done under plans that were never adopted or approved, and that neither the plans for reclamation or irrigation have been adequately adopted or sanctioned. Objection No. 9 insists that the assessment was not made or spread in proportion to the entire amount raised by the levy, and was unfairly and inequitably levied, and plaintiffs' assessment is therefore greater than their proportionate share should be. No. 10 avers that the value of plaintiffs' land will not be enhanced in proportion to the amount of the assessment; that the alleged improvements have not improved said lands; that the tracts of land on behalf of which the scheme of irrigation was proposed and originated and which are benefited thereby should be charged with the costs and expenses of irrigation construction and maintenance and the "lands which never desired irrigation and the owners of which never sought irrigation" should not be loaded with the vast unforeseen expenses since sought to be avoided or lessened by the original projectors of the scheme, by bringing in plaintiffs and others as burden-bearers.

The court found that the proceedings leading up to and including the levy and assessment were regular and legal; that said lands were assessed in proportion to the benefits to be derived from the expenditures of money set forth in said plans as the estimated cost of the work; that the commissioners did not impose any separate sum or charge whatever upon plaintiffs' lands or any part thereof for charges theretofore incurred in the construction or operation or maintenance of irrigation works or incidental expenses or interest on indebtedness incurred in the construction, maintenance, or operation of such works or for the construction of additional irrigation works or for the maintenance or incidental expenses thereof in connection with future works. As to the estimates for interest, the following is taken from said plans and estimates as incorporated in the findings:

> Estimates of Costs.
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> "In the following tabulation is given the total estimated cost of all works included in these plans of reclamation district No. 108 to be completed or acquired after July 27, 1917. This total estimated cost as shown for each item includes interest estimated on the outstanding expenditures for such item and the expenditures to be hereafter made in connection with such item up to the date of the estimated time that will be required to levy, equalize and collect upon the assessment to be hereafter made in accordance with these plans and estimates, the district having no funds available for the payment of the outstanding warrants or warrants to be hereafter issued until collection can be made on said assessment to be hereafter made."

It is found that no amount was included in said plans and estimates of said assessment for expenses which were not for maintenance or repair; that each expense was segregated or separately stated as required by law; that each piece of work referred to in the complaint was done for the benefit of said district and the lands therein, including plaintiffs', and the assessment was in all respects and as to all lands within the district fairly and lawfully made and levied. The court, in short, found against plaintiffs and in favor of defendants upon every material issue made by the pleadings.

[1] The complaint makes no charge of felonious misappropriation or embezzlement of the funds of the district, and the allegations of improper application of the funds of the district, if, indeed, they may be regarded as sounding in fraud, rest upon doubtful implications flowing from the general language, of the pleading rather than upon direct and positive allegations. Fraud is never to be presumed, but it must be affirmatively pleaded and proved, or the facts from which it is to be inferred must be of such character that no other reasonable conclusion may be reached but the single one of evil design on the part of the person or entity whose acts are attempted to be impugned. We conclude from the pleadings that it is not the claim of the plaintiffs that the moneys which came into the hands of the officers of the district were feloniously misappropriated by them or were not applied to the payment of reclamation and irrigation works and the maintenance and repair of the project and on account of interest, but that certain of the expenditures made were not authorized by law. Favoritism is alleged to have been shown to the River Farms Company, but no satisfactory evidence was adduced at the trial to sustain the allegation and the court found against plaintiffs on that issue. The written objections actually filed by plaintiffs with the board of supervisors are not specific, but are set forth in the most general terms.

[2, 3] Plaintiffs at no time, either by the complaint herein or the written objections filed with the board of supervisors, requested a modification or amendment of the assessment in any particular or a reapportionment of the entire assessment as by section 3462, Political Code, provided, or for general relief. A direct attack is made upon the validity of the assessment in its entirety by reason of the acts, omissions, and failures of the district and its officers to comply with the statutory procedure in such cases provided and for want of jurisdiction on the grounds set forth in the written objections. Said written objections filed with the board of supervisors as prescribed by section 3462, Political Code, being ten in number, and which constitute the foundation of the action, assumed to state the specific grounds of objection, but not one of them questioned the validity or sufficiency of section 3455, Political Code, but each objection was placed on jurisdictional grounds because of alleged infirmities therein pointed out. "Jurisdiction" is a comprehensive term. A court or judicial body may lack jurisdiction to render a judgment, order, or decree, although the act under which the proceedings are prosecuted is invulnerable to attack on strictly constitutional grounds. Section 3462, supra, requires the objector to specify the grounds of objection to the assessment, and unless this be done the decision of the board of supervisors becomes final and the assessment list is conclusive evidence that said assessment has been made and levied according to law. "No objection to such assessment shall be considered by the board of supervisors, or allowed in any other action or proceeding, unless such objection shall have been made in writing to the board of supervisors as above specified." Pol. Code, § 3462. "As above specified" relates to the clause which prescribes the grounds of the objections to be stated in writing. The purpose of this provision obviously is to save the assessment from subsequent attack upon some ground which would compel a court to invalidate the entire assessment, thereby entailing a heavy loss or waste which could have been avoided had the attention of the board of supervisors been timely called to the error, omission, or defect. Had the objection been made on the ground that section 3455, supra, as amended in 1917, was invalid for any reason and the objectors were relying upon such invalidity as a ground of attack that would be urged against any assessment that might be levied under it, it may be that the irrigation project would have been abandoned or postponed to such time as the question of its validity should have been determined, thereby avoiding a heavy loss which must be sustained by some one or deferred to such time as the Legislature should, by reenactment, cure such defects as are now urged against the plan of improvement by reason of the defective title of the act or any objection that might be made upon the due process clauses of the state or federal Constitutions. Again, it is provided by subdivision 4, section 3455, supra, that after the board of supervisors has approved the plans a hearing must be held by the state reclamation board to consider such objections as may be offered with respect to said plans and it shall thereafter approve, modify, amend, or reject the same. Subdivision 5 of said section further provides that when the state reclamation board shall have taken action approving, modifying, or rejecting any original, supplementary, or new plan of reclamation, after a hearing as therein provided, "such action shall be final, and thereafter the sufficiency of said plans shall not be subject to attack either before the reclamation board or in any court. * * *" No appearance was made or objection filed or taken by any of the plaintiffs against the proposed plan of reclamation, including irrigation. The foregoing provisions deny to the property owners no constitutional right. They are served with notice to appear and state in writing their objections, and defaulting therein they are concluded by statutes of repose. O'Dea v. Mitchell, 144 Cal. 374, 77 P. 1020, involved the failure of parties in a street assessment case to avail themselves of the remedy provided by the statute by filing written objections as to the extent or area of the district within the time required by statute, and it was held to constitute a waiver of all objections. The question of the invasion of a constitutional right was disposed of as follows:

> "Appellants contend that the assessment here involved is in conflict with the Fourteenth Amendment to the Constitution of the United States, because lots which should have been assessed were not included in the district, and therefore excessive and unjust burdens were placed upon the lots which were assessed—thus violating the principle of equality; but for the reasons above stated, if for no other, this contention cannot be maintained; appellants having failed to invoke the remedy provided by the statute, are now in no position to assert rights, if any they have, which could have been secured by that remedy."

[4] The right to question the constitutionality of a statute may be waived. "It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered as waived." 12 C. J. 785. "And where parties have failed to invoke a remedy provided by statute they are in no position thereafter to assert rights which could have been secured by that remedy, by endeavoring to invoke the aid of the Constitution." 5 Cal. Jur. 627. One who receives a benefit from an unconstitutional law is estopped from asserting its unconstitutionality. Vickery v. Board of Commissioners, etc., 134 Ind. 554, 32 N. E. 880. As to the necessity of pointing out specifically the grounds of protest against

inclusion of lands in a drainage district or being thereafter estopped from objecting on jurisdictional grounds not set forth in the protest, see Mackay et al. v. Hancock County, 137 Iowa, 88, 114 N. W. 552.

[5-7] It cannot be doubted, in view of the well-settled law upon the subject, that the Legislature has the power to create, by special acts, reclamation or irrigation districts. It could have established reclamation district No. 108 as a separate irrigation district, notwithstanding its organization as a reclamation district, in which case the district area would have had a dual existence. That the Legislature holds the power to merge or consolidate into a unified system two established systems of bringing arid and swamp and overflowed lands into a state of cultivability and productiveness there can exist no reasonable doubt. The effort of the Legislature in adopting the amendment here questioned was to effect such a result.

Section 3455, Political Code, amended in 1917, under which amended act reclamation district No. 108 asserts authority to exercise the powers and functions of an irrigation district, provides:

> "3455. (a) * * * Within Sacramento and San Joaquin drainage district, * * *. If and when any such district is located, in whole or in part, within the Sacramento and San Joaquin drainage district; (1) (Plans to be reported to supervisors). The board of trustees of such reclamation district must report to the board of supervisors of the county within which the district, or the greater part thereof, is situate, by filing, with the county clerk of said county, three copies of the original plan or plans of the works of reclamation and three copies of every new, supplemental, or additional plan, if any, together with the estimates of the cost of the contemplated works of the district, including incidental expenses, maintenance and repair necessary for the reclamation of the lands of the district in pursuance of any such plan or plans. The term 'works of reclamation' as used in this chapter shall include not only such public works and equipment, as are necessary for the unwatering of lands in reclamation districts, but shall also include such like works as may be necessary to water or irrigate the same lands in such districts."

The portion of the subdivision above quoted provides that "the term 'works of reclamation' as used in this chapter shall include not only such public works and equipment, as are necessary for the *unwatering* of lands in reclamation districts, but shall also include such like works as may be necessary *to water or irrigate* the same lands in such districts." (Italics supplied.)

[8] The act consolidating and reorganizing reclamation district No. 729 with reclamation district No. 108 and fixing and establishing the boundaries of the consolidated district to be known as reclamation district No. 108 went into effect in August, 1913. Its management and control was made subject to the provisions of the Political Code of the state and to other laws of the state relative to reclamation districts. Stats. 1913, p. 62. An act approving, confirming, and declaring valid the creation, formation, and organization of said consolidation was adopted in 1915 (Stats. 1915, p. 559). The act amending section 3455, Political Code, to its present form and amending a number of other sections of the Political Code "relating to swamp and overflowed, salt marsh and tidelands" by reference to the numbers of the sections amended went into effect July 17, 1917 (Stats. 1917, p. 1197). An amendment of a Code section may be made by reference to the number of the section to be amended. Estate of Elliott, 165 Cal. 339, 132 P. 439. The same Legislature passed an approval and confirmation act of the district as defined in 1915, which provided that in the control and management of the affairs of the district it is subject to the provisions of the Political Code and to all laws of the state, except as therein provided, in connection with the issuance and payment of warrants and payment of assessments and conferred jurisdiction upon the board of supervisors of Colusa county as to all matters concerning said district and providing also for the management, control and administration of the affairs of said district. Stats. 1917, p. 1219. By an act approved in 1919 it was again provided that the management and control of the affairs of the district are subject to the provisions of the Political Code and to all other laws of the state, except as provided in said act, in the issuance and payment of warrants and payment of assessments; also providing for the deposit of moneys of the district with the treasurer of Colusa county and conferring jurisdiction upon the board of supervisors of the county of Colusa as to all matters concerning said district; providing for the management, control, and administration of the affairs of the district and ratifying the incorporation of certain lands in said district; authorizing the trustees to make equitable settlements with the owners of land so incorporated as to the cost of any work theretofore done before the act became effective; declaring reclamation district No. 108 to be the successor in interest of reclamation district No. 108 as defined and approved by the several acts of 1913, 1915, and 1917. By an act of the Legislature of 1921 another section was added to the Political Code. The title of said act is expressive of the subject and follows:

> "An act to add to the Political Code a new section, to be numbered three thousand four hundred sixty-seven, relating to the power of trustees of reclamation districts to make rules and regulations for furnishing water for the irrigation of lands in the district, fixing charges and rates for the same, collection of the same, levying assessments for the same on the lands in the district, providing for a special fund kept

by the county treasurer in which sums collected for irrigation shall be kept, and providing for the paying out said fund on orders or warrants by the trustees for the costs of irrigation." Stats. 1921, p. 1590.

[9, 10] From the foregoing reference to statutes it will be seen that reclamation district No. 108 exists as a creature of special statutory enactments, and it is given broad powers thereunder in addition to the powers conferred by general laws. Large sums of money for irrigation construction were expended, beginning with July, 1917, before the act of 1919 was adopted. All reclamation districts existing in the state at the time of and prior to the 1917 amendment formed under any statute of the state were subject to the provisions of the Political Code relating to reclamation districts just as though such districts had been formed by or created under the provisions of the code relating to "swamp and overflowed, salt marsh and tidelands." The title of the act amending section 3455, in addition to making specific reference to the number of the code section, incorporates as a part of its title the language last above placed within quotation points. We think the title was expressive of the subject of the act if the term "reclamation" can be said to be sufficiently comprehensive to include irrigation. Certainly every landowner within district No. 108 and every person interested in reclamation in the state was, by the title of the act, put upon notice that the reclamation laws of the state were the subject of amendment by the state Legislature. Owners of land within the district subject to reclamation could not have read the title of the proposed act without understanding that a change was to be made in the law. Upon reading the act the proposed change becomes manifest. And this is so whether the term "reclamation" should be deemed not ordinarily sufficiently broad as to include "irrigation." What we mean to say is that the nature, purpose, and scope of the amendment of 1917 could not have escaped the attention of the owners of reclamation lands which were to be made subject to irrigation. There is authority holding that an irrigation district possesses independent powers necessary to drain its overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district. Pioneer Irrigation District v. Stone, 23 Idaho, 344, 130 P. 382; Nampa, etc., Irrigation District v. Petrie, 28 Idaho, 227, 153 P. 425; United States v. Ide (C. C. A.) 277 F. 373. The conclusion reached in the above-cited cases must rest upon the theory that the two methods employed to reclaim land are germane to a general purpose and in accord with the policy of the government. If the conclusion in the above-cited cases be correct, there appears to be no reason why the converse of the situation is not true and that it may with equal soundness of reason be argued that the more ancient method adopted by the individual or the state for the enlargement of cultivable areas, to wit, "reclamation," is sufficiently broad and comprehensive to include the irrigation of lands which are rendered excessively dry and arid in the summer seasons by reason of the shutting out of the storm and flood waters of winter. Reclamation includes irrigation in its general, ordinary sense, and, as a matter of fact, the term is quite generally applied to the reclaiming of arid lands as well as the shutting out of overflow waters. The primary purpose in each case is to regulate or control waters to the extent that lands may be brought into a state suitable for cultivation. Reclamation and irrigation of lands are cognate subjects and in many instances one would be futile and useless without the other. The same principle of law which sanctions the construction of drainage works as a necessary adjunct to an irrigation system is at least persuasive here in addition to other features of the case which have received consideration.

On July 27, 1917, said reclamation district was reorganized and the area was increased by adding 3180 acres, making a total of 57,280 acres. The plans as prepared and adopted include an irrigation system. The estimated cost of said works was $1,231,255 and as summarized consisted of a back levee, without maintenance; irrigation, without maintenance; drainage and irrigation, and drainage laterals, without maintenance; incidental expenditures of the district; total estimated cost, without maintenance; maintenance of back levee; maintenance and operation of irrigation system. The estimated cost and expense of each item was set out. In 1919 the district was again reorganized and enlarged so as to include an additional 700 acres of land. The plans were unaffected by reorganization. On August 19, 1920, a report of the engineer covering "amended, new, supplemental and additional plans of reclamation and estimates of cost" was adopted by the trustees as the plan of the district. This plan provided primarily for modification of the irrigation project as included in the report of 1917. It also contained revised estimates of costs of all necessary reclamation works. The estimated costs were segregated into seven groups or branches of improvement, to wit, back levee, drainage works, irrigation works, bridges and culverts, power plant, rights of way, and incidental expenses. The estimated cost of construction, maintenance, and operation was set opposite each group. The total estimated cost was $1,951,644.87. On September 21, 1921, the board of trustees rescinded the plan adopted in 1917 and the plan adopted in 1921 and adopted an "amendatory and additional plan of reclamation" which included an enlarged irrigation project and new estimates of cost. It contains the same items of expense as the plan of 1920, but with a material increase in the estimates of cost; the total being $3,137,336.54. The report, plans, and estimates which are assailed by the plaintiffs and are known as "new, supplemental, and amendatory plans," were filed March 3, 1923. Said report and plans and estimates make a comprehensive recital of all the proceedings taken by the district since its reorganization in 1917 and set forth the history of the district from a much earlier date.

The summary of the totals as computed and estimated by the trustees and officers in the estimates of 1923 is as follows: For construction, $2,338,490.75; maintenance, $438,929.43; drainage operation, $185,802.98; irrigation operation, $100,583.66; incidentals, $343,993.87; total, $3,407,800.69.

[11] Necessarily the subjects dealt with had to be grouped or classified to some extent, keeping in mind a substantial compliance with the statute, if the reports, plans, and estimates were to be held within reasonable limits. It could not be expected that each item considered in forming the estimates would be set out in minute detail.

[12, 13] Plaintiffs complain bitterly of the lack of itemization of certain interest-bearing periods with respect to dates and the rate of interest charged. In this respect it is contended that, if interest on past expenses is claimed, the basis for the charge should be stated in the plans and estimates; if future interest on past expense is a legitimate charge, then the amount and rate of interest should be stated in the plans and estimates so that the landowner may know whether the charge is fair. The amount of the future interest on past expense is not stated, and if interest on past expense is a permissible item there is no way of segregating it from unstated future interest. In short, it is claimed that the plans and estimates are poorly prepared and leave the question of interest in a state of utter confusion. On the question of charges of interest, as well as all other charges or expenses or things or matters about which appellants were entitled to be informed, the officers of the district were called as witnesses and examined thereon. The questions whether or not the items upon which interest was computed are set out in commendable detail and whether or not specific sums of interest were included as items of charges could have been gone into fully at the hearing had before the board of supervisors and again at the trial. As a matter of fact, the commissioners, who are engineers, were examined as to the interest expenditures and charges, and it was not made to appear to the trial court that a want of segregation or itemization in the particulars raised by the objections was inexplicable to a fatal degree, or was a mystifying method employed by the officers of the district to perpetrate wrongs upon certain of the landowners of the district. The officers gave their theory as to what they believed to be the fairest plan of arriving at estimates, which were, after all, except in cases where interest has accrued, or where the situation presents some fixed basis of computation, but an approximation.

[14-16] It may be presumed, in the absence of evidence to the contrary, that the officers did their duty and computed interest on a basis not exceeding its legal rate. But this was a matter easily ascertainable. The trial court having heard the evidence addressed to the issues before it and having made its finding thereon, we are not permitted to interfere with its judgment unless as a matter of law it appears to be erroneous. This does not so appear. We have also given consideration to other objections made on the ground that there was not a proper segregation of expenditures on account of cost of construction and maintenance and other matters of expense. It was the purpose and effort of the commissioners to classify under general headings cost, maintenance and operation expenses. As a rule they were not segregated or itemized in the manner pointed out by plaintiffs. But as we observed above, the trial court found no sufficient reason because of such failure to invalidate the assessment. The plans and estimates are complicated and brought into the calculations a large number of problems difficult of solution. Many of the problems which confronted the commissioners were not capable of exact results even by the application of the rules of the most exact of sciences, mathematics. We think the work of the commissioners, however, is the result of at least a reasonable, fair and intelligent consideration of a difficult problem. The question of benefits conferred was passed upon and fixed by the commissioners and finally by the trial court. The contention that the main canal is about nine miles from the nearest point of plaintiffs' lands is not determinative of the question of benefits. The land is within the district, and it has a right to the use of the waters which are brought into the district from the Sacramento river. The benefits that are thereby derived, as compared to other lands within the district, were questions of fact to be determined by the district in the first instance and by the trial court finally. As an abstract proposition lands located more distantly from a watercourse may be benefited in a greater degree than lands which are adjacent to the stream. So with respect to lands of high elevation compared with low lands. The Wilkins Slough pumping plant, constructed at a considerable cost and rendered useless by reason of the fall of the water level to a point below the intake of the canal, was a contingency, it would seem, that could not ordinarily be foreseen. Large quantities of water taken from the river for irrigation purposes and excessive dry seasons were responsible for its failure. The Knight's Landing, Howell Point, Rough and Ready, and Steiner Bend pumping and drain-

age losses were questions submitted to the court upon the theory of their invalidating effect as to plaintiffs' entire assessment. The sound judgment of the court, even though we may question certain of the expenditures and transactions, cannot, under the rule of decision, be disturbed. A comprehensive plan or scheme of reclamation involving many problems, such as we have before us, must fail or disappoint in some respects, and in the absence of proof of bad faith upon the part of its officers, courts will not exact such a rigid stewardship of those charged with a public duty as to completely ignore the complexities and uncertainties that attend the problem.

We are of the opinion, in view of the procedure taken by the district and the legislative treatment of the subject-matter, that the supplemental plans and estimates which succeeded the 1917 reorganizing act and the subsequent acts heretofore mentioned give warrant for including the costs and expenses incurred after the passage of the 1917 act and prior to the adoption of the 1923 plans and estimates.

The rulings of the court on the admissibility of evidence in the two instances complained of are not sufficient to justify a reversal in view of the record contents.

Judgment affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; LANGDON, J.; SHENK, J.; CURTIS, J.; PRESTON, J.

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200 Cal. 799

J. W. BROWNING, Plaintiff and Appellant, v. RECLAMATION DISTRICT NO. 108, Defendant and Respondent. (Sac. 3867.)

(Supreme Court of California. Feb. 28, 1927.)

In Bank. Appeal by plaintiff from a judgment of the Superior Court of Colusa County, George H. Thompson, Judge, in an action contesting assessment for reclamation and irrigation purposes. Affirmed.

Seth Millington, of Gridley, for appellant.
Devlin & Devlin, of Sacramento, and Thos. Rutledge, of Colusa, for respondent.

PER CURIAM. The sufficiency of the identical plans and estimates and the validity of the assessment levied upon plaintiff's lands thereunder are attacked upon this appeal by appellant herein upon substantially the same grounds as were urged in Ella L. Hershey et al. v. Reclamation District No. 108 et al., Sac. No. 3866 (Cal. Sup.) 254 P. 542, this day decided. The main questions presented by this appeal were specifically disposed of in the case of Ella L. Hershey et al. v. Reclamation District 108 et al., supra.

In appellant's opening brief he concedes the legality of the assessment levied upon all the lands within the district "for drains, levees, pumps and other matters incident to reclamation as the same had always been known and recognized prior to the amendment of section 3455, Political Code, as amended by the Legislature of 1917 (Stats. 1917, p. 1197) and under the new section added to the Political Code by the Legislature of 1921 * * * (Stats. 1921, p. 1590)." The objection specifically urged is to "that part of the assessment that has to do with the strictly irrigation features." No other questions not decided in the case above referred to are raised in appellant's opening brief. In the reply brief appellant questions the correctness of two findings upon minor matters which could not in any event affect the result of the decision.

Upon the grounds heretofore stated the judgment appealed from is affirmed.

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200 Cal. 800

J. W. BROWNING and Western Lands & Reclamation Co. (a Corporation), Plaintiffs and Appellants, v. RECLAMATION DISTRICT NO. 108, Defendant and Respondent. (Sac. 3868.)

(Supreme Court of California. Feb. 28, 1927.)

In Bank. Appeal by plaintiff from a judgment of the Superior Court of Colusa County, George H. Thompson, Judge, in an action contesting assessment for reclamation and irrigation purposes. Affirmed.

Seth Millington, of Gridley, for appellants.
Devlin & Devlin, of Sacramento, and Thos. Rutledge, of Colusa, for respondent.

PER CURIAM. Upon the grounds stated, and for the reasons set forth in Ella L. Hershey et al. v. Reclamation District No. 108 et al., Sac. No. 3866 (Cal. Sup.) 254 P. 542, and in Browning v. Reclamation District No. 108, Sac. No. 3867 (Cal. Sup.) 254 P. 551, the judgment appealed from is affirmed.

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200 Cal. 667

PERKINS MFG. CO. v. JORDAN, Secretary of State. (S. F. 12047.)

(Supreme Court of California. March 15, 1927.)

1. Courts 🔑97(5)—Supreme Court must mold rulings to conform to decisions of federal Supreme Court on question whether federal Constitution is violated.

Supreme Court must mold rulings to conform with decisions of United States Supreme Court on question whether federal Constitution is violated by state statute, though such conformity requires overruling of precedent set by previous decision.

2. Commerce 🔑69(1)—Constitutional law 🔑230(1)—Corporations 🔑648—License tax on foreign corporations doing intrastate business, based solely on authorized capital stock, held to burden interstate commerce, tax property outside state, and deny equal protection (Deering's Gen. Laws Cal. 1923, Act 1743, p. 548, § 3; Const. U. S. art. 1, § 8, cl. 3, and Amend. 14).

Deering's Gen. Laws Cal. 1923, Act 1743, p. 548, § 3, providing for license fee to be paid by foreign corporation doing intrastate business, based solely on authorized capital stock of such corporation, *held* invalid as violating commerce clause and Fourteenth Amendment to United States Constitution by laying unwarranted burden on interstate commerce, taxing property outside state, and denying equal protection of laws.

3. Commerce ⚷=69(1)—Constitutional law ⚷=230(1)—Whether tax on foreign corporations doing intrastate business is filing fee or privilege tax held immaterial on question whether federal Constitution is violated (Const. U. S. art. 1, § 8, cl. 3, and Amend. 14).

In determining whether license fee to be paid by foreign corporation doing intrastate business violates commerce clause and Fourteenth Amendment to federal Constitution, it is immaterial whether it is filing fee or privilege tax, since effect rather than name or aim of tax is controlling.

4. Corporations ⚷=648—Authorized capital of foreign corporation cannot be measure of fee for doing intrastate business.

Authorized capital of foreign corporation cannot be used as measure of tax against such corporation for excise or privilege tax to do intrastate business.

5. Mandamus ⚷=87—Mandamus to compel issuance of certificate to foreign corporation held proper remedy for corporation alleging invalidity of severable section of statute levying tax for intrastate business (Deering's Gen. Laws Cal. 1923, Act 1743, p. 548, § 3; Const. U. S. art. 1, § 8, cl. 3, and Amend. 14).

Mandamus to compel issuance of certificate to foreign corporation *held* proper remedy for corporation alleging invalidity of Deering's Gen. Laws Cal. 1923, Act 1743, p. 548, § 3, providing for fee to be paid by foreign corporation doing intrastate business, as violating commerce clause and Fourteenth Amendment to United States Constitution, since such section and provisions dependent thereon are severable from remainder of act.

In Bank.

Application by the Perkins Manufacturing Company for a writ of mandate, prayed to be directed to Frank C. Jordan, as Secretary of State, to compel the issuance to a foreign corporation of a certificate to do business in California without payment of license tax. Writ granted.

Willard P. Smith and Reuben G. Hunt, both of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Frank L. Guerena, Deputy Atty. Gen., for respondent.

Dunne, Dunne & Cook, of San Francisco, amici curiæ.

PRESTON, J. The state of California by the act of May 10, 1915 (St. 1915, p. 422), and several subsequent acts amendatory and supplementary thereto (Deering's Gen. Laws 1923, Act 1743, p. 548), put into effect a comprehensive plan regulating and governing the right of foreign corporations to transact intrastate business therein.

The act requires the filing with the secretary of state by the corporation of an authenticated copy of its charter, together with payment of a certain filing fee therefor; also the filing of an affidavit showing the authorized capital stock of said corporation on January 1st of the current year; also the designation of a resident agent in said state upon whom service of process may be had. The act then further provides for the payment of an annual license tax or fee as follows:

"Sec. 3. Except those corporations hereinafter specified, every corporation incorporated under the laws of this state, and every corporation incorporated under the laws of any other state, territory, or foreign country now doing intrastate business within this state, or which shall hereafter engage in intrastate business in this state, shall procure annually from the secretary of state a license authorizing the transaction of such business in this state, and pay therefor the license tax prescribed herein.

"For the purpose of measuring said tax the secretary of state shall examine all articles of incorporation and all documents on file in his office relating to an increase or decrease in the authorized capital stock of corporations which are subject to said tax, and determine the amount due from each corporation by the following rule:

"When the authorized capital stock of the corporation does not exceed ten thousand dollars, the tax shall be ten dollars; when the authorized capital stock exceeds ten thousand dollars, but does not exceed twenty thousand dollars, the tax shall be fifteen dollars; when the authorized capital stock exceeds twenty thousand dollars but does not exceed fifty thousand dollars, the tax shall be twenty dollars; when the authorized capital stock exceeds fifty thousand dollars but does not exceed one hundred thousand dollars, the tax shall be twenty-five dollars; when the authorized capital stock exceeds one hundred thousand dollars but does not exceed two hundred fifty thousand dollars, the tax shall be fifty dollars; when the authorized capital stock exceeds two hundred fifty thousand dollars but does not exceed five hundred thousand dollars, the tax shall be seventy-five dollars; when the authorized capital stock exceeds five hundred thousand dollars but does not exceed one million dollars, the tax shall be one hundred dollars; when the authorized capital stock exceeds one million dollars but does not exceed three million dollars, the tax shall be two hundred dollars; when the authorized capital stock exceeds three million dollars but does not exceed five million dollars, the tax shall be three hundred fifty dollars; when the authorized capital stock exceeds five million dollars but does not exceed seven million five hundred thousand dollars, the tax shall be five hundred fifty dollars; when the authorized capital stock exceeds seven million five hundred thousand dollars but does not exceed ten million dollars, the tax shall be eight hundred dollars; when the authorized capital stock exceeds ten million dollars, the tax shall be one thousand dollars; when the capital stock of any corporation has no par value the tax shall be one hundred dollars; when part of the capital stock of any corporation has a par value and a part of such stock has no par value, the tax shall be computed upon such par value stock in accordance with the admeasurement schedule herein established, to which sum shall be added the sum of fifty dollars. Building and loan companies and associations shall pay an annual license tax of ten dollars.

"All corporations having no capital stock, but organized for profit, shall pay an annual tax of ten dollars. Said license tax shall be due and payable to the secretary of state on the 1st day of January of each and every year. Such license tax shall be paid on or before the hour of 6 o'clock p. m. of the 1st Monday of February of each year and if not so paid shall at said hour become delinquent and there shall thereupon be added thereto as a penalty for such delinquency the sum of ten dollars."

The act also provides penalties for failure to pay the license fee within the time prescribed by law and for persistent failure provides for a forfeiture of its right to transact business within the state. It also makes it a misdemeanor to carry on business within the state after such right has been forfeited and perhaps some other penalties.

The proceeding before us involves the validity of said above-quoted provision requiring the payment of the annual license fee. It will be noted that this fee is in no wise regulated by either the amount of property owned, capital employed, or business done within the state. Indeed, it bears no relation whatever to the property owned, capital employed, or business volume of the corporation either in or out of the state or at all. The tax is predicated solely upon the authorized capital stock of the corporation and is wholly without relation to any other standard. Again, the corporation thus taxed may never issue the amount of stock authorized, and, if it does, it may employ the whole thereof in its business elsewhere than in California. A corporation with a small amount of authorized capital stock may be doing an immense business in California and be required to pay only a small privilege tax, whereas, on the other hand, a corporation with a large authorized capital stock may be doing an insignificant amount of business in California, and under this act be required to pay a larger privilege tax. Further, two corporations may be doing an equal amount of business in California; one with an authorized capital of $100,000 would be required to pay a tax of $25, while the other with an authorized capital of $1,000,000 would be required to pay a tax of $100 for no greater privilege.

Petitioner asserts the invalidity of that portion of said act above quoted, in an original proceeding in mandate against respondent as secretary of state, alleging substantially as follows:

(a) That it is a foreign corporation duly organized and existing under the laws of the state of Minnesota, with its principal place of business at St. Paul therein.

(b) That it is engaged in the business of manufacturing, selling, and installing wood and metal doors, ornamental iron, wire goods, structural steel and sheet metal products, including especially steel rolling doors, tin clad doors and similar products, and in carrying on such trade in both interstate and intrastate commerce throughout the country.

(c) That it has an authorized capital stock of $50,000, with, however, only $20,000 thereof issued and outstanding, which said latter amount represents the total investment in said business.

(d) That as a part of its interstate business it is advisable and financially advantageous to it to carry on in several states intrastate business as well as interstate business, which said intrastate business is inseparably and inextricably interwoven with its interstate business.

(e) That the amount of capital employed in California does not exceed one-half of 1 per cent. of its total invested capital.

(f) That, desiring to qualify for the transaction of intrastate business in the state of California, it did on April 1, 1926, offer to comply with said above-mentioned act, known as the Corporation License Act, by tendering to the secretary of state a certified copy of its charter, with regular filing fee therefor, affidavit as to authorized capital stock, and designation of a resident agent, and offered to comply with all other provisions of said act applicable thereto, save and alone the payment of the sum of $15 claimed by said respondent as such secretary of state as a license fee under the above-quoted provision of said act.

Respondent by admission or insufficient denial conceded the existence of the foregoing facts, but refused to accept said copy of charter and other documents tendered or to allow same to be filed or to otherwise allow petitioner to qualify for intrastate business unless and until it paid the said license tax. The pleadings, proof, and admission of facts above noted bring squarely before us the validity of said provision requiring an annual license fee when tested by the commerce clause of and the Fourteenth Amendment to the Constitution of the United States.

[1] Of course, it requires no debate nor review of authorities to hold that the plain duty of this court is to speedily mold its rulings in conformity with the decisions of the Supreme Court of the United States upon these subjects. The strength and stability of our federation of states lie in our noninterference with the constitutional powers which have been specially ceded to the central government. It was upon this very point that the Articles of Confederation were weak and the condition was remedied by the commerce clause, the Fourteenth Amendment and other

powers which have been reposed by the Constitution exclusively in the federal government.

Unfortunately for respondent in this case, the Supreme Court of the United States has squarely and plainly spoken on the subject before us and has promulgated the following canons of interpretation:

> "In cases involving the validity of laws of a state imposing license fees or excise taxes on corporations organized in another state, this court has decided:
>
> " '1. The power of a state to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister state—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.
>
> " '2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.
>
> " '3. Consistently with the due-process clause, a state cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the state.
>
> " '4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a state in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the state cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the state.
>
> " '5. A license fee or excise of a given per cent. of the entire authorized capital of a foreign corporation doing both a local and interstate business in several states, although declared by the state imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other states; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.' " International Paper Co. v. Massachusetts, 246 U. S. 135, 141, 38 S. Ct. 292, 294 (62 L. Ed. 624, Ann. Cas. 1918C, 617); Air-Way Elec. Appliance Cor. v. Day, 266 U. S. 71, 45 S. Ct. 12, 69 L. Ed. 169.

[2] Petitioner insists that the provision of the Corporation License Act in question is clearly violative under the above specifications of both the commerce clause and the Fourteenth Amendment in that it lays an unwarranted burden upon interstate commerce, taxes property outside the state over which the state of California has no jurisdiction, and denies to persons within the jurisdiction of California the equal protection of the laws. Clearly, there is no escape from this conclusion. Indeed, the case of Air-Way, etc., Cor. v. Day, supra, seems squarely to decide these very questions. There a law of the state of Ohio was under test, the germane provisions of which were as follows:

> "Section 5503 (enacted May 31, 1911) imposes an annual fee required of foreign corporations having capital stock with par value as follows: 'On or before October 15th, the auditor of state shall charge for collection, as herein provided, annually, from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchises in this state, a fee of three-twentieths of 1 per cent. upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state. * * *'
>
> "An Act of May 17 [14], 1921 (sec. 8728—11, General Code of Ohio), provides: '* * * The amount of fees payable by a foreign corporation having common stock without par value * * * under section 5503 shall be three-twentieths of 1 per cent. upon the proportion of the authorized preferred stock represented by property owned and used and business transacted in this state and 5 cents per share upon the proportion of the number of shares of authorized common stock, represented by property owned and used and business transacted in this state. * * *" Air-Way, etc., Cor. v. Day, supra, pages 78, 79 (45 S. Ct. 13).

It will be noted that this Ohio statute makes a pretense at least of setting up a standard bearing some relation to property owned and used and business done within said state. In the case before us we have not even this consolation for, as above noted, the act has as its only measure the authorized capital stock of the corporation, regardless of the property owned and used or business done within the state of California.

The facts in the Ohio Case were as follows: Plaintiff was incorporated under the laws of Delaware, with an authorized capital stock of 400,000 shares without par value, one half of which was common stock and the other half founders' stock. The only difference between the two classes of stock was the voting power thereof. The corporation obtained from the secretary of the state of Ohio, in conformity with its laws, a certificate of admission to do business in that state, and it also paid the initial fee for the privilege of there exercising its franchise. It also had a certificate from the commissioner of securities of said state authorizing it to sell its stock therein. It acquired two large manufacturing plants at Toledo and commenced the business of manufacturing electrical household appliances and selling them in intrastate and interstate commerce. It had issued only 50,485 shares of stock, of which 10,010 shares were common and 40,475 were founders' stock. All of its property, valued at $458,278.56, was located in Ohio, and the amount of business transacted the preceding year was $250,954.58. The admitted value of the stock was $7 per share. An annual license fee of $20,000 was demanded, and by reason of the intrastate business as distinguished from the entire business transacted, it was reduced to $14,926. In other words, instead of being calculated on 400,000 shares, it was calculated on 298,520 shares, the first charge being about eight times the issued capital stock, and the latter amount being six times the issued capital stock.

The Supreme Court of the United States, without dissent on the part of any member thereof, declared this law invalid, using in part the following language:

> "All plaintiff's business, intrastate and interstate, and all its property wherever located were represented by the 50,485 shares of stock outstanding. The annual fee demanded by the state officers is five cents per share on 400,000 shares, and that fixed by the lower court is based on 298,520 shares. The inevitable effect of the act is to tax and directly burden interstate commerce of foreign corporations permitted to do business in Ohio, and engaged in interstate commerce, wherever the number of shares authorized, subject to the charge of five cents each, exceeds the number of outstanding shares attributable to or represented by the corporation's property and business in that state. In this case, the fee fixed by the commission was based on nearly eight times the number of outstanding shares and that determined by the court on nearly six times that number. As some of the outstanding shares are represented by plaintiff's interstate business, the application of the rate to all the shares, or to a number greater than the total outstanding, necessarily amounts to a tax and direct burden upon all the property and business including the interstate commerce of the plaintiff. International Paper Co. v. Massachusetts, supra, 142 (38 S. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617). We hold that the act violates the commerce clause.
>
> "The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement. * * * The number of nonpar value shares of the corporation is not an indication of, and does not purport to be a representation as to, the amount of its capital. Each outstanding share represents merely an aliquot part of its assets. The number of shares not subscribed or issued has no relation to the privilege held by plaintiff in Ohio, and it is not a reasonable measure of such a fee. Such shares may never be subscribed or issued, or additional shares may be issued to acquire property or do business in other states or to carry on interstate commerce. Plainly the fee, to the extent that it is based on a number of shares in excess of those outstanding, has no relation to what was paid in for the stock or to its value or to the amount of plaintiff's capital, its property or its business, intrastate in Ohio or interstate. The act in its practical operation does not require like fees for equal privileges held by foreign corporations in Ohio under the same circumstances. Unless, under the laws of the states where organized they chance to be authorized to issue the same number of nonpar value shares, the annual franchise fees imposed on foreign corporations having the same amount of property and business, and exercising the same privileges in Ohio will not be the same; and the charge imposed on one may be many times that made against another. * * * Again, compare two corporations organized in a sister state having the same number of authorized nonpar value shares, one having property and business of little value, all in Ohio, and the other having much more property and business in that state, and also much property and business in other states. The act would require the former to pay five cents per share on all its shares, but would require the latter to pay a fee based only on the proportion of its shares representing its property owned and used and business transacted in Ohio.
>
> "It is clear that the mere number of authorized nonpar value shares is not a reasonable basis for the classification of foreign corporations for the purpose of determining the amount of such annual fees. Such a classification is not based on anything having relation to the purpose for which it is made. Southern Ry. Co. v. Greene, 216 U. S. 400, 417 (30 S. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247); Royster Guano Co. v. Virginia, 253 U. S. 412, 415 (40 S. Ct. 560, 64 L. Ed. 989). The act has no tendency to produce equality; and it is of such a character that there is no reasonable presumption that substantial equality will result from its application. Martin v. District of Columbia, 205 U. S. 135, 139 (27 S. Ct. 440, 51 L. Ed. 743); Gast Realty Co. v. Schneider Granite Co., 240 U. S. 55, 58 (36 S. Ct. 254, 60 L. Ed. 523); Kansas City Southern Ry. Co. v. Road Improvement District, 256 U. S. 658, 660 (41 S. Ct. 604, 65 L. Ed. 1151). The act violates the equal protection clause of the Fourteenth Amendment." Air-Way, etc., Cor. v. Day, supra, pages 82–85 (45 S. Ct. 14).
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> "It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the commerce clause; and the Fourteenth Amendment does not permit taxation of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of Baltic Mining Company v. Massachusetts, 231 U. S. 68, 87 (34 S. Ct. 15, 58 L. Ed. 127, 134), tends to support a different view, it conflicts with conclusions reached in later opinions and is now definitely disapproved." (Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 218, 45 S. Ct. 477, 481 [69 L. Ed. 916, 44 A. L. R. 1219]).

These decisions realign the court in accord with such previous decisions as Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. Ed. 355; Pullman Co. v. Kansas, 216 U. S. 56, 30 S. Ct. 232, 54 L. Ed. 378; Ludwig v. Western Union Tel. Co., 216 U. S. 146, 30 S. Ct. Rep. 280, 54 L. Ed. 423; Atchison, etc., Ry. Co. v. O'Connor, 223 U. S. 280, 32 S. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050; International Text-Book Co. v. Pigg, 217 U. S. 91, 30 S. Ct. 481, 54 L. Ed. 678, 27 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103; Buck's

Stove & Range Co. v. Vickers, 226 U. S. 205, 33 S. Ct. 41, 57 L. Ed. 189, and produce harmony between those decisions and the following cases: Looney v. Crane Co., 245 U. S. 178, 38 S. Ct. 85, 62 L. Ed. 230; International Paper Co. v. Mass., 246 U. S. 135, 38 S. Ct. 292, 62 L. Ed. 624, Ann. Cas. 1918C, 617; Air-Way, etc., Cor. v. Day, supra; and Alpha Portland Cement Co. v. Mass., supra.

The so-called Baltic-Dental Case (Baltic Mining Co. and S. S. White Mfg. Co. v. Commonwealth of Mass., 231 U. S. 68, 34 S. Ct. 15, 58 L. Ed. 127) has in some respects been distinguished and in other respects definitely overruled. See Looney v. Crane Co., supra, and Alpha Portland Cement Co. v. Mass., supra.

The effect of this realignment of the Supreme Court of the United States is to necessarily overthrow our holding in the case of Pick & Co. v. Jordan, 169 Cal. 1, 145 P. 506, Ann. Cas. 1916C, 1237, and to revive the doctrine announced in the case of Mulford Co. v. Curry, 163 Cal. 276, 125 P. 236. We accord to the Legislature a sincere effort to frame a law that was just as far as the amount of the charges to foreign corporations desiring to enter our state for intrastate business was concerned, and the Legislature, no doubt, acted in perfect good faith, relying upon the validity of the decision in the case of Pick & Co. v. Jordan, supra, but in view of the holding of the United States Supreme Court above announced, that a law on this subject in order to be valid must bear at least some relation to property owned and used and business carried on or proposed to be carried on within the state of California, we must bow to the supremacy of the federal Constitution in this matter as interpreted by the highest court of our country.

[3] There is no substance in the argument of respondent that a different principle may apply in the case of filing fees graded on authorized capital than in the case of a privilege or excise tax based upon authorized capital. The effect upon interstate commerce and upon equal protection of the law to persons in the several states is the test, and neither the name nor the aim of the state tax can suffice to prevent consideration by the Supreme Court of the United States of the necessary effect and consequences of the state statute.

[4] Respondent contends also that the tax was simply measured by this standard, and, being an excise or privilege tax, there can be no objection to using the authorized capital as a foot rule for such measurement. This point is abundantly answered by the above authorities, and recently the Supreme Court of the United States specially dealt with the question as follows:

"One ground on which the state court put its decision was that, in taxing the transfer of the property which the decedent owned in Pennsylvania, it was admissible to take as a basis for computing the tax the combined value of that property and the property in New York and Massachusetts. Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the state had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the state's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail. If Pennsylvania could tax according to such a standard other states could. It would mean, as applied to the Frick estate, that Pennsylvania, New York and Massachusetts could each impose a tax based on the value of the entire estate, although severally having jurisdiction of only parts of it. Without question each state had power to tax the transfer of so much of the estate as was under its jurisdiction, and also had some discretion in respect of the rate; but none could use that power and discretion in accomplishing an unconstitutional end, such as indirectly taxing the transfer of the part of the estate which was under the exclusive jurisdiction of others [citing many cases]." Frick v. Commonwealth of Pennsylvania, 268 U. S. 473, 494, 45 S. Ct. 603, 606 (69 L. Ed. 1058, 42 A. L. R. 316).

There are other attacks made by petitioner and by amici curiæ under the same provisions of the Constitution of the United States upon the statute in question, but the above holding makes it unnecessary to further pursue this branch of the subject.

[5] There is likewise no merit to the contention of respondent that mandate will not lie, because, if this provision is invalid, the whole act must fall with it. We think the provision in question and the provisions dependent thereon are and each of them is clearly severable from the remainder of the act, and that no injury will be done to the integrity of the other provisions by the holding here made. Mandamus is, therefore, the proper remedy. Mulford Co. v. Curry, supra; Pick & Co. v. Jordan, supra; Melville Clark Piano Co. v. Jordan, 169 Cal. 804, 145 P. 516.

We find nothing in the cases of Schwab (Oceanic Steamship Co.) v. Richardson, 188 Cal. 27, 204 P. 396, and 263 U. S. 88, 44 S. Ct. 60, 68 L. Ed. 183, and Pullman Company v. Richardson, 185 Cal. 484, 197 P. 346, and 261 U. S. 330, 43 S. St. 366, 67 L. Ed. 682, which is opposed to the views above announced.

Let the writ of mandate issue as prayed for.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

200 Cal. 681

MIX v. YOAKUM et al. (L. A. 8200.)

(Supreme Court of California. March 16, 1927.)

1. **Executors and administrators 🔑251—Claimant against estate can recover only on cause of action set forth.**

In an action on a rejected claim against decedent's estate, a claimant can only recover on the cause of action set forth in his claim.

2. **Executors and administrators 🔑443(5)—Complaint against executors to recover money alleged to have been held in trust by decedent held sufficient to establish express trust.**

Complaint, in suit against executors to recover sum alleged to have been held in trust by decedent for plaintiff, *held* sufficient to establish an express trust, it being unnecessary to allege that fund or proceeds was traceable to specific fund or property in executors' hands.

3. **Appeal and error 🔑866(1)—Reviewing court cannot consider sufficiency of complaint, dismissed because not stating cause of action, as against special demurrer for defect of parties.**

Where complaint was dismissed because it did not state facts sufficient to constitute a cause of action, reviewing court cannot consider its sufficiency as against special demurrer because of defect or misjoinder of parties defendant.

4. **Limitation of actions 🔑66(15), 103(1)—Where action did not accrue during decedent's lifetime, no demand for money prior to his death or repudiation of trust was necessary.**

In complaint to recover sum alleged to have been held in trust for plaintiff, where cause of action did not accrue against decedent during his lifetime, it was unnecessary to allege that demand for money was made prior to decedent's death, or that there was repudiation of trust during his lifetime.

5. **Limitation of actions 🔑66(7), 103(3)—Limitations begin to run on claim against decedent's estate on rejection of demand by executors, or their refusal to act.**

In complaint to recover sum alleged to have been held in trust by deceased for plaintiff, where cause of action accrued against decedent's executors, limitations began to run on their rejection of plaintiff's demand or their refusal to act.

6. **Executors and administrators 🔑437(7)—Filing of complaint after expiration of tenth day, and within statutory period, held to constitute election to deem claim against estate rejected (Code Civ. Proc. § 1496).**

Filing of complaint in suit against executors to recover sum alleged to have been held in trust by deceased for plaintiff, after expiration of tenth day following presentation of claim to executors, and within statutory period, *held* an election by plaintiff to deem the claim rejected, within Code Civ. Proc. § 1496.

7. **Executors and administrators 🔑447—That claimant against estate demanded more than he was entitled to held not to render complaint subject to general demurrer.**

That claimant in complaint against executors to recover sum alleged to have been held in trust by deceased demanded more than he was entitled to did not render complaint subject to general demurrer.

8. **Executors and administrators 🔑447—Complaint held not demurrable because not praying that claim be paid in due course of administration of decedent's estate.**

Complaint, in suit against executors to recover sum alleged to have been held in trust by deceased for plaintiff, and praying for money judgment, *held* not subject to general demurrer because it did not pray that claim be paid in due course of administration.

9. **Pleading 🔑34(1)—Pleadings must be liberally construed with view of substantial justice between parties (Code Civ. Proc. § 452).**

Since enactment of Code Civ. Proc. § 452, in construction of a pleading to determine its effect, its allegations must be liberally construed with view to substantial justice between the parties.

10. **Pleading 🔑67—Pleading, silent as to essential averment, need not anticipate defense or negative existence thereof.**

Assuming there is presumption against pleader when pleading is silent as to essential averment, such presumption does not require allegations in anticipation of defense or to negative existence of defensive matters.

In Bank.

Appeal from Superior Court, Los Angeles County; Ira F. Thompson, Judge.

Action by Charles M. Mix against F. E. Yoakum and another, as executors of the last will and testament of Finis E. Yoakum, deceased. From a judgment of dismissal, plaintiff appeals. Reversed.

Newby & Palmer, of Los Angeles, for appellant.

Meserve & Meserve, of Los Angeles, for respondents.

SHENK, J. This is an appeal from a judgment dismissing an action on a claim against the estate of Finis E. Yoakum, deceased. A demurrer, general and special, to the amended complaint was overruled in one department of the trial court, and the defendants answered. When the cause proceeded to trial in another department, a witness on behalf of the plaintiff having been sworn, counsel for the defendants objected to the introduction of any evidence on the ground that the said amended complaint did not state facts sufficient to constitute a cause of action. The objection was sustained, the plaintiff declined to amend, and the judgment of dismissal from which this appeal is taken was entered.

Briefly stated, the plaintiff alleges that prior to his death, the decedent was a minister who claimed to be a divine healer; that the plaintiff had an invalid child who the decedent said was possessed of a demon, which he would drive out of the child by prayer; that plaintiff relied on the assurance of the decedent in that respect, was converted to the latter's faith, attended his church, and remained a communicant thereof until the death of the decedent, still having and retaining the greatest confidence in the integrity and benevolence of the decedent; that in May, 1906, the plaintiff was about to return to his old home in an Eastern state because of his inability to obtain employment in California, of which fact, and also of the fact that the plaintiff had some funds on hand, the decedent became aware; that thereupon decedent represented to the plaintiff that, if he would remain in California, he would continue to pray for the plaintiff's daughter, and that, if plaintiff would deliver to the decedent the said funds, the decedent and one D. M. McDonald would hold the funds for plaintiff "as a trust fund," to be by them loaned to various persons such as they should select, and that such funds would earn not less than 12 per cent. per annum; that they would pay the plaintiff such interest as his money would earn from time to time; and that they "would repay to him the principal at such time as he should demand the same"; that the plaintiff, because of the confidential relations existing as aforesaid, believed and relied upon the said representations, and so believing and relying he delivered to said Yoakum and the said McDonald checks, United States bonds, and money aggregating $3,300, to be used by them in making said loans; that the said Yoakum and McDonald paid to the plaintiff interest on said sum of $3,300 at the rate of 12 per cent. per annum, which they reported to the plaintiff was earned by said money, up to and until the 4th day of April, 1915; that there is now due from the said estate the sum of $3,300, with interest at the rate of 12 per cent. per annum from April 4, 1915, no part of which has been paid, except several items in the aggregate amount of $167.89, the last of which was paid September, 1917. It was further alleged that the said Finis E. Yoakum died testate on the 17th day of August, 1920 leaving an estate in the county of Los Angeles; that his will was admitted to probate, and that letters testamentary were issued on April 4, 1921, to the defendants herein; that notice to creditors was first published on April 7, 1921; and that on the 25th day of the same month the plaintiff presented to the executors his verified claim for $3,300, plus interest thereon at the rate of 7 per cent. per annum from April 4, 1915; and that said claim was never allowed or rejected by said executors. A copy of the claim is then set forth, in which it is stated that the amounts therein specified aggregating the total of $3,300 were delivered to the decedent and said McDonald to be held by them in trust for the claimant, and to be loaned by them for the claimant's use and benefit. No action having been taken on said claim, this suit was commenced on February 20, 1922, wherein it is prayed that judgment be rendered for the sum of $3,300, together with interest from the 4th day of April, 1915, at the rate of 7 per cent. per annum and for general relief.

The defendants attack the complaint on numerous grounds, many of which go to the sufficiency thereof as against a special demurrer, and which do not now require consideration. The only question for determination on this appeal is whether the plaintiff has set forth facts sufficient to entitle him to relief against the estate.

[1, 2] It is well settled that in an action on a rejected claim a claimant can only recover upon the cause of action set forth in his claim. Estate of Dutard, 147 Cal. 253, 81 P. 519, and cases cited. There is a clear distinction between the cause of action of one who claims specific property held and claimed by the estate adversely to the claimant and a cause of action founded upon a claim against the estate. In the one case the claimant is in no sense a creditor of the estate, and in the other he occupies the position of a creditor. Estate of Dutard, supra. It is clear that the foundation of the claim of the plaintiff herein is of the latter class. He does not pursue any specific fund or property, but as a general creditor seeks a money judgment, which, if obtained, would be paid in due course of administration. The allegations of the complaint follow the averments of the claim, and as such are sufficient upon which to establish an express trust. Schroeder v. Jahns, 27 Cal. 274; Orcutt v. Gould, 117 Cal. 315, 49 P. 188.

It is insisted that the complaint is fatally defective because it does not allege that the trust fund or the proceeds thereof cannot be traced to specific money or property in the hands of the defendants. We do not deem such an averment essential. Counsel for the defendants have cited numerous cases to the effect that, when the money or property delivered to the defendant cannot be traced to a specific fund or property in the hands of the personal representative, the claimant is in the position of a general creditor, and cannot recover except by the presentation of a claim against the estate. But we have been cited to no authority in this state or elsewhere to the effect that the claimant is compelled to allege and prove a specific fund or property in the hands of the estate when he is seeking to recover as a general creditor. It would seem to be true that, if the claimant elect to occupy the less advantageous position of a general creditor, he has the option to do so, and it must be assumed, in the absence of an allegation to the effect that the trust fund can be traced to specific money or property, that it is impossible for the claimant to so truthfully aver, and, if he does so aver and prove, he may not then be deemed also a general creditor.

[3-5] It is further insisted that there is no intimation in the complaint that the funds are not in the possession of McDonald. We deem this objection not available to the defendants under the situation here presented, for we cannot now consider the sufficiency of the complaint as against a special demurrer on the ground of a defect or of misjoinder of parties defendant. It is contended that it is not alleged that demand for the money was made prior to the death of the decedent, or that there was any repudiation of the trust during the lifetime of the decedent. Assuming that there was no such demand or repudiation, the plaintiff's cause of action was not affected thereby, for the reason that the said cause of action under such circumstances did not accrue against the testator during his lifetime, but did accrue against the executors of his estate. The statute of limitations would not commence to run until repudiation of the trust or until demand was made. No such repudiation or demand is alleged except the demand upon the executors and their refusal to act. Upon rejection or such refusal the statute would commence to run. Schroeder v. Jahns, supra.

[6] It is contended that the amended complaint is insufficient, for the reason that it does not allege that the plaintiff elected to deem the claim rejected after the expiration of the tenth day following its presentation. Section 1496 of the Code of Civil Procedure provides that, if an executor refuse or neglect to indorse an allowance or rejection on the claim for ten days after the same has been presented to him, such refusal or neglect may "at the option of the claimant, be deemed equivalent to a rejection on the tenth day." The complaint alleges that the said claim was presented to the defendants as executors at the place designated in the notice to creditors, and that the claim has never been allowed or rejected by the executors or either of them. We think the filing of the complaint after the expiration of the tenth day and within the statutory period, as was done in this case, constituted an election on the part of the plaintiff to deem the claim rejected. Cowgill v. Dinwiddie, 98 Cal. 481, 33 P. 439; Barclay v. Blackinton, 127 Cal. 189, 59 P. 834.

[7, 8] In the claim the plaintiff demanded interest on the principal sum. In the prayer of the complaint such interest is likewise demanded. It is insisted that interest is not allowable. Whether interest should be allowed under the facts as developed on the trial is a question we need not now decide. The fact that the plaintiff may have demanded more than that to which he was entitled did not render the complaint subject to the general demurrer. Nor do we think that the plaintiff is not entitled to relief by reason of the fact that a money judgment only is demanded without a prayer that the same be paid in due course of administration. If a judgment for any sum be rendered in favor of the plaintiff, it would necessarily be paid in due course of administration, for the plaintiff would take his place as a general creditor.

[9, 10] The defendants insist upon the application of the rule that a pleading must be taken most strongly against the pleader. This rule received recognition in the earlier cases (Chipman v. Emeric, 5 Cal. 49, 63 Am. Dec. 80; Joseph v. Holt, 37 Cal. 250), and the old rule seems to have received some, but we think, ill-considered notice in Silvers v. Grossman, 183 Cal. 696, 192 P. 534, where, on page 702 (192 P. 537), a quotation from Joseph v. Holt, supra, is set forth. Since the enactment of section 452 of the Code of Civil Procedure in 1872, it has been generally recognized that, in the construction of a pleading for the purpose of determining its effect, "its allegations must be liberally construed, with a view to substantial justice between the parties." Estate of Wickersham, 153 Cal. 603, 96 P. 311; Menefee v. Oxnam, 42 Cal. App. 81, 183 P. 379. If it be assumed that there is a presumption against the pleader when the pleading is silent as to an essential averment, such presumption would not go to the length of requiring allegations in anticipation of matters of defense or to negative the existence of defensive matters. 21 Cal. Jur. 51–53.

We conclude that the pleading under attack contains a statement of facts sufficient as against a general demurrer.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.

200 Cal. 706

NORLAND v. GOULD et al. (L. A. 8541.)

(Supreme Court of California. March 18, 1927.)

1. Jury 🔑26—Refusal of jury trial after noncompliance with rule of court requiring deposit held not abuse of discretion (Code Civ. Proc. § 129; Const. art. I, § 7).

In personal injury action, refusal of jury trial *held* not abuse of discretion, where rule of court requiring deposit was not complied with, in view of Code Civ. Proc. § 129, and Const. art. 1, § 7.

2. Negligence 🔑134(4)—Evidence held to support finding boy was injured while attempting to board truck without invitation or knowledge of driver.

Evidence *held* to support findings that 10 year old boy was injured while attempting to board truck which overtook him on road, without invitation from driver, and that driver did not discover that he was making such attempt until too late to prevent accident.

3. Negligence 🔑82—Injury to boy attempting to board moving truck without invitation held as matter of law due solely to his own negligence.

Injury to boy in attempting to board moving truck without invitation from or knowledge of driver *held* as matter of law to be caused by his own negligence, without any contributing factor from driver or owner of truck.

In Bank.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Action by Daniel Norland, by his guardian ad litem, C. Norland, against George B. Gould and another. Judgment for defendants, and plaintiff appeals. Affirmed.

A. Donaghy and Loren W. Smith, both of Santa Ana, for appellant.

Joe Crider, Jr., of Los Angeles, and W. F. Menton, of Santa Ana, for respondents.

LANGDON, J. This is an appeal by the plaintiff from a judgment against him in an action brought to recover damages for personal injuries sustained by plaintiff Daniel Norland when he was a minor of the age of ten years. The action was brought by plaintiff by his duly appointed guardian ad litem against the Excelsior Creamery Company, the owner of an automobile truck which injured plaintiff, and George B. Gould, the driver of said truck at the time of the accident.

The plaintiff was injured while attempting to board the automobile truck, which was loaded with hay and was traveling slowly along the highway. Plaintiff's cause of action is based upon the alleged willful and wanton negligence of the defendant Gould in omitting to use due care to avoid the injury to plaintiff.

[1] When the cause came on for trial, the record shows that the attorney for plaintiff said, "What do I understand about the jury this morning?" to which the court replied, "Why, I understand the rule was not complied with and the money was not put up for this jury, and therefore the jury was waived." Counsel attempted to persuade the court to grant a continuance and permit a jury trial, despite the asserted waiver, and the court refused to do so. There is nothing in the record which shows compliance by plaintiff with the following rule of court, which was read into the record:

> "In any case, other than a criminal case, the party desiring a trial by jury must, at least ten days before the day set for trial, or if the order setting the case for trial is made less than ten days before the time fixed for trial, then at the time such order is made, deposit with the clerk the sum of twenty-four dollars for the payment of jury fees. If such sum is not so deposited a trial by jury shall be deemed waived and the court will proceed to trial without a jury."

Section 129 of the Code of Civil Procedure provides:

> "Every court of record may make rules not inconsistent with the laws of this state, for its own government and the government of its officers. * * *"

The law of this state is:

> "A trial by jury may be waived * * * in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." Article 1, § 7, Const. of Cal.

There is nothing in the record showing a compliance by plaintiff with the foregoing rule of court, and, indeed, it is not contended upon appeal that he did comply therewith; but the contention is that he should be excused from the consequences of noncompliance. The case of Naphtaly v. Rovegno, 130 Cal. 639, 63 P. 66, 621, presents a similar point and it was there held that the appellant was not entitled to a new trial. We find no grounds for disturbing the exercise of the discretion of the trial court with reference to this matter.

[2] The trial court heard the evidence and found that the defendant Gould was operating a truck owned by the Excelsior Creamery Company at the time of the injury to plaintiff, and while driving this truck along the highway he overtook plaintiff and two companions, all under the age of 11 years; that Gould did not invite the boys to get upon his truck, and did not slow down to allow them to do so; that plaintiff's two companions got upon the running board of said truck, and from there climbed upon the seat, and were sitting beside Gould when the accident happened; that plaintiff attempted to follow his companion, and that in said attempt, while he was hanging to the side thereof, without the

knowledge or consent of Gould, he fell from said truck, and the rear wheel thereof passed over his foot and leg; that Gould did not discover that plaintiff was attempting to board said truck until approximately the time of the accident, and too late for Gould to give any aid to plaintiff to prevent said accident; that the injury to plaintiff was not caused by the wanton or willfull or any negligence or by entire or any absence of care on the part of Gould.

Appellant insists that these findings are not sustained by the evidence. With this contention we cannot agree. Gould testified that he first saw the boys when they were attempting to catch the truck ahead of the one he was driving; that they, apparently, stepped back to the right-hand side of the road; that he called to them not to attempt to board his truck: that the truck was heavily loaded with hay. The next he saw of the children was when one of the boys was climbing up on the truck. He proceeded to scold him for boarding trucks, and while doing so he caught a glimpse of plaintiff's head as he was falling down from the truck. The plaintiff testified that his two companions jumped upon the moving truck, and he was behind them.

> "I grabbed hold and put my knee on; this knee was on, and this foot here got on a rock and tripped me.
>
> "Q. Then what happened? A. Then I fell down and they ran over me."

[3] Appellant contends that the findings show a want of care on the part of defendant which would entitle the plaintiff to recover, but it appears to us that, as a matter of fact and of law, the injury was caused by the negligence of plaintiff without any contributing factor from the defendants. A case analogous in principle to the instant case is found in Allred v. Pioneer Truck Co., 179 Cal. 315, 176 P. 455, wherein it is said:

> "At the time of the accident an employee of plaintiff was driving a furniture van, drawn by three horses, along Broadway, in the city of San Diego. As constructed, this van was an inclosed box some twelve or fifteen feet in length, six feet high and five feet in width, with a tail or end gate three feet wide, suspended by chains so that the outer edge was but two feet eight inches above the surface of the street. The van was filled with furniture, by reason of which neither the driver nor the assistant with him, occupying the front seat of the vehicle, could see the end gate upon which, unknown to them, three or four boys were riding. Melvin Allred and another lad were on their way to school, and seeing these boys on the end gate they ran to the vehicle and his companion climbed upon the end gate. Young Allred, however, ran around the side of the wagon and either in attempting to climb on the projecting end of the brake-beam or by slipping upon the wet asphaltum pavement fell in front of the hind wheel, receiving injuries which caused his death. * * *
>
> "Construing the evidence thus summarized most strongly in favor of plaintiff, we are clearly of the opinion that it is insufficient to establish any neglect of duty on the part of the defendant toward the deceased. * * * Very few vehicles operated on highways are so constructed that boys cannot climb upon them or some parts thereof, and the proposition advanced, carried to its logical conclusion, would mean that the driver of an automobile or other vehicle whose duty requires him to observe the road along which he is traveling and attend to his motive power, must be argus-eyed or accompanied by outriders charged with the duty of seeing that small boys do not find lodgment upon the running boards or other parts of the vehicle or approach a position of danger where they may, as in this case, fall under a wheel. The law does not impose such duty on one lawfully operating a vehicle along a public street."

The foregoing language is very apt in connection with the facts presented upon the record before us.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; RICHARDS, J.; CURTIS, J.; PRESTON, J.; SHENK, J.

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200 Cal. 710

In re HINDE'S ESTATE.

HINDE et al. v. DIEDERICHSEN.

(L. A. 8945.)

(Supreme Court of California. March 18, 1927.)

1. Wills 🔑327—On motion for nonsuit in will contest, evidence favoring contestant must be taken as true, and contradictory evidence disregarded.

In will contest, all evidence in favor of contestant must, as against motion for nonsuit, be taken as true and contradictory evidence, if any, must be disregarded.

2. Wills 🔑324(3)—Evidence held to justify nonsuit of will contest as to undue influence of one alleged to be in confidential relationship with testator.

Evidence in will contest *held* to justify nonsuit as to ground that confidential relationship existed between decedent and sole beneficiary, and that latter exerted undue influence over testator.

3. Wills 🔑82—Will cannot be set aside because it is unjust, unreasonable, or cruel.

Testator has right to make unjust or unreasonable or even cruel will, and no will may be legally set aside on mere establishment that it is such a will.

4. Wills 🔑159—Undue influence to justify setting aside of will must result in execution of will not expressing testator's own desires.

To authorize setting aside of will for undue influence it must be shown, not only that undue influence was exercised, but that it produced effect on mind of testator by which will he executed was not expression of his own desires.

5. Wills 🔑163(8)—Presumption of undue influence over testator is not raised by showing interest and opportunity alone.

Presumption of undue influence over testator is not raised by proof of interest and opportunity alone, but there must be substantial proof of pressure actually overpowering volition of testator when will was made.

6. Wills 🔑324(3)—Evidence held to justify nonsuit in will contest as to charge that will was induced by fraudulent statements.

Evidence in will contest *held* to justify nonsuit as to ground that will was induced by fraudulent statements made by sole beneficiary though record disclosed sufficient opportunity for making such statements.

7. Wills 🔑360—Grounds of will contest apparently abandoned at trial will not be considered on appeal.

On appeal from will contest, it is unnecessary to consider any grounds of contest which were apparently abandoned at trial.

8. Appeal and error 🔑1075—Ruling granting new trial will not be considered on appeal, though notice of appeal therefrom was filed, where brief indicated abandonment of such appeal.

On appeal in will contest it was unnecessary to consider ruling granting new trial, though contestants filed notice of appeal therefrom, in view of statement in brief that they "are not here urging reversible error" in such action, since appeal from such order may be considered as having been abandoned.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Will contest by Lillie Hinde and others against Arthur Diederichsen, sole beneficiary and executor of the will of Alfred Hinde, deceased. After nonsuit as to five grounds of contest there was judgment revoking the probate of the will on the other ground alleged. A new trial was granted, and contestants appeal. Affirmed.

Sweet, Stearns & Forward, of San Diego, for appellants.

Eugene Daney, of San Diego, for respondent.

PER CURIAM. This is an appeal by the above-named contestants from a judgment of nonsuit and from an order granting a new trial.

Alfred Hinde, the decedent, was a resident of, and died in the county of, San Diego on November 14, 1923, at the age of 71 years. He left surviving him as his only heirs at law certain nieces and nephews, the contestants herein. By the terms of an olographic will bearing date October 25, 1923, the decedent bequeathed all of his property to the proponent, Arthur Diederichsen, a friend of some years' standing. The value of the estate is asserted to be in excess of $50,000. Upon the petition of the sole beneficiary, who is also named therein as executor, the said will was duly admitted to probate and letters testamentary issued to him. Thereafter the appellants filed their contest urging several grounds in support of a revocation of probate. As stated in the appellants' brief, the grounds of contest were:

> "(1) That the will was a forgery; (2) that the testator was of unsound mind at the time of the execution of the will; (3) that the will was the result of undue influence of Arthur Diederichsen exercised upon decedent by him when a relation of confidence and trust existed between decedent and said Diederichsen; (4) that the will was the product of a fraud practiced upon decedent by Arthur Diederichsen; (5) that the will was the result of undue influence exercised by Arthur Diederichsen; (6) that the will was mutilated, canceled, and torn by decedent prior to his death, for the purpose of revoking the same."

After issue joined, the cause was tried before a jury. A motion for nonsuit subsequently made on behalf of the respondent herein was granted as to all of the grounds of contest excepting that which had for its purpose an attack on the testamentary capacity of the testator. This latter issue was thereupon submitted to the jury, and it returned a verdict declaring the decedent to have been of unsound mind at the time he executed his will. In conformity with the terms of said verdict judgment was entered revoking the probate of decedent's will. The trial court thereafter made its order granting the respondent's motion for a new trial upon said issue of testamentary capacity.

In support of their appeal from the judgment of nonsuit the appellants contend that evidence had been introduced by them sufficient to warrant the submission to the jury of the issues raised by the grounds of contest numbered 1, 3, 4, 5, and 6. It is asserted by the contestants that the evidence adduced by them established the existence of a confidential relationship between the decedent and the respondent and an activity upon the latter's part in procuring the execution of the will, which, when considered together, were sufficient to place the burden upon the proponent of proving that the will was not induced by undue influence or fraud.

[1, 2] We are in accord with the rule announced in Estate of Newhall, 190 Cal. 709, 719, 214 P. 231, 235 (28 A. L. R. 778) cited by the appellants, which upon a will contest requires that—

> "All of the evidence in favor of the contestant must as against a motion for a nonsuit, be taken as true, and contradictory evidence, if any, must be disregarded. This having been done, if there is any substantial evidence tending to prove the fact necessary to make out the

contestant's case, the motion for a nonsuit must be denied and the case given to the jury."

Application of this rule to the instant case, however, clearly indicates the correctness of the trial court's judgment of nonsuit. A painstaking research of the record fails to disclose any evidence tending to show or establish that a confidential relationship existed between the decedent and the respondent, and likewise fails to reveal any evidence which would give credence to the allegations and assertions of undue influence and fraud.

Our survey of the record indicates that the decedent, a retired physician, and the respondent were intimate and warm personal friends for a number of years. On September 9, 1923, the testator became ill as a result of having partaken of tainted fowl, and the respondent, upon learning of his plight, immediately attempted to alleviate his suffering. Conscious of his duty to a friend, the respondent remained with the decedent at the latter's home for several nights ministering to his wants. The respondent thereafter removed the decedent to his (respondent's) home, where he could receive that care required by one so afflicted. Subsequently, and when the circumstances necessitated it, the testator was removed by the respondent to the Paradise Valley Sanitarium, where he also remained with him for several nights. His visits to see the decedent at the hospital were of frequent occurrence, and continued until the decedent passed away on November 14, 1923. At this point it may be remarked that the evidence discloses that all of the contestants, excepting Lillie Hinde, were residents of England. They had not seen the testator for many years, and their communication with him had been confined to an occasional exchange of letters. The contestant Lillie Hinde, however, had come to the United States at the solicitation of the decedent. For a period of time they resided together. It appears from various communications addressed by the decedent to the contestants long prior to his demise that he was grieved at the treatment accorded him by said contestants, and more particularly by Lillie Hinde. In addition to this, the decedent had remarked to several witnesses that he did not want Lillie Hinde near him, as they could not live together amicably. It is also significant to note in this respect that the decedent had, approximately two weeks prior to his death, addressed a letter to the contestant Minnie Eaton, in England, wherein he stated that he was staying with "very dear friends who consider me one of the family & they are doing everything possible for me & are most attentive to my every need & request. I've known them for years and I'm greatly indebted to them for a thousand & one kindnesses done." This same missive likewise indicated that the decedent had "dropped Lillie altogether & will not allow her to come near me," as she was "inconsiderate" and "unkind."

[3] With this picture before us it is easily understood why the testator chose to bestow his worldly accumulations upon the friend who had served him well rather than upon nieces and nephews from whom, for a long period of time, he had been disassociated, if not alienated. When these matters are borne in mind, there would appear to be nothing unnatural about the dispositive provisions of the decedent's will. However, even could it be said to be an unnatural will, and upon this question we express no opinion, it would be sufficient to state that a testator has the right to make an unjust, or an unreasonable, or even a cruel, will, and no will may be legally set aside upon the mere establishment that it is such a will. Estate of Smith (Cal. Sup.) 252 P. 325; Estate of Martin, 170 Cal. 657, 151 P. 138.

[4, 5] We are unable to conclude that the evidence introduced by the contestants is sufficient to warrant an inference that the will in question was the product of, and induced by, undue influence exerted by the respondent upon the testator. There is an utter lack of any proof of pressure brought to bear upon the testator which overpowered his mind and overcame his volition at the very time the will was made. Estate of Perkins, 195 Cal. 699, 235 P. 45; In re Rick's Estate, 160 Cal. 450, 117 P. 532. It is necessary to show, not only that undue influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires. The presumption of undue influence is not raised by proof of interest and opportunity alone. " 'In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made.' " Estate of Bryson, 191 Cal. 521, 541, 217 P. 525, 533; Estate of Newhall, 190 Cal. 709, 717, 214 P. 231, 28 A. L. R. 778. In the instant case there is not, in our opinion, one iota of evidence tending to show the circumstances prevailing at the very time the will was executed. The contestants merely have shown that the respondent, at a time subsequent to the date appearing on the face of the will, and pursuant to the testator's request, attempted to have a certain attorney at law visit the testator. And that, in compliance with a second request of the decedent, the respondent succeeded in bringing said attorney to the Paradise Valley Sanitarium to see the testator on the day preceding his death. It was on the occasion of this visit that the respondent delivered the olographic will in question to the decedent, who, in turn, delivered it to said attorney for examination. Called on behalf of the contestants under section 2055 of the Code of Civil

Procedure, the respondent disclaimed all knowledge of the existence or whereabouts of the will until the day preceding the testator's death, when, in response to the latter's direction, he removed the will from its resting place under the mattress in the bed occupied by the decedent while staying at the respondent's home. Subsequent to a perusal of the contents of said will by the attorney of the testator's own choosing, the instrument was left by the decedent in the custody of said attorney. This evidence is uncontradicted, and, standing alone, fails to show that the mind of the testator, at the time of making the will, was subjugated to, and dominated by, the desires and designs of the respondent to the point of undue influence.

[6] Nor do we think there is any evidence which tends to support an inference that the will in question was induced by the fraudulent statements charged to the respondent. It may be conceded that the record discloses sufficient opportunity for the making of the alleged false statements. This, however, is not enough. In our opinion, there is a dearth of evidence tending to show that said false and fraudulent statements were in fact made.

[7] The record is also devoid of all evidence that might tend to establish the first and sixth grounds of contest. It therefore becomes unnecessary to consider either of these grounds of contest, inasmuch as they were apparently abandoned upon the trial.

[8] And, though the contestants filed a notice of appeal from the order granting a new trial upon the issue of testamentary capacity presented by the second ground of contest, it likewise becomes unnecessary to consider this phase of the case, for said contestants state in their brief that they "are not here urging reversible error in the action of the trial court in making its order granting a new trial." The appeal from said order may therefore properly be considered as having been abandoned by the contestants.

For the foregoing reasons, the judgment of nonsuit and the order granting a new trial appealed from herein are, and each is, hereby affirmed.

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200 Cal. 661

ALLYNE et al. v. MURASKY, Superior Court Judge, et al. (S. F. 11830.)

(Supreme Court of California. March 15, 1927.)

1. Dismissal and nonsuit 🔑60(1)—Requirement for dismissal unless action brought to trial within five years held inapplicable to retrial after new trial granted (Code Civ. Proc. § 583).

Code Civ. Proc. § 583, providing that action shall be dismissed unless brought to trial within five years after answer is filed, except where parties have stipulated for extension of time, is not applicable to retrial of causes after new trial has been granted.

2. Dismissal and nonsuit 🔑60(1)—Where action was brought to trial within less than three years after filing of answer, defendants could not have dismissal thereof as of right (Code Civ. Proc. § 583).

Where action was brought to trial within less than three years after filing of answer, defendants were not entitled to have case dismissed as of right under Code Civ. Proc. § 583.

3. Dismissal and nonsuit 🔑60(1)—Court cannot read into statute providing for dismissal of action not tried within five years words compelling dismissal of actions not retried (Code Civ. Proc. § 583).

Since Code Civ. Proc. § 583, does not lay down rule of cases in which action has not been brought to trial within five years following order granting new trial, court cannot read therein words compelling dismissal of action not retried within five years after new trial was granted.

4. Statutes 🔑188—Words of a statute must be interpreted according to common acceptation.

The words in a statute are to be interpreted according to their common acceptation.

5. Dismissal and nonsuit 🔑67—Petition to dismiss action because not retried for nine years after motion for new trial granted held not to allege abuse of discretion.

Petition for mandamus to compel dismissal of action because there was no retrial for approximately nine years after granting of motion for new trial *held* not to allege breach of trial court's discretion in refusal to dismiss.

6. Mandamus 🔑154(2)—Petition for mandamus must state specific facts and make prima facie case to warrant alternative writ.

The petition for a writ of mandate must state specific facts sufficiently to justify granting of relief and make clear prima facie case to warrant alternative writ.

In Bank.

Petition by Lucy H. Allyne and others for a writ of mandate to be directed to Frank J. Murasky, Judge of the Superior Court of the State of California in and for the County of San Francisco, Department No. 2, and another, directing the dismissal of an action pending in said court. Writ denied.

Leicester & Leicester, of San Francisco, for petitioners.

Garret W. McEnerney and Andrew F. Burke, both of San Francisco, for respondents.

SEAWELL, J. [1] Petition for writ of mandate to be directed to the respondent superior court in and for the city and county of San Francisco and to the honorable Frank J. Murasky, judge in department No. 2 of said respondent court, commanding a dismissal of a certain action heretofore commenced in said court. The principal question involved is whether the mandatory provisions of section 583, Code of Civil Procedure, require the dismissal of an action which has not been brought to trial within five years after the granting of a motion for a new trial. We are of the opinion that neither section 583 nor any other section of the Code compels a trial judge to dismiss an action under such circumstances.

The facts of the case, as they appear in the petition for the writ, are: Petitioners and one Mary J. Kelly were named as defendants in an action commenced in the court below on December 31, 1910, to quiet title to certain real property described in the complaint against all persons claiming any interest therein. Defendants Lucy H. Allyne, Edith W. Allyne and Agnes M. McGuire answered, admitting plaintiff's ownership and right to possession of all lands described in the complaint with the exception of a certain parcel known as Emmet place. As to said parcel, they alleged that they and each of them had a private right of way over it to and from adjoining lands owned by them, and that it was, and for more than forty years prior thereto had been, a public highway or street. Defendant Mary J. Kelly, since deceased, whose representative did not join in the petition herein, filed an answer of similar import. Defendant and petitioner city and county of San Francisco also filed an answer in which it alleged that the property in question constituted an open public street or highway. The case was tried on July 17, 1913, and a decree entered on November 29, 1913, adjudging plaintiff to be the owner and entitled to the possession of all lands described in the complaint with the exception of Emmet place. As to said Emmet place it was adjudged that plaintiff was the owner of the westerly 39 feet; that the entire parcel was a public street or alley, and that the public and said defendants had the right to pass over and use the same as and for a public street or alley.

Thereafter plaintiff made a motion for a new trial, which was granted on October 18, 1916. No further action was taken until September 24, 1925, almost nine years later, when those of defendants who are petitioners herein gave notice that they would move the court to dismiss the action upon the ground that plaintiff had failed to bring the action to trial within five years after the entry of the order granting a new trial. Plaintiff thereupon filed a notice of motion to set the cause for trial and also an affidavit in opposition to defendants' motion to dismiss, setting forth therein purported grounds for failure to bring the action to a second trial. The motion of plaintiff was granted and that of defendants denied.

Section 583, Code of Civil Procedure, provides:

> "*Dismissal of Actions.* The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended."

[2] The plain and obvious purpose of the foregoing section is to regulate the matter of compulsory dismissals only under one set of circumstances, to wit, where an answer has been filed and the action has not been brought to trial within five years thereafter. Other sections in the same chapter of the Code provide for dismissals under other circumstances, and if none of said sections pertaining to dismissals cover the situation in the instant case, where more than five years have elapsed since the entry of the order granting a new trial, it must be held that it is the duty of the trial judge to determine the question as to the reasonableness of the delay, and his determination cannot be disturbed by an appellate court unless it is made to appear that he has abused his discretion. Impliedly the court below held that it was satisfied that there was a reasonable excuse for the delay. In the case at bar the stage in the proceedings to which section 583 applied has passed, inasmuch as the action was brought to trial within slightly less than three years after the filing of the answer. For this delay the defendants were not entitled to have the case dismissed as a mandatory right (Romero v. Snyder, 167 Cal. 216, 138 P. 1002), but the court in the exercise of the discretion given it by said section 583, might have dismissed the action upon motion of the defendants. But a motion for dismissal was not made, and, inasmuch as the action was brought to trial within the five-year period of limitation, the requirements of the statute were satisfied.

[3, 4] Section 583 does not purport to lay down a rule governing cases in which an action has not been brought to trial within a period of five years immediately following the entry of an order granting a new trial. We are asked by the petitioners to do more than indulge in a liberal construction of a statute. We are asked here to extend a statute's operation by implication to a subject which, in the absence of a statutory regulation, was concededly within the discretion of the trial court. Section 583 was intended, no doubt, to compel expedition in the trial and disposition of causes. While this is admittedly so, we find no warrant in its language that would justify us in reading into the section words which would clearly compel a dismissal if an action be not retried within five years after a new

trial has been granted. The words in the section are to be interpreted according to their common acceptation. Perrin v. Miller, 35 Cal. App. 129, 169 P. 426.

The case of Romero v. Snyder, 167 Cal. 216, 138 P. 1002, in which an attempt was made to extend the section to cover cases without its purview, while not conclusive on the point raised here, is persuasive, inasmuch as it refused to depart from the express language of the statute. In that case a motion to dismiss made within less than two years after demurrer filed was granted. The proceeding thereafter came before this court on appeal from the judgment of dismissal. It was there contended that the provision of section 583 authorizing the court in its discretion to "dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after answer filed to bring such action to trial" impliedly prohibited the court from dismissing within less than two years after answer filed, and that a demurrer was an answer within the meaning of the section. The court held that appellant was correct in the contention that an action could not be dismissed within less than two years after answer filed, but further held that a demurrer was not an answer, and where only a demurrer had been filed a dismissal might be made on the ground that a delay of less than two years was unreasonable. The statements made by the court in this case to the effect that said section 583 purports to cover the entire subject of dismissals after answer filed can fairly be interpreted to mean only after answer filed and before an action has been once brought to trial. If the five-year limitation was to be held to apply in the case at bar, it would necessarily follow that the two-year limitation would also apply, and that a trial judge would be powerless to determine that a delay of less than two years was unreasonable and warranted a dismissal. We cannot hold that the Legislature has indicated an intention to accomplish such a result by the enactment of section 583.

[5, 6] It was the evident theory of petitioners, as shown by the notice of motion to dismiss the action, that it was the mandatory duty of the court to dismiss said cause, it not having been brought to trial within five years after the granting of the motion for a new trial. The notice specifically mentions the failure of plaintiff to bring the cause to trial within that period. The question of the abuse of discretion seems not to have been seriously urged by petitioners on the motion for a dismissal. The petition as framed does not plead facts sufficient to show that the court below committed an abuse of discretion. We are not able to say as a matter of law that the long delay in bringing the case to a retrial was not excusable under the state of facts shown to exist upon the hearing of the motion, which was presumptively deemed sufficient to justify the court in exercising its discretion in the manner complained of. The facts are not before us. All that is presented in this respect is an affidavit made by the plaintiff in which he avers that certain negotiations were pending between some of the parties litigant, which, it was believed, would put an end to the litigation if consummated. If the affidavit above referred to was the only ground relied upon by the court to support its action we would incline to the view that it did not furnish a valid reason to warrant a denial of the motion. But we cannot presume that there were not other valid reasons which justified the court in making its order. There is nothing in the petition which would in any way tend to dispute the presumption that evidence was adduced fully supporting the court in the exercise of its discretion. "The petition for a writ of mandate must state specific facts sufficient to justify the granting of relief sought, and make a clear prima facie case to warrant the alternative writ." 16 Cal. Jur. 859.

We therefore conclude that the portion of section 583 which makes it the mandatory duty of a court to dismiss an action which is not brought to trial within five years after answer filed has no application to the retrial of causes, and, as to the second ground, that an abuse of the discretionary power of the court to dismiss the action has not been sufficiently alleged in the petition. While nine years is a long period for an action to lie in repose, we cannot say that there may not, conceivably, be rare cases in which it would not be an abuse of discretion to refuse to dismiss. The demurrer to the petition is well taken.

The writ is denied.

We concur: WASTE, C. J.; RICHARDS, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

200 Cal. 654

In re SMITH'S ESTATE.

SMITH v. SMITH et al.

(L. A. 9421.)

(Supreme Court of California. March 14, 1927.)

1. Infants 🔑90 — Where no exception was taken to appearance of minor whose mother appeared with her, contest of probate proceeding may be considered as properly made by minor's mother.

Notwithstanding minor child was without right to appear in contest of proceeding to have estate of decedent set aside to his second wife as widow, both on account of her minority and fact that order for her support ran in favor of her mother, where no exception was made to her appearance, since mother's appearance jointly with her was sufficient to protect her interests, reviewing court will consider contest as properly made and presented by the mother.

2. Divorce 🔑308—Order directing bank to hold trust deed to secure payment of support for child held to create lien against property therefor (Civ. Code, §§ 140, 2872).

Order of superior court, after wife's successful suit for divorce, directing bank to hold trust deed deposited with it to secure payment for support of minor child, *held*, in view of Civ. Code, §§ 140, 2872, to create lien against property in bank's hands to secure payment as against petition of second wife to have trust deed set aside to her under Code Civ. Proc. § 1469, as sole estate of deceased husband.

3. Divorce 🔑308—Order directing bank to pay proceeds from collection of trust deed to support of minor child held to continue after husband's death.

Where husband deposited trust deed with bank with instructions to pay proceeds of collection thereof in monthly installments for minor child, order of superior court directing that bank hold deed to secure such payment *held* to continue after husband's death, notwithstanding custody of child had been awarded to wife in her divorce action.

4. Divorce 🔑164—Probate court is without power to modify order or decree in divorce action.

Probate court having no jurisdiction of divorce proceedings is without power to modify order or decree rendered in divorce action.

In Bank.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

In the matter of the Estate of Elmer Leon Smith, deceased. Petition by Edith Smith to have estate set aside to her, opposed by Ella P. Smith and another. From a judgment for petitioner, respondents appeal. Reversed, with directions.

Walters & Mauk, of Los Angeles, for appellants.

Wood, Janeway & Pratt and Roland T. Kinney, all of Los Angeles, for respondent.

CURTIS, J. On June 26, 1924, an interlocutory decree of divorce was entered in favor of Ella P. Smith and against Elmer L. Smith in the superior court of the county of Los Angeles. In this interlocutory decree it was provided that the defendant Elmer L. Smith should pay to plaintiff for the support of their minor child, Rhea Smith, the sum of $50 per month. Thereafter, the defendant being in arrears in said payments, the plaintiff in said divorce action filed an application in said superior court by which, we assume from the brief reference thereto in the record herein, plaintiff sought to have the defendant adjudged guilty of contempt of court for failure to comply with said order directing him to pay said sum of $50 per month towards the support of his minor child. Upon the hearing of this application, it was found that defendant was in arrears in said payments in the sum of $181. The court also found that some time prior thereto the defendant had deposited with the Walnut Park Bank in said county a trust deed executed by Gilbert Patterson to said defendant; that said trust deed "called for the sum of $1,200, payable $30 a month, together with interest"; and that said defendant had deposited said trust deed in said bank and said bank held the same for the defendant with an order signed by the defendant to pay to the said Rhea Smith the monthly payments thereof with interest. Thereupon the court made an order as follows:

> "That in order to secure the payments of said installments, as provided for in said interlocutory decree, the court do order that the said Walnut Park Bank aforesaid, be and they are hereby required to hold said trust deed for the security and payment of said support for the said child, Rhea Smith, and that said bank is ordered not to deliver over the said trust deed to the defendant Elmer L. Smith, or any person for him, but to hold the same and receive the payments together with interest thereon from time to time and pay the same to the said Rhea Smith, taking her receipt therefor, and to hold said trust deed until the further order of the court."

The date of this order was April 6, 1925. On September 30, 1925, the defendant died without said order ever having been revoked or modified. Thereafter Edith Smith, with whom said defendant had contracted a second marriage, after being divorced from the said Ella P. Smith, was, by the probate court of said county of Los Angeles, appointed executrix of his last will, and on June 18, 1926, she filed in said probate court her petition under section 1469 of the Code of Civil Procedure to have the whole of the estate of said deceased set aside to her upon the ground that the value thereof did not exceed the sum of $2,500. In this petition it was alleged that the only property left by said decedent was said trust deed, upon which there was then left unpaid the sum of $1,000, payable at the rate of $30 per month. The said Ella P. Smith and her minor daughter, Rhea Smith, appeared in said proceeding and filed written objections to the granting of said petition on the ground that by virtue of the order of court of date April 6, 1925, made in the divorce action, there was created a lien against said property in their favor to secure the amounts ordered by the court to be paid by the defendant for the support of said minor child. It appears from said written objections that there was due and unpaid from decedent at the date of his death something over $400 for the support of said minor; that said minor would be 16 years of age on March 26, 1926; and that the whole amount of indebtedness secured by said trust deed would be required to meet the payments then due and which would become due for the support of said Rhea Smith during her minority. The matter was submitted to the trial court on an agreed statement of facts in which it was stipulated that the amount due for the support of said minor was at the death of decedent the sum of $426; that said minor would be 16 years of age on March 26, 1926; that the $1,000 indebtedness secured by the trust deed then in the possession of the Walnut Park Bank constituted all the assets of the estate of Elmer L. Smith, deceased, otherwise known as Elmer Leon Smith; "that the moneys and assets sought to be set apart to the widow in said application are the moneys and assets of the trust deed and notes set forth in said order" of April 6, 1925; and that the decree directing said Elmer L. Smith to pay for the support of his minor child, Rhea Smith, the sum of $50 per month had never been modified. Upon this state of facts the probate court made its decree setting aside to the said Edith Smith, as the surviving widow of said deceased, all the property of said estate and directed the said bank to pay over to her all of the estate of said Elmer Leon Smith, deceased, in its possession, including the indebtedness secured by said deed of trust, and all proceeds thereof in its possession or to be in its possession thereafter. From this order Ella P. Smith and Rhea Smith have appealed.

[1] No exception appears to have been made either in the lower court or in this court to the appearance or participation as a party to this proceeding of Rhea Smith, a minor. It is apparent that said minor is without any right to appear herein, both on account of her minority and for the further reason that the order for her support ran in favor of her mother, Ella P. Smith, and not in favor of the minor. However, as the mother, Ella P. Smith, has appeared jointly with the minor in all matters herein, and as her appearance and participation herein is sufficient to protect all the interests involved, we will consider said contest as properly made and presented by her.

[2] The sole question presented on this appeal is whether a lien was created on the indebtedness secured by the trust deed in the possession of the Walnut Park Bank by the order of court made on the 6th day of April, 1925. Appellant Ella P. Smith, and we will hereafter refer to her as the sole appellant herein, contends that such a lien was created in her favor. The sole contention made by respondent to support the order appealed from is that no lien was created in favor of appellant by said order of court, and therefore the subsequent order of the probate court setting aside this property to the surviving widow was valid and should be sustained. Respondent concedes the power of the court under section 140 of the Civil Code to require the husband to give reasonable security for the payment of money ordered by the court for the support of his minor child and to impose a lien upon his property to secure the payment of the amounts ordered. She further concedes that this may be done in various ways, one of which may be by the appointment of a receiver. She then contends that no receiver was appointed in this instance. It may be conceded that the order of the court cannot be construed as appointing the Walnut Park Bank a receiver for the purpose of holding the trust deed and applying the payments thereon to the support of the minor, but the appointment of a receiver is only one of the methods which the court may employ to compel obedience to its orders. She then insists that the order requiring the bank to hold the trust deed for security and to pay the proceeds therefrom to his minor child created no lien upon the property, but is "merely a personal order in the nature of an injunction and was not an order in rem." We are unable to follow respondent's reasoning.

> "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." Civ. Code, § 2872.

The order of court of date April 6, 1925, expressly provides:

> "In order to secure the payments of said installments, as provided for in said interlocutory decree, the court do order that the said Walnut Park Bank aforesaid, be and they are hereby required to hold said trust deed for the security and payment of said support for the said child, Rhea Smith. * * *"

This is a direct charge imposed by order of court upon the property therein described to secure the performance of certain acts enumerated in said order. It was unquestionably within the power of the court under said section 140 of the Civil Code to make said order, and it is just as certain that by such order the court created a lien against the property in the hands of the bank to secure the payment of the amounts due and to become due for the maintenance of the minor. It is true that said order further directed the bank not to deliver the trust deed to Elmer L. Smith, the father of said minor, or to any other person, but to hold the same and to receive payments thereof and to pay them to said Rhea Smith; but this further order, instead of detracting from the previous portion thereof, only confirmed and strengthened it. In our opinion there is no question but that by the order of court a lien was created on the securities in the hands of the bank in favor of said Ella P. Smith.

[3] As to the amount of said lien, as already noted, the court found that at the death of said deceased there was due from him $426 for the support of his said minor child. Respondent, however, concedes that the liability of a father for the support of his minor child is not extinguished by his death, but that his said estate is liable for said support. She contends, however, that by the decree of divorce, in which the minor was awarded to the custody of the mother, the father was under no legal obligation to provide support for said child beyond that which may be directed by the court which has granted the divorce either in its decree or by subsequent modification. Even were this the correct rule, it has no application to the present proceeding, as we have here an order of court directing the father to pay for the support of his minor child during her minority. Had the father lived, this order would have continued in force during the minority of his child unless modified by the court. No modification of the order has been made. The question, therefore, is: Does this order continue in force after his death? This question seems never to have been before the appellate courts of this state. Its solution, however, does not appear difficult. The purpose of the order was to maintain the child during her minority and to compel such maintenance by the father. The necessity for the support of the minor is the same, whether the father be alive or dead. Having made provision for the support of the minor, which is at least partially adequate for her maintenance during her minority, is there any reason whatever why this support should cease on the death of the father, leaving property properly applicable for the payment of said support? No reason has been suggested to us and we know of none. Surely no obligation can exceed in importance that which the father owes to his own offspring. It is true he assumed additional duties upon contracting a second mariage, but these are subordinate to those which he owed prior to his said marriage to support his own children.

In other jurisdictions it has been held that the provision in a decree of divorce directing the father to pay certain amounts towards the support of his minor child is not discharged by his death. Creyts v. Creyts, 143 Mich. 375, 106 N. W. 1111, 114 Am. St. Rep. 656; Miller v. Miller, 64 Me. 484; Stone v. Boyley, 75 Wash. 184, 134 P. 820, 48 L. R. A. (N. S.) 429; Mansfield v. Hill, 56 Or. 400, 107 P. 471, 108 P. 1007; Murphy v. Moyle, 17 Utah, 113, 53 P. 1010, 70 Am. St. Rep. 767. In the last-mentioned case the facts were somewhat similar to those in the present proceeding. A divorce had been granted to the mother and the custody of the minor awarded to her, with the provision in the decree that the father pay to the mother a certain sum monthly towards the support of the minor. The decree further provided that as security for the payment of said amount for the support of the minor the mother was given a lien upon certain real property owned by the father. The father died while his said child was in her minority. The wife filed a claim against his estate for the child's support up to the time when the child should become of age. The trial court gave judgment in her favor for the full amount prayed for and directed that said amount be paid to the clerk of the court to be by him paid to the mother in accordance with the terms of the decree of divorce. It further directed a sale of the property given as security, and, if the proceeds thereof were not sufficient to pay the amount due under said decree, that the estate of the father should be liable for the balance. Upon appeal the Supreme Court of Utah affirmed the judgment and stated that—

> The decree of divorce "created an obligation to pay and a lien on the property described in the modified decree as security for payment in accordance with the terms of the decrees, which obligation and lien continued in force after the death of the deceased, and bound his estate. Such lien was subject to foreclosure for failure to make payment of the sum stipulated at any time during the minority of the child."

The court further held that—

> "The court had the right to enforce the former decrees, and foreclose the lien upon failure of payment; and its power to do so was not affected by the death of the testate, and, if the proceeds shall be insufficient to satisfy the claim, it may enforce payment of the balance out of the estate."

Replying to appellant's contention for a contrary ruling, the court said:

> "It is unsound, as being at variance not only with the decrees of the court and the law, but also with justice for it is the solemn duty of every husband and father to support his wife during life, and his children during their minority, suitably to their station in life, and, if he fail to do so, every principal of justice demands that they be thus supported out of his estate."

[4] Our conclusion, therefore, is that appellant has a lien upon the funds secured by the trust deed in the possession of the Walnut Park Bank to secure the payment not only of the amount due for the support of the minor at the death of the father, but for such additional amounts as may accrue in accordance with the interlocutory decree during the minority of said Rhea Smith, or until said de-

cree is modified by the court in which it is granted. The further contenton of respondent that the order appealed from may be treated as an order modifying the decree giving a lien upon the trust deed is without merit. The order appealed from was made by the probate court, and such court has no jurisdiction over divorce proceedings, and, consequently, was without power to modify any order or decree rendered in a divorce action.

The order appealed from is reversed, with directions to the probate court to enter its order in accordance with the views expressed herein.

We concur: WASTE, C. J.; PRESTON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.; LANGDON, J.

200 Cal. 637

LOS ANGELES CITY SCHOOL DIST. OF LOS ANGELES COUNTY v. ODELL et al. (L. A. 9179.)

(Supreme Court of California. March 10, 1927.)

1. Mandamus 🔑163—Averments of petition for mandamus may be accepted as true on general demurrer.

On general demurrer, averments of petition for writ of mandate may be accepted as true.

2. Statutes 🔑93(6)—Statute as amended to authorize sale of realty by any school district without reference to attendance held not special legislation, nor arbitrary, discriminatory classification of districts (Pol. Code, § 1617½ [St. 1917, p. 1645], as amended by St. 1919, p. 399).

Pol. Code, § 1617½ (St. 1917, p. 1645), as amended by St. 1919, p. 399, authorizing trustees of any school district, as well as city boards of education, to sell realty of district, and striking all reference to daily average attendance, *held* not unconstitutional as special legislation or providing for arbitrary and discriminatory classification of school districts.

3. Statutes 🔑211—Clear, unambiguous language of statute authorizing all school districts to sell realty should not be restrained by title inadvertently retaining reference in amended statute to average daily attendance (St. 1919, p. 399, amending Pol. Code, § 1617½ [St. 1917, p. 1645]).

Language of St. 1919, p. 399, amending Pol. Code, § 1617½ (St. 1917, p. 1645), being clear and unambiguous as to intent to extend provisions authorizing sale of realty by city boards of education to all city school and high school districts, without regard to average daily attendance, should not be controlled and restrained by title, inadvertently retaining reference to such attendance in amended act.

4. Statutes 🔑211—Title may be relied on to ascertain intent of ambiguous act, but not to restrain or control positive provisions.

Title of act may be relied on in ascertaining Legislature's intention, where act itself is ambiguous, but cannot be used for purpose of restraining or controlling any positive provision of act.

5. Statutes 🔑231—Revised act must be construed as original legislation, and every part given effect, if possible.

Revised act must be construed as new and original piece of legislation, and effect given to every part thereof, if possible.

6. Statutes 🔑122(4)—Amendatory act authorizing all school districts to sell realty held not unconstitutional as referring to subjects not included in title (St. 1919, p. 399, amending Pol. Code, § 1617½ [St. 1917, p. 1645]; Const. art. 4, § 24).

St. 1919, p. 399, entitled "An act to amend" Pol. Code, § 1617½ (St. 1917, p. 1645), and authorizing trustees of any school district to sell realty thereof without regard to average daily attendance, *held* not to violate Const. art. 4, § 24, as referring to subjects not included nor mentioned in title.

7. Statutes 🔑109—Numerous statutory provisions having general object fairly indicated by title may be united (Const. art. 4, § 24).

Numerous provisions having one general object fairly indicated by title of act may be united, under Const. art. 4, § 24.

8. Statutes 🔑109—Title need not embrace abstract of statute's contents (Const. art. 4, § 24).

Title of act need not embrace an abstract of its contents to comply with Const. art. 4, § 24.

9. Statutes 🔑109—Act entitled act to amend particular section of named Code sufficiently states subject (Const. art. 4, § 24).

An act entitled an act to amend a particular section of named Code sufficiently states subject of act as required by Const. art. 4, § 24.

10. Statutes 🔑109—Title of amendatory act, expressing subject after number of section and name of Code amended, is sufficient (Const. art. 4, § 24).

Amendatory act, title of which includes words expressing subject of act after number of section and name of code amended, complies with requirement of Const. art. 4, § 24, that subject of act be embraced in title.

11. Schools and school districts 🔑65—Statute authorizing sale of school property, on which no public school is being maintained, includes public high schools (Pol. Code, §§ 1663, 1720, and § 1617½ [St. 1917, p. 1645], as amended by St. 1919, p. 399; Const. art. 9, § 6.

Language of Pol. Code, § 1617½ (St. 1917, p. 1645), as amended by St. 1919, p. 399, authorizing sale of school property, "upon which no public school is being maintained," is broad enough to include a public high school, under Const. art. 9, § 6, and Pol. Code, §§ 1663, 1720.

12. Schools and school districts ⚷65—City school district's contract for sale of realty occupied by high school held not void, where lease to high school district expired before date for delivery of title and possession (Pol. Code, § 1617½ [St. 1917, p. 1645], as amended by St. 1919, p. 399).

Where lease of school property by city school district to city high school district expired before date contemplated in former district's agreement of sale for delivery of title and possession to purchaser, proposed sale was not void, under Pol. Code, § 1617½ (St. 1917, p. 1645), as amended by St. 1919, p. 399, because of occupancy of property for high school purposes, when contract was executed.

13. Schools and school districts ⚷65—School district may contract to sell realty, title and possession to be delivered after expiration of lease to high school district, though equitable title vests in purchasers on execution of contract.

City school district may negotiate for sale of property, title and possession to be delivered at deferred date after expiration of lease to city high school district, though entire equitable title vests in purchasers on execution and delivery of contract.

In Bank.

Application by the Los Angeles City School District of Los Angeles County for a writ of mandate to Robert A. Odell and another, as President and Secretary of the Board of Education of the City of Los Angeles. Writ granted.

Everett W. Mattoon, Edward T. Bishop, County Counsel, and J. H. O'Connor, Assistant County Counsel, all of Los Angeles (Hill. Morgan & Bledsoe and Haas & Dunnigan, all of Los Angeles, of counsel), for petitioner.

Robert A. Odell and Frank P. Doherty, both of Los Angeles, for respondents.

WASTE, C. J. [1] The petitioner, Los Angeles city school district, prays for the issuance of a writ of mandate to compel the respondents, as president and secretary, respectively, of the board of education of the city of Los Angeles, to execute and sign, on behalf of said board, an agreement of sale of the real property hereinafter referred to. The respondents have filed a general demurrer to the petition, and we may therefore accept the averments of the petitioner as true. Petitioner and the Los Angeles city high school district, separate and distinct legal entities, are governed and controlled by the board of education of the city of Los Angeles, as created and provided for in the city charter. Petitioner is the owner of real property situated at the northwest corner of Eighth street and Grand avenue in the city of Los Angeles, commonly known as the "Grand avenue school site." The board of education, by unanimous vote, adopted a resolution authorizing the sale of the property, and the highest bid, that of the Capital Company in the sum of $1,575,539.22, was accepted. An agreement of sale was thereupon prepared and executed by the company, and was presented to the board of education, which, by apt resolution, authorized and directed the respondents, as president and secretary, to sign and execute the contract on behalf of the board. The respondents have refused and decline to sign or execute the agreement of sale, assigning as the reason for such refusal that section 1617½ of the Political Code, purporting to authorize the sale of public school property, is unconstitutional as being special legislation, and on the further ground that the proposed sale is illegal and void for the reason that the Los Angeles city high school district is maintaining a public high school on the property.

[2] In support of their contention that section 1617½ of the Political Code is unconstitutional, respondents assert that the authority given by it to sell public school property is confined to boards of education governing city school and city high school districts having an average daily attendance in excess of 55,000; and that such classification is arbitrary and discriminatory, and, if given effect, would permit but two school boards, namely, those of the cities of Los Angeles and San Francisco, to sell school property. There is no basis for this contention. As now in force, the section contains no limitation based on average daily attendance. Prior to 1917 boards of school trustees and city boards of education had power to purchase or sell school lands only when directed by a vote of their districts. In that year section 1617½ of the Political Code was enacted. By its terms boards of education or other governing boards in cities and having jurisdiction over both the elementary and high school districts embracing such cities, in which the total number of units of average daily attendance in both such school districts, as shown by the annual report of the county superintendent of schools to the state superintendent of public instruction for the preceding school year, exceeded 55,000, were authorized to sell or lease for a term not exceeding 99 years any real property belonging to their respective school districts, or high school districts upon which no public school was being maintained. Stats. 1917, p. 1645. At the next session of the Legislature the section was amended to read, so far as is pertinent here:

> "1617½. Boards of education, or other governing boards, in cities and having jurisdiction over both the elementary and high school districts embracing such cities, and boards of trustees of any school district and boards of trustees of union high school or joint union high school districts, are hereby authorized to sell or lease for a term not exceeding ninety-nine years, any real property belonging to their re-

spective school districts, or high school districts upon which no public school is being maintained. * * *" Stats. 1919, p. 399.

By the amendment, the Legislature not only made the section apply to boards of trustees of any school district, and boards of trustees of union high school or joint union high school districts, as well as to city boards of education, but struck from its provisions all reference to a daily average attendance. There is therefore nothing in the section itself on which respondents can base their objection that it is unconstitutional as being special legislation, and provides for an arbitrary and discriminatory classification of school districts.

[3-5] However, the title of the act amending the section affords some basis for the contention of the respondents, in that it retains the reference to "a total average daily attendance execeeding fifty-five thousand." We have carefully examined the legislative history of Assembly Bill No. 298, introduced January 20, 1919, purporting "to amend section one thousand six hundred seventeen and one-half of the Political Code." Other than extending its provisions to "boards of trustees of union high school districts," the bill was in the identical language of section 1617½ as originally enacted. It was twice amended in the Assembly and once in the Senate. By one of these amendments the requirement of, and all reference to, the "total number of units of average daily attendance" was stricken from the body of the act, but, apparently through inadvertence, was not eliminated from the title. It is therefore quite clear that the Legislature intended that the provisions of the amendatory act should extend to and include all city school and city high school districts, without regard to the average daily attendance therein. The language in the body of the act being clear and unambiguous, it should not be controlled and restrained by the title thereto. The authorities are numerous to the effect that the title of an act may be relied on in ascertaining the intention of the Legislature, where the act itself is ambiguous; but the title "cannot be used for the purpose of restraining or controlling any positive provision of the act." Flynn v. Abbott, 16 Cal. 359, 366; Barnes v. Jones, 51 Cal. 303, 306; In the Matter of the Boston M. & M. Co., 51 Cal. 624, 626. There is no ambiguity in the amendatory act of 1919, and the title thereto may not, therefore, be employed to control the plain provisions thereof. It is also settled that a revised act must be construed as a new and original piece of legislation and, if possible, effect must be given to every part thereof. Donlon v. Jewett, 88 Cal. 530, 26 P. 370. It follows that the "arbitrary classification" complained of by the respondents does not in fact exist, and cannot, therefore, form the basis of a constitutional attack on the statute.

[6-10] Nor do we think it can be successfully maintained that the amendatory act of 1919 violates section 24 of article 4 of the Constitution by referring to certain subjects apparently not included nor mentioned in its title. It has been held that numerous provisions having one general object fairly indicated by the title to the act may be united. Ex parte Liddell, 93 Cal. 633, 636, 29 P. 251; Estate of Wellings, 192 Cal. 506, 519, 221 P. 628; McClure v. Riley, 198 Cal. 23, 26, 243 P. 429. The statute in question was intended to authorize and sanction the sale and leasing of public school property by the enumerated boards, and this purpose is fairly discernible from the title to the act, and, in our opinion, all of the provisions need not have been set forth in the title. It is not necessary that the title of an act should embrace an abstract of its contents. Abeel v. Clark, 84 Cal. 226, 24 P. 383. Moreover, it has been held that an act entitled an act to amend a particular section of one of the Codes sufficiently states the subject of the act. People v. Oates, 142 Cal. 12, 14, 75 P. 337; Estate of Elliott, 165 Cal. 339, 345, 132 P. 439. The almost universal custom of the Legislature in making amendments to the Codes has been to put into the title of the amendatory act, after the number of the section amended and the name of the Code, additional words expressing the subject of the act; and it is well settled that such amendatory act complies with the constitutional requirement. 23 Cal. Jur. p. 661, § 54. That portion of the title of the amendatory act of 1919 which reads, "An act to amend section one thousand six hundred seventeen and one-half of the Political Code," adequately expresses the intention of the Legislature, which was to supersede the previous legislation upon the subject. It cannot be said that the provisions of the act are in excess of the title. From the foregoing it follows that section 1617½ of the Political Code, as amended in 1919, is not subject to any of the constitutional objections urged.

[11-13] The further objection of the respondents to authenticating the agreement of sale is based on the contention that, at the time its execution was directed by the board of education, a public school was being maintained on the property. The fact is that although no elementary school was being conducted on the Grand avenue school site by the petitioner, it had been occupied by the Los Angeles city high school district for more than three years for high school purposes, under an annual rental agreement with petitioner, and, at the time of the negotiations between petitioner and the Capital Company a public high school was being maintained on the property. The section (1617½, supra) authorizes the sale of property belonging to school districts "upon which no public school is being maintained." It is contended by respondents that the maintenance of any public school on the real property sought to be transferred is sufficient to preclude a sale thereof under the code section, and that, inasmuch as the Los Angeles city high school district is maintaining a public school on the property under the lease from the petitioner, the contemplated sale is illegal. In reply to this contention, petitioner urges that it has abandoned the property as a school site, and is not now using it for such purpose; and, furthermore, that the provisions of section 1617½ preclude a sale of public school property only when the district which owns the same is maintaining a public school thereon.

The language "upon which no public school is being maintained" is broad enough to include a public high school. Const. art. 9, § 6; Pol. Code, §§ 1663, 1720; Chico High School Board v. Board of Supervisors, 118 Cal. 115, 50 P. 275. The decision in Richey v. Corralitos Union School Dist., 67 Cal. App. 708, 228 P. 348, lends support to the contention of the petitioner that it has abandoned the school site for school purposes, and as the occupancy for high school purposes was by another school district, it cannot be said that the property is being used for school purposes within the intent of section 1617½, supra; but we deem it unnecessary to pursue that subject further, for the admitted fact is that the lease of the property by petitioner to the Los Angeles city high school district expired and terminated prior to the date contemplated in the agreement of sale on which title to and possession of the property was to be delivered to the purchaser. At the time contemplated for such delivery of title and possession the school site was not used or occupied by either the Los Angeles city school district or the Los Angeles city high school district for any school purpose whatever. The respondents contend that notwithstanding the deferred date for the delivery of title and possession, the entire equitable title to the property would have vested in the purchasers upon the execution and delivery of the agreement of sale, and that the Los Angeles city school district would thereafter possess nothing more than the legal title to the property. That is no doubt true. Keese v. Beardsley, 190 Cal. 465, 473, 213 P. 500, 26 A. L. R. 1538; Orange Cove Water Co. v. Sampson (Cal. App.) 248 P. 526. But no authorities have been cited to us which would tend to support the theory of the respondents that the school district may not enter into negotiations for the sale of the property as was done in the present case, the delivery of title and possession to take place at some deferred date. It is not contended here that the proceedings looking to the sale of the Grand avenue school site were in any way irregular, or that the price agreed to be paid by the purchasers of the property was in any way inadequate, or that any colorable circumstance attached to the sale of the property.

We are therefore of the view that no sufficient reason has been shown by the respondents why they should not execute the agreement of sale as directed and authorized by the resolution of the board of education acting for the Los Angeles city school district, the owner of the property.

Let a writ of mandate issue directing the respondents to execute and deliver the agreement of sale as prayed for.

We concur: RICHARDS, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

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200 Cal. 697

BAILES v. KECK et al. (L. A. 8525.)

(Supreme Court of California. March 18, 1927.)

1. Bills and notes 🔑439—Indorsement and delivery of notes for consideration by payee to comakers held to extinguish obligations releasing other maker.

Obligations evidenced by promissory notes *held* extinguished by indorsement and delivery for valuable consideration by payee to comakers, releasing other maker in suit by comakers' assignee.

2. Bills and notes 🔑318—Assignee of comakers, to whom notes were indorsed for consideration, had actual notice of payment from notes and indorsements, preventing recovery against other comaker.

Where obligations evidenced by promissory notes were extinguished by indorsement and delivery for consideration to comakers, assignee of comakers was prevented from recovery thereon against other comaker by actual notice contained in notes and indorsements.

3. Pleading 🔑8(22)—Allegation that notes sued on by assignee of comakers were not paid by transfer to comakers held mere conclusion.

In suit against one of makers by assignee of notes from comakers, to whom notes were indorsed for value, allegations that notes were acquired by comakers for sole purpose of transfer, and that acquisition did not constitute payment, *held* mere conclusions of law.

4. Pleading 🔑8(1)—Essential allegations of fact cannot be supplied by pleading conclusions of law.

Mere conclusions of law cannot be permitted to supply essential allegations of fact in pleading.

5. Pleading 🔑218(4)—Affidavit relating to transactions in connection with notes held not to warrant vacating dismissal of suit for defective pleadings showing payment.

Affidavit setting forth transactions involved in connection with promissory note sued on *held* insufficient to warrant setting aside order for dismissal for failure to amend complaint after demurrer or to sustain pleading, defective because showing payment.

6. Pleading ⚷218(4)—Refusal to set aside order of dismissal after demurrer held not abuse of discretion, where excusable neglect was not shown.

Refusal to set aside order of dismissal after sustaining of demurrer *held* not abuse of discretion in action on promissory notes, leave to amend having been granted which plaintiff declined.

7. Pleading ⚷218(4)—Excusable neglect not raised, where, after sustaining of demurrer, plaintiff declined offer to amend.

Where court, after sustaining demurrer, granted plaintiff leave to amend, which plaintiff declined, question of excusable neglect was not raised on motion to vacate.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine and F. C. Collier, Judges.

Action by C. Sheridan Bailes against J. L. Keck, L. J. Gillespie, and another. From a judgment dismissing the action, upon an order sustaining a demurrer to the complaint, and from an order denying plaintiff's motion to vacate the order of dismissal, plaintiff appeals. Judgment and orders affirmed.

Louis N. Whealton, of Long Beach, for appellant.

Hill & Morgan and Kenneth K. Wright, both of Los Angeles, for respondents.

SEAWELL, J. This appeal is taken from a judgment dismissing the action upon an order made sustaining a demurrer to the complaint interposed by defendant Keck with leave to amend and also from an order denying plaintiff's motion to vacate said order dismissing the action. Defendants Gillespie and Brittain made no appearance. It appears from the judgment that the demurrer was sustained on or about July 10, 1924, with leave to amend said complaint within 10 days after service of notice of the court's ruling upon plaintiff's counsel. Notice was accordingly served upon said counsel for plaintiff, who, for a period of more than 10 days thereafter, failed, refused, and neglected to amend said complaint. A judgment of dismissal of the action was accordingly made and entered. The facts relied upon as being sufficient to support plaintiff's demand are pleaded as two separate and distinct causes of action. The first alleges that on or about January 23, 1923, at Long Beach, Cal., for a valuable consideration, defendants J. L. Keck, L. J. Gillespie, and F. E. Brittain executed and delivered to Farmers' & Merchants' Bank, a corporation, located at Long Beach, Cal., their joint and several promissory note. Omitting therefrom the provisions for the payment of an attorney's fee and the acknowledgment by defendants of a pledge of undescribed property with said bank as collateral security for the payment of said note, with full authority given to said bank to collect and sell said securities in order to protect itself against depreciation of the value of the same, it is as follows:

"$20,000.00. Long Beach, Cal., January 23, 1923.

"Sixty days after date, for value received, we, or either of us, promise to pay Farmers' & Merchants' Bank of Long Beach, Cal., or order, at said bank in Long Beach, the sum of twenty thousand and no/100 dollars with interest at the rate of eight per cent. per annum from date until paid, to be compounded quarterly and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable, and may be charged to the account in said bank of either the principal maker, or sureties on said note, at the option of the holder of this note. * * * Principal and interest payable in gold coin of the United States."

The order in which the note was signed and the indorsements made thereon follows:

"Due —— J. L. Keck.
"No. 18782 —— L. J. Gillespie.
"Address —— F. E. Brittain."
"$4.00 revenue stamps attached."
[Indorsement of payments of interest omitted.]
Indorsement:
"Pay to the order of L. J. Gillespie and F. E. Brittain without recourse.
"Farmers' & Merchants' Bank of Long Beach.
"By C. J. Walker, President."

It is next alleged that prior to the filing of the complaint said Farmers' & Merchants' Bank indorsed said promissory note without recourse to the order of the defendants L. J. Gillespie and F. E. Brittain, as set forth in the preceding paragraph, and for a valuable consideration delivered said promissory note to said Gillespie and Brittain, and thereafter and prior to the filing of the complaint they, and each of them, for a valuable consideration, indorsed and delivered said promissory note to plaintiff, Bailes, who is the owner and holder thereof. It is alleged that there has been paid upon said principal sum of $20,000 the sum of $15,000, leaving the sum of $5,000 due, owing, and unpaid from defendants on account of principal, together with interest thereon and the sum of $500 as a reasonable sum as attorney's fees. A demand made upon each of said defendants for payment of said sums is also alleged.

The second cause of action is based upon a joint and several 60-day promissory note, bearing date February 28, 1923, in the sum of $7,500, made, executed, and delivered to said Farmers' & Merchants' Bank of Long Beach by the defendants, makers of the promissory note set forth in the first cause of action. The two notes sued upon are identical in form and substance except as to minor and unimportant details. The methods of assignment and the assignees in both causes are identical. Allegations similar in legal effect are set forth in each cause of action. There was paid on account of principal on the $7,500 note, $3,500, leaving due and unpaid on account of the principal, $4,000. A general demurrer was interposed by defendant Keck to both causes of action upon the ground that neither stated a cause of action. The other defendants did not join him in the demurrer or appear in any way. Judgment on the order sustaining the demurrer, upon the failure, refusal, and neglect of the plaintiff to amend his complaint, was filed November 21, 1924. The judgment recites as a fact the sustaining of the demurrer on or about July 10, 1924.

Plaintiff's attorney, on July 31, 1924, in a paper properly entitled and filed, directed the county clerk to "enter the dismissal of the above-entitled action as to all defendants." On October 11 plaintiff gave notice that on October 17 he would move the court for an order vacating the dismissal of the action and for permission to file an amended complaint and for general relief, the motion to be based upon the affidavit of defendant F. E. Brittain and the accompanying amended complaint. No appeal was taken from the order sustaining the demurrer. The dates of the indorsements of said notes by the bank to Gillespie and Brittain are omitted from the complaint. All that is alleged is that "prior to the filing of the complaint herein" said notes were indorsed to Gillespie and Brittain. This was long after the notes had matured. From an inspection of the indorsements and allegations of the complaint the inference is irresistible that the notes were indorsed or assigned long after maturity.

[1] There can be no doubt that the obligations evidenced by the two promissory notes, as shown upon the face of the complaint, became extinguished by the indorsement and delivery of the same, for a valuable consideration, by the payee, Farmers' & Merchants' Bank, to Keck's comakers, Gillespie and Brittain. Gordon v. Wansey, 21 Cal. 77; James v. Yaeger, 86 Cal. 184, 24 P. 1005; Yule v. Bishop, 133 Cal. 574, 62 P. 68, 65 P. 1094; Dodds v. Spring, 174 Cal. 412, 163 P. 351; 19 Cal. Jur. 920–922; 8 C. J. 342. Gordon v. Wansey, supra, early declared the law of this state to be that the payment of the obligation by one of the comakers or sureties of a joint and several note and the surrender of the same to such comaker or surety extinguishes the obligation so far as the note is concerned. The doctrine laid down in that case has since been followed consistently by this court and seems to be firmly established as the law. There, for a valuable consideration, the payee assigned several promissory notes to one of the joint and several comakers. The latter, in turn, assigned said notes to Gordon, the plaintiff in said action, who brought suit upon them against Wansey, a comaker with Gordon's assignor. This court held upon the appeal that the transaction amounted to payment and the notes became functus officio and were not revived by the assignment to the plaintiff. It is said that if the rights of the plaintiff had attached before maturity and his position been that of an innocent holder, he would be entitled to protection, but under the circumstances of that case, the action was not maintainable. The court said that it was clear that the notes could not have been enforced by plaintiff's assignor, and having taken them with a knowledge of that fact (as in the instant case) they were equally unavailable in the hands of plaintiff. What the rights of plaintiff might be in an action for contribution, the court observed, it was unnecessary to decide, inasmuch as the action was based on the notes. Again, in James v. Yaeger, supra, the court, addressing itself to the same principle of law announced in Gordon v. Wansey, said:

> "It is contended by the appellant that the findings of the court do not sustain the judgment. In this contention we fully agree with counsel for appellant. By the payment to the payee the note became extinct, and ceased to be a binding obligation. (Code Civ. Proc. § 1473; Wright v. Mix, 76 Cal. 465 [18 P. 645].) And a purchaser of the note after maturity—or in this instance, the note being nonnegotiable, whether the purchase was before or after maturity—took it subject to the defense of payment. (Elgin v. Hill, 27 Cal. 373.) Having been paid, it became functus officio, and no action could be maintained upon it. (Gordon v. Wansey, 21 Cal. 79.) If the respondent had been an innocent purchaser, it would have been different. But here, not only was the note nonnegotiable and the purchase by the respondent after maturity, but his purchase was from one of the makers of the note. This was sufficient to put him upon inquiry. But it must be presumed, in this case, that the respondent took the note with full knowledge of all the facts."

There is nothing in the cases cited by appellant which tends to shake the doctrine announced in the above-cited cases, which is unquestionably applicable to the instant case. The case of Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641, cited by appellant, is not an authority announcing a doctrine contrary to that adopted by the cases heretofore cited, but, in reality, is a reaffirmation of the principle announced by this court since its earliest consideration of the question. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075, cited by appellant as an authority here, is clearly distinguishable from Gordon v. Wansey and the line of cases in harmony with it. In Enscoe v. Fletcher certain notes were distributed to one of the joint makers as an heir at law of the payee upon the latter's death. It was held that if the obligation was extinguished it was solely by operation of law brought about by the death of the payee and the distribution of his estate, including the notes, to his heir, who was a joint maker of said notes. The court held that the notes were not and did not purport to be paid in full. Indeed, there was no voluntary assignment or surrender of the notes by the payee to any one. The payee died, leaving the notes as a part of his estate. That case cannot be accepted as authority for changing the well-recognized rule of law.

[2-4] The court properly sustained the demurrer, as the notes and indorsements gave actual notice to the assignee that they were assigned by the two comakers, Gillespie and Brittain, for a valuable consideration. The cause of action was bottomed solely upon the obligations evidenced by said notes. No attempt was made to state a cause of action in assumpsit upon an implied promise of the makers for a contribution, or upon any theory upon which relief could have been granted. The demurrer was sustained after argument and plaintiff either refused or failed to amend the complaint within the time allowed by the court. About two months thereafter plaintiff noticed a motion for an order setting aside the order sustaining the demurrer and for leave to file a proposed amended complaint, which was in all respects identical with the original complaint except that the allegation set forth in subdivision 2, paragraph 1 of the original complaint, whereby it was alleged that upon the indorsement and delivery of said notes to plaintiff for a valuable consideration plaintiff became and had ever since been and still was the owner and holder of said notes, was omitted from the proposed amended complaint. In this connection, and in contradiction of the preceding allegations of the proposed amended complaint and the whole of the original complaint, it was alleged that said notes were acquired by Gillespie and Brittain for the sole purpose of transferring the same to plaintiff, and that neither Gillespie nor Brittain became the holder of said notes in his own right; that said notes were not, at the time of the transfer thereof by said Farmers' & Merchants' Bank to Gillespie and Brittain, paid, nor have said notes at any time since said transfer by said bank been paid and neither Gillespie nor Brittain were released from the obligations upon said notes at any time by said bank, and that each of them is liable thereon as a maker of said notes, and "plaintiff ever since has been and still is the owner and holder thereof for the purpose of collection." The allegations by which plaintiff seeks to avoid the rule of law as to the extinguishment of obligations by the acts of comakers of a note and to hold Keck liable on the obligations which he jointly executed to the bank are nothing more than conclusions of law which cannot be permitted to supply essential allegations of fact. The allegation as to whether the bank payee was actually paid a valuable consideration for said notes by Gillespie and Brittain, as previously alleged, is equivocal and evasive. There is no positive or direct allegation in the proposed amended pleading to the effect that the obligation owing to said bank upon said notes was not in fact and truth paid and discharged before the bank surrendered its evidence of debt to said comakers of the notes. Prior allegations therein aver that the notes were indorsed by said bank and delivered to the makers Gillespie and Brittain for a valuable consideration and thereafter assigned to plaintiff for a valuable consideration. Eliminating inconsistent and contradictory averments and the failure of a positive allegation as to the extinguishment of the obligations by payment from a consideration of the question, any other theory than that the obligation to the bank payee was discharged is highly improbable.

[5] In support of the motion to set aside the order dismissing the action, plaintiff produced an affidavit of defendant Brittain, who averred that at the time of the making of the notes he was a cotrustee with defendant Keck of one or more of the Keck syndicates; that said notes were given to procure a loan of moneys to be used for the benefit of said syndicates and not for the benefit of deponent or of said Keck or any one of the trustees of said syndicates; that when said notes became due deponent caused a demand to be made upon said Keck for a payment of his proportion thereof and that said Keck refused to pay any portion thereof; that said Keck syndicates, of which deponent and Keck were trustees, were, on June 12, 1924, the date on which the complaint was filed, indebted to plaintiff, C. Sheridan Bailes, in the sum of approximately $15,000; that deponent, before filing the complaint herein, entered into an agreement with plaintiff "to cause said promissory note to be transferred to plaintiff in order that he might collect the same and in consideration thereof plaintiff agreed to credit upon his claim against said Keck syndicates any moneys received by plaintiff as the proceeds of said note"; that after the filing of the complaint deponent (Brittain), pursuant to an agreement made with counsel for plaintiff and counsel for deponent Brittain, caused a dismissal of the action to be executed and delivered to Keck's counsel; that the condition under which said dismissal was delivered was that Keck would contribute at least the sum of $3,000, or his pro rata share, toward the payment of certain indebtedness of said syndicates; that said payment was to be made out of a certain escrow then pending in Security Trust & Savings Bank, City of Los Angeles, and upon payment of said sum the attachment issued in the action would be dismissed without any claims or

further demands upon either party by reason of the action or at all; that upon receiving said dismissal of the action Keck caused the same to be filed on August 11, 1924, and he thereafter refused to contribute anything toward the payment of said indebtedness of $9,000 out of said escrow or at all and refused to keep and perform the terms and conditions under which said dismissal was delivered and had deponent (Brittain) known or believed that Keck would not have kept his agreement to pay said sum of $3,000 he would not have executed or delivered said dismissal authorization to him.

We fail to find anything in the affidavit used in the motion to set aside the order of dismissal that helps the pleading or tends to excuse plaintiff's refusal to amend the pleading within the time allowed by law. The demurrer seems to have been sustained at least a month before the transaction related by deponent took place and the time in which to amend had expired. The order of dismissal, so far as we can see, had nothing whatever to do with the legal question as to the sufficiency of the complaint.

[6, 7] The matters set up in the affidavit seem to be in conformity with Keck's claim that Brittain had not parted with his interest in the notes and that the action, so far as the complaint shows, should have been one in contribution, rather than upon the notes. Keck filed a counter affidavit setting up the trusteeship of himself, Brittain, Gillespie, and another of the Keck syndicates in which Brittain seemed to have had the greatest interest. Keck's affidavit avers the relationship of all the parties named in a rather complicated business proposition involving the development of oil lands and the mutual agreements entered into and breaches thereof committed by Brittain. From the recitals in the affidavits it would seem that the relations and rights of the parties therein are too complex to be determined in a simple action upon a promissory note. We do not deem it necessary to go into details as to the rights of the parties, as we have concluded that the averments and counter averments do not present a sufficient reason to warrant us in holding that the trial court abused its discretion by refusing to set aside the order of dismissal after demurrer sustained. The court granted leave to amend in the first instance. Plaintiff declined the offer. No question of excusable neglect could therefore be raised. The proposed amended complaint is framed upon the same theory as the original complaint, except in the few particulars above pointed out.

The judgment and orders appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

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200 Cal. 800

BAILES v. KECK et al. (L. A. 8526.)

(Supreme Court of California. March 18, 1927.)

Guaranty 🔑59—Indorsement by payee for consideration to one of makers held discharge of note, releasing guarantor in suit by makers' assignee.

Indorsement and delivery of note for consideration by payee to one of makers *held* to extinguish obligation, releasing guarantor in suit brought on note by makers' assignee.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine and F. C. Collier, Judges.

Action by C. Sheridan Bailes against J. L. Keck, E. E. Millican, and others. From a judgment of dismissal upon an order sustaining a demurrer to the complaint, and from an order denying plaintiff's motion to vacate the order of dismissal, plaintiff appeals. Judgment and orders affirmed.

Louis N. Whealton, of Long Beach, for appellant.

Hill & Morgan and Kenneth K. Wright, all of Los Angeles, for respondents.

SEAWELL, J. This appeal is, with respect to the main legal question presented, a counterpart of Bailes v. Keck, Gillespie, and Brittain (L. A. 8525) 254 P. 573, this day filed, except that in the instant case defendants Keck and Millican are shown upon the face of the promissory note sued on to be guarantors rather than makers thereof. In this respect only the case differs from L. A. 8525. The transaction out of which the note sprang, so far as a gleam of light is shed upon the former interrelated business connections of the parties to this and the companion action, appear not from the pleadings, but are referred to in affidavits, pro and contra, used upon a hearing of the motion to vacate the order dismissing the action after demurrer sustained upon refusal on the part of plaintiff to amend his complaint within the time allowed by the court.

The note was joint and several and was dated December 11, 1923, and was for the sum of $5,000, payable upon demand to the California National Bank of Long Beach. F. E. Brittain and Mary J. Brittain were the makers and J. L. Keck and E. E. Millican guarantors. Thereafter, it is alleged, said bank indorsed said note without recourse to one of its makers, to wit, F. E. Brittain, for a valuable consideration, and delivered said note into his possession. He, in turn, according to the allegations of the complaint, for a valuable consideration, indorsed and delivered said note to plaintiff, who became and is the owner and holder thereof. Interest has

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

been paid thereon to the amount of $1,431.96 by some one not named. Judgment for the principal, interest, and counsel fees against guarantor Keck is demanded.

The motion to vacate the order or judgment dismissing the action after demurrer sustained, the proffered amended pleading and the affidavits offered in support of and in opposition to appellant's motion are in substance and effect identical with the proceedings reviewed in case No. 8525. It is therefore unnecessary to restate the grounds upon which the judgment and order in that case were affirmed, and it is sufficient to say that the rule therein declared is applicable to and must rule our decision in the instant case.

Judgment and orders appealed from are affirmed.

We concur: WASTE, C. J.; RICHARDS, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.

81 Cal. App. 686

MORLOCK v. FINK. (Civ. 5553.) ★

(District Court of Appeal, First District, Division 2, California. March 11, 1927. Rehearing Denied April 8, 1927. Hearing Denied by Supreme Court May 9, 1927.)

1. Money received 🔑6(4)—Lender may sue, as for money had and received, one retaining money loaned and refusing security as agreed.

Where one received money under a loan agreement, by which he promised to give security if he retained the money without giving security, lender *held* to have action for money had and received, even though entire amount agreed upon had not been advanced.

2. Contracts 🔑297—Failure to lend entire amount promised breaches contract.

Where one, agreeing to lend a certain entire amount, fails to lend whole sum agreed, promisee may claim damages for breach of contract.

3. Pleading 🔑253—Refusal of court to allow new answer, after plaintiff's amendment to conform to proof, held no error, amendment being deemed denied.

An amendment to conform to proof is deemed denied, and trial court did not err in allowing such amendment without permitting defendant to file a new answer.

4. Money received 🔑6(4)—Where loan agreement was terminated, judgment against one receiving money thereunder and refusing security as agreed held based on promise to repay implied by law.

Judgment against one receiving money under a loan agreement, which had been abandoned or could not be carried out, and refusing to furnish security as agreed, *held* not based on express contract but upon contract implied by law, since money was in his possession only for purpose of performing the agreement.

5. Money received 🔑19(3)—Finding of express promise to repay money held surplusage where judgment was based on promise implied by law.

Where the court gave judgment in an action for money had and received, based on promise implied by law, an additional finding of an express promise to repay was regarded as surplusage.

6. Pleading 🔑35—Surplus allegations added to count for money had and received may be disregarded.

Where judgment is given on a count for money had and received, surplus allegations added to that count may be disregarded.

7. Money received 🔑19(3)—Where judgment given on implied promise to repay money, finding of money lent held surplusage.

In an action for money had and received, where the judgment given was based on a promise implied by law, finding on count for money lent may be disregarded as surplusage.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Lester E. Morlock against Paul Martin Fink, also known as P. M. Fink and M. Fink. Judgment for plaintiff, and defendant appeals. Affirmed.

Philip C. Boardman, Louis P. Dunkley, both of San Francisco, for appellant.

James M. Thomas, of San Francisco, for respondent.

KOFORD, P. J. The assignor of the plaintiff, Mrs. Vierhus, together with a Mrs. Tisney agreed to lend the defendant $5,000. Each was to contribute $2,500. Mrs. Tisney expressed doubt of her ability to raise her share, but the appellant claims the agreement was that the full sum of $5,000 was to be lent. Defendant agreed to give security for the loan by executing a mortgage on a certain paint factory and machinery in Alameda. The mortgage was not executed, but Mrs. Vierhus advanced $2,500, and later, when Mrs. Tisney proved unable to raise her share, Mrs. Vierhus, upon the importunities of appellant, advanced the further sums of $1,000 and $350, making a total of $3,850. This action was to recover that sum. The defendant paid $1,000 after the action was commenced. Plaintiff was given judgment for the remainder, or $2,850. Defendant appeals from the judgment.

[1] Mrs. Vierhus demanded of appellant (defendant) that he execute a note or give the security mentioned above for so much as had been advanced to him by her, she being unable to advance more. This he refused to do. Appellant's attitude at the trial was that, under the verbal understanding had between the parties to the transaction, he was not obliged to give such note or se-

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★Rehearing denied. Hearing denied by Supreme Court.

curity because the entire amount agreed upon had not been advanced. It is a disputed point in the evidence as to just what the exact verbal agreement was. The matter was carried on in an unbusinesslike way. But, accepting appellant's interpretation of the transaction as the correct one, he was obliged either to give security for as much money as he had received or return it. Mrs. Vierhus had stated she was unable to raise more money, and Mrs. Tisney had proved unable to lend more than $150 of her share. If appellant would not go through with the agreement for as much as had been advanced, he could not keep the money in his possession indefinitely, but was bound in equity and good conscience to return it. The facts make a clear case in favor of plaintiff for money had and received.

A somewhat similar state of facts was said to present a case of money had and received in Whyte v. Rosencrantz, 123 Cal. 634, 56 P. 436, 69 Am. St. Rep. 90 The facts are also similar to a case where money has been advanced upon an executory contract, and where a failure to perform is a failure of consideration. This, also, has been held to present a proper case of money had and received. Richter v. Union Land, etc., Co., 129 Cal. 367, 62 P. 39.

[2] It would be true, also, that for the breach of the agreement to lend a certain entire amount appellant could claim damages for breach of contract. We cannot see how he could make such a claim under the evidence here as against Mrs. Vierhus, because she advanced more than she agreed. But, at any rate, there is no offset pleaded or claimed in the case.

[3] The complain set forth two counts, but for only the one sum of money. One was for money had and received, and one was for money lent. In each count it was alleged that defendant (appellant) agreed to repay the sum upon demand. At the close of plaintiff's case the court allowed an amendment to the complaint to conform to proof as it was stated. This amendment changed the clause alleging that defendant agreed to repay on demand to an allegation that defendant agreed to repay in eight months. It is one of appellant's contentions on this appeal that the trial court erred in allowing this amendment to the complaint without permitting defendant to file a new answer. The court, in ruling, stated that an amendment to conform to proof is deemed denied. This is correct. Glougie v. Glougie, 174 Cal. 126, 131, 162 P. 118. Furthermore, plaintiff's counsel stipulated that it might be deemed denied. Morton v. Bartning, 68 Cal. 306, 9 P. 146, cited by appellant, is not in point here. That case held it error to refuse defendant permission to plead the statute of limitations, where plaintiff was permitted to amend his complaint in such a way as to call for that plea. But in this trial appellant made no offer of proof nor suggestion of any defense which was not available to him without amending his answer, although the permission to amend the complaint was granted before defendant put on his defense.

Conformably to the amendment the court found as follows:

> "That within two years last past at, ——, the above-named defendant became indebted to one M. M. Vierhus in the sum of $3,850, for and on account of moneys had and received from said M. M. Vierhus by the said defendant, for his (her) benefit and use, as follows:
>
> "On July 5, 1923, $2,500, on July 27, 1923, $1,000, on August 14, 1923, $50, on August 15, 1923, $300, and for which said amounts said defendant agreed to pay the same to M. M. Vierhus eight months after the dates thereinbefore mentioned; that since the commencement of this action there has been paid thereon the sum of $1,000 on account."

[4] Of the amount advanced, $350 was lent only seven and one-half months prior to the date the action was commenced, to wit, March 31, 1924. If the action were dependent upon an express promise to repay in a certain time the $350 would not have been due at the time the original complaint was filed. From what we have said above, however, it follows that this judgment is not based upon an express contract, but upon the contract implied by law, that the defendant should return the money which is in his possession only for the purpose of performing an agreement which has been abandoned or cannot be carried out through no fault of plaintiff's assignor.

[5] Notwithstanding the finding of the trial court that defendant agreed to repay in eight months, the law implied a promise to repay sooner than eight months. The court's findings of fact upon this implied promise are to be found in that part which follows the essential parts of the money had and received count. The additional finding of the express promise to repay will be regarded as surplusage, under the facts of this case.

It is said in Fox v. Monahan, 8 Cal. App. 707, 709, 97 P. 765:

> "The approved and usual form for this count is very simple, consisting simply in stating that the defendant is indebted to the plaintiff in a certain sum 'for money had and received by the defendant to and for the use of plaintiff.'"

[6] Surplus allegations added to the count for money had and received may be disregarded like surplusage in other forms of pleading. Sidebottom v. Sidebottom, 215 Mo. App. 513, 255 S. W. 353; Lindskog v. Schouweiler, 12 S. D. 176, 80 N. W. 190.

[7] The allegation and finding of defendant's express promise to repay being surplusage, so also is the finding on the second count for money lent. Each being for the same sum of money and the one growing out

of the other, there is no fatal inconsistency in the findings.

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

PEOPLE v. KELLER. (Cr. 1353.)★

(District Court of Appeal, Second District, Division 2, California. March 4, 1927. Rehearing Granted April 1, 1927.)

1. Criminal law ⇐543(2)—Evidence held not to show due diligence to secure attendance of complaining witness for second trial, and testimony at former trial was improperly admitted (Pen. Code, § 686).

Where second trial was set 15 days away but nothing was done to insure attendance of complaining witness until day case was set for trial, when continuance was granted and bench warrant issued but there was no showing as to what was done under process, *held* that there was no showing of due diligence, within Pen. Code, § 686, to secure attendance of witness, and testimony given at former trial was improperly admitted.

2. Criminal law ⇐334—Burden is upon prosecution to show due diligence to secure witness before testimony of former trial is admissible (Pen. Code, § 686).

Before testimony for people, given on a former trial, may be admitted in criminal action, burden is upon prosecution to show exercise of due diligence to secure attendance of witness, under Pen. Code, § 686.

3. Criminal law ⇐1186(4)—Conviction based on testimony given at former trial, with no showing of due diligence to find witness, held "miscarriage of justice" (Const. art. 6, § 4½).

Conviction for grand larceny, based on testimony of complaining witness given at former trial, where there was no showing that due diligence was exercised to secure witness' attendance for second trial, *held* miscarriage of justice, within Const. art. 6, § 4½.

Appeal from Superior Court, San Diego County; L. D. Jennings, Judge.

Agnes Keller was convicted for grand larceny, and she appeals. Reversed.

Richard Kittrelle, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., and Warner I. Praul, of Los Angeles, for the People.

WORKS, P. J. Defendant was informed against for the crime of grand larceny and was convicted. She appeals from the judgment.

Appellant was convicted upon a second trial. At the first trial the jury disagreed. The complaining witness was not present at the second trial, but the trial judge, over the objection of appellant, permitted the district attorney to read to the jury his testimony given at the earlier hearing. The objection of appellant was that the prosecution had not shown due diligence in an attempt to produce the absent witness, and the same point is now made here. Section 686 of the Penal Code provides, in part, that a defendant in a criminal action—

> "is entitled: * * * to be confronted with the witnesses against him, * * * except that * * * the testimony on behalf of the people * * * of a witness * * * who cannot, with due diligence, be found within the state, given on a former trial of the action in the presence of the defendant who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness, may be admitted."

On July 6, 1925, appellant entered her plea, and the action was set down for trial on July 22. On August 31, the cause having been tried and the jury having failed to agree upon a verdict, it was set for a second trial on September 15. When that date arrived the complaining witness was not present in court, and on motion of the district attorney the court ordered a bench warrant to issue forthwith for him, and the trial was continued to September 21. On the last-mentioned date a further continuance was granted to September 29, upon motion of the district attorney, supported by affidavit. It is not shown by the record what the affidavit contained or who made it. On September 29 the trial was continued to the next day, but upon what showing or for what reason does not appear from the minutes of the trial court. On September 30 a continuance was again had for one day, no reason being shown for the order. On October 1 the trial was commenced.

Immediately at the close of the district attorney's opening statement to the jury that officer requested leave to read the testimony of the complaining witness taken at the first trial, whereupon the court asked for a showing of due diligence. The district attorney then put a witness on the stand, who testified that he was a detective sergeant in the San Diego police department; that he had made an investigation to determine whether the complaining witness could be located in the city of Los Angeles; that he went to that city on September 16 for the purpose, but that he began his investigation at a certain hotel in San Diego, where he ascertained from the register that the witness had checked out on the afternoon of September 3 and had left as a forwarding address the name of a certain hotel in Los Angeles; that he, the investigator, then went to Los Angeles, arriving there on the evening of the day he had examined the San Diego hotel register; that he immediately went to the hotel mentioned on the San Diego register and found

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★Superseded by opinion 256 P. 829.

from it that the prosecuting witness had registered there on the evening of September 3 and had checked out on September 5, leaving no forwarding address; that he remained in Los Angeles four days, being engaged all that time in his investigation; that while he was there he went "to the newspaper offices in Los Angeles" and to the post office, but that he found no trace of the witness in that city except that he got some information, without stating the nature of it or from whom it was obtained, to the effect that the witness might be in Long Beach; that he then went there and "just made a search of the city," for he "had no specific place to go there outside of checking the post office"; that he did not go to the "newspaper offices at Long Beach"; and that he found no forwarding address at the post offices at Long Beach and Los Angeles. This is the only formal showing of due diligence made by the record, but we think we may state some further facts bearing upon the question, because of statements made during a colloquy between the trial judge and counsel, including the counsel for appellant, and assented to by the latter. A subpœna was issued to the sheriff of San Diego county for the complaining witness, and also to the sheriffs of San Luis Obispo, Santa Barbara, Ventura, Kern, Los Angeles, Riverside, Orange, and Imperial counties, but none of them was served and return was made upon each that the complaining witness could not be found in the county of the officer to whom it was sent. Counsel for appellant stated during the colloquy that:

> "No subpœna was issued in this [San Diego] county until the 15th day of September of this year."

A little later he said, also, that:

> "There was no subpœna issued for the witness until the 15th of September, and the trial was set for the 16th, if I remember rightly."

There was no dissent from the two statements. Each of these remarks was made after the following is shown by the record to have occurred:

> "The Court: Have you seen the various returns made by the sheriffs from the southern part of the state?
>
> "Mr. Wright (counsel for appellant): I have not, your honor. [The Court hands papers to Mr. Wright.]"

We think this chain of circumstances amounts to nothing more than a stipulation that no subpœnas were issued to any sheriff before September 15, the very day for which the second trial of the action was first set, as appellant's counsel was in error in his recollection that the trial date was the 16th. A statement of the district attorney showed that the return of the sheriff of San Diego county was made on October 1, the day the trial actually commenced. There was no showing as to when the return of any of the other sheriffs was made.

[1] The most striking feature involved in this showing appears at the very outset, in point of time. On August 31 the action was set down for a second trial on September 15, but in the interim no subpœna for the complaining witness was issued, not even one for service in the county in which the cause was pending. There may be instances in criminal cases in which such a course would be proper, although we do not decide that it ever would be. It is possible that, under special circumstances, a district attorney might be justified in concluding from a private understanding with a witness that he would be present at a trial, and still be able, without ever having issued a subpœna for the witness, to make a showing of due diligence if he should fail to appear. There was no showing here, however, of any such understanding. We have the bare facts that the trial was set 15 days away and that during that time absolutely nothing was done to insure the attendance of the most important witness for the prosecution. Moreover, if an attempt had been made to serve a subpœna upon the witness 12 days before the date set for the trial, he could have been located at a hotel in San Diego. Ten days before the day set he could have been served at a hotel in Los Angeles. These facts appear from the testimony of the investigator, who was the only witness offered to show due diligence.

If any escape from this chain of circumstances is possible, there is more to follow. When September 15 was reached, the district attorney secured a continuance of the trial because of the absence of the prosecuting witness, and a bench warrant was issued for his apprehension. There was no showing as to what was done under this process, nor was it proved what, if anything, was ascertained concerning the whereabouts of the absentee, in an attempt to serve it. On September 16, the next day after that on which the trial should have been commenced, the investigator began a belated search for the witness. The testimony read to the jury showed that the witness was a newspaper reporter by occupation, and that at the time of the first trial, which had occurred as late as July or August, he was employed by a certain San Diego newspaper, and that he had been with the publication for three years. It was not shown that the investigator, or any one else, ever visited the office of the newspaper for the purpose of ascertaining whether the witness had resigned from his position or had been discharged, and, if either, where he had gone; or whether he still retained the position and was away temporarily on vacation or otherwise. The investigator did go to "the newspapers" in Los Angeles, but after he got from some person whose identity is not disclosed some information, the character of which is not divulged, that the witness might be in Long Beach, he failed to visit the offices of the newspapers there. He knew, so he said, of no place to go except to the post office. After four days of ceaseless search—the efforts actually expended in making it are meagerly stated in the record—the investigator returned to San Diego. This was about September 20. From that time until October 1, when the trial actually commenced, nothing was done by the district attorney's office to locate the complaining witness except to await returns upon the subpœnas which had been issued, not earlier than September 15, to the sheriffs of nine of the counties of Southern California, including San Diego. It has been decided in many cases that when there is evidence that an absent witness has actually left the state, due diligence in attempting to locate him within the state requires what would be but a perfunctory search under other circumstances. There was, however, no such evidence here. The search in the present instance was not what it should have been, and, above and beyond all, it was commenced too late. There was a lack of due diligence, and the trial judge abused the discretion reposed in him by permitting the district attorney to read to the jury the former testimony of the witness. Some of the points presented by this appeal were considered in People v. Hayes, 72 Cal. App. 292, 237 P. 390, where many cases on the subject are cited.

[2] Questions under section 686 of the Penal Code arise too frequently in the courts of review of the state. The right of a defendant in a criminal case to be confronted by the witnesses against him is a most valuable one. Indeed, in some states, although not here, it is guaranteed by direct constitutional provision. The right, as secured by the statute in this state, is stated in broad and general language. Exceptions, under certain special circumstances, are allowed by the statute, and the burden, of course, is upon the prosecution in each instance to show that the exception and not the rule prevails. It is to be feared that this burden often is too lightly assumed by district attorneys. It will not do to count too much upon the fact that the determination whether an exception to the general rule exists is confided to the discretion of trial courts. It is true that in a vast majority of the cases the courts of review have upheld the exercise of discretion permitting the reading of former testimony, but their work has been increased by the mere presentation of the question with such frequency. When a criminal case is set for trial one of the first, as well as one of the most important, duties of the district attorney is to assemble the witnesses for the prosecution. If this duty is strictly regarded in every case, a right of defendants which is sometimes lost will sometimes be saved, and the labors of courts of appeal will be lessened. If a witness is not then found, due diligence easily can be shown.

[3] Appellant presents other points, but it is not necessary to consider them.

Section 4½ of article 6 of the Constitution does not save the situation here presented. There has been a miscarriage of justice in the case. In truth, with the former testimony of the complaining witness out of the record, no case remains.

Judgment reversed.

We concur: CRAIG, J.; THOMPSON, J.

81 Cal. App. 582

NORTH ELK OIL CO. et al. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (Civ. 5510.)

(District Court of Appeal, Second District, Division 2, California. March 4, 1927.)

1. Master and servant 🔑405(4)—Finding of compensable injuries held sustained by evidence (Workmen's Compensation Act).

Finding that injuries to workman arose out of employment *held* sustained by evidence in proceedings under Workmen's Compensation Act (St. 1917, p. 831).

2. Evidence 🔑471(13)—Injured employee seeking compensation, though lay witness, could testify that he never had venereal disease claimed by experts to be cause of injury.

In proceedings under Workmen's Compensation Act (St. 1917, p. 831), injured employee, though lay witness, could testify in opposition to expert testimony that he never had venereal disease claimed to be cause of injuries, where statement was made as statement of fact, not of opinion.

3. Evidence 🔑471(13)—Lay witness may testify as to fact whether he has had particular disease.

Lay witness may testify as to whether he has had particular disease, as matter of fact known to himself.

4. Master and servant 🔑417(7)—Award of Industrial Accident Commission on conflicting evidence is conclusive.

Award of Industrial Accident Commission will not be disturbed by reviewing court, where evidence is conflicting.

Certiorari to Industrial Accident Commission.

Proceedings under the Workmen's Compensation Act by E. E. Walters, employee, against the North Elk Oil Company, employer, and the Zurich General Accident & Liability Insurance Company, Limited, insurer. Award of the Industrial Accident Commission in the employee's favor, and the employer and insurer bring certiorari. Award affirmed.

Verge, Cooney & Kearney, of Los Angeles, for petitioners.

G. C. Faulkner, of San Francisco, for respondents.

WORKS, P. J. E. E. Walters was employed by North Elk Oil Company. In the course of his employment he and a fellow employee were engaged in some operations which required the handling of a certain sand line, as it is termed. This line was a wire rope, and, at the end and some distance from and below where Walters and his companion were working, it was wound round the drum of a donkey engine. At a time when the engine, temporarily, was not in operation, the two men had the sand line in their hands. In some manner a loop or kink in the line caught one of the hands of Walters' companion, and while the two men were attempting, by pulling on the line, to disengage the member, the engine was started and began to draw in the rope and wind it on the drum. Fearing serious injury to the imprisoned hand, Walters and his companion pulled and strained at the rope, at the same time calling to the operator of the engine to stop it. This was finally done, but not until Walters, as a result of his tugging at the line, according to testimony before the Industrial Accident Commission, felt a severe pain in his right groin. The nature of the injuries claimed to have been suffered by him will be described in detail below. He made application for compensation because of them, and an award was made in his favor. Petitioners asked for a rehearing before the Industrial Accident Commission, which was denied. They then applied to this court for the writ of review, and a writ issued.

There was ample evidence before the commission to justify the finding that after the occurrences above related Walters was found to be afflicted with a right orchitis and epididymitis; that is, these afflictions were found to be present on the right side of the applicant. Orchitis is an inflammation of a testicle. Epididymitis is an inflammation of the epididymis, an oblong organ attached to the testicle.

[1] Two experts gave evidence which tended to show that the injuries of Walters did not arise out of his employment. Dr. R. W. Harbaugh made a written statement which contained the following:

> "In my opinion the strain and exertion were a minor factor in reactivating an old quiescent infection. I believe, then, that we are dealing with a case in which pre-existing disease is the primary factor, the strain incidental to his [Walters'] occupation acting as an exacerbating factor."

The record contains several written statements by Dr. Gustav F. Boehme. The first of these is dated February 15, 1926, the occurrence out of which Walters' application arose having taken place on December 28, 1925. The statement is based upon an examination of the applicant on February 13, and reads, in part:

> "At the present time this man has a receding epididymitis. This condition in my opinion is due to infection of some sort and is not attributable to injury. You will notice that this man sustained no blow or injury in this region, and therefore I feel that all injury can be excluded as a causative factor. * * * There is no disability due to injury. There will be no permanent disability."

In a second statement, dated April 17, 1926, the same expert says:

> "This condition, as I see it, at this time and as I saw it previously, leaves no question of doubt in my mind but that we are dealing with an infectious process involving the epididymi. * * * This case, in my opinion, presents nothing which was occasioned by injury or industry, and I do not feel that any disability is to be attributed to any occupational cause."

It is contended that these opinions relate to matters which are exclusively for experts, and that therefore certain lay evidence which is to be found in the record cannot be considered as affecting the opinions of the experts from whose statements we have quoted, and, legally, could not have been considered by respondent commission as a foundation for the award it made. Before we come to that particular question, however, several others are to be examined. In the first place, the opinion of one of the two experts was not given without qualification. The portion of the statement of Dr. Harbaugh which is above set forth was preceded immediately by this remark: "Medical opinion is divided upon the subject as to just what relationship strain and exertion have on this type of case." Again, a third expert, Dr. A. B. Edgerton, gave his views upon the question as to the cause which produced the condition of Walters. He testified before the commission:

> "Q. Have you known of those conditions developing from strain? A. No; I never have known of a case developing from strain.
>
> "Q. Have you any opinion whether or not such a strain as he described, or a very severe strain, could cause it, or precipitate it? A. It is very hard to say; I never have seen a case in my experience that has happened, although it might happen.
>
> "Q. You say it might happen? A. It might."

Further, Dr. Boehme, in his statement dated April 17, gave the reasons for the conclusion reached by him. They were:

> "(1) That the man in no way claims any local injury to the scrotum. (2) The fact that the epididymis alone is involved and that there is involvement on both sides. It is usual for injuries in this region to involve not alone the

epididymis but also the testicle, and the involvement of the epididymis alone, especially bilaterally, leads to the conclusion that there must have been some infection in the past. You will note that the patient himself also admits that there was some discharge present a few days before admission to the hospital. (3) The fact that his condition did not come on until a considerable time after the alleged accident, and that he worked for the rest of the day following the alleged injury, and two days thereafter, and then was laid off, not because of injury, but because there was no work. (4) The fact that it is practically anatomically impossible to produce an injury in this region without direct violence on the part. Had there been any torsion or any other serious injury this man would have had immediate pain, and would within a very short period of time thereafter have been forced to quit. This was not the fact in this case."

The first reason assigned was a proper subject of consideration by the expert, for it was in strict accordance with the evidence, that is, if by "local injury" he intended to refer to a traumatic injury, as he apparently did. Several things are to be mentioned in connection with the second reason. Take first the statement, "The epididymis alone is involved." Dr. Boehme never examined Walters until February 13, a month and a half after the occurrences from which his claim for compensation arises. Moreover, the expert's statement as to the involvement of the epididymis alone is in the present tense, was made on April 17, and is given as a reason for an opinion expressed on the same day. There was evidence from which a finding could have been made that the reason given was not a proper subject for the consideration of the expert. Walters testified that immediately after the accident and before he left the spot at which it occurred his testicle was painful: "It was painful then; for a while I couldn't hardly do anything." He said he first saw a doctor a week or ten days after he was hurt, and that in the interim his testicle had swollen so that a suspensory which he had bought would not contain it. When he went to the physician the latter "noticed the condition I was in; my right testicle was as long as your finger, and it had gotten so it was about, pretty near, I should say between 5 and 6 inches long, and swollen up and very painful." Some time after he was seen by this physician, and after he had consulted another, he went to a hospital where he remained in bed for a week. At the end of his sojourn there, as he testified, "the swelling left me, practically all of it, and they called me up and asked me if I was able to travel, to go to Los Angeles," his injuries having been incurred at Taft. This trip to Los Angeles was taken, and seems to have been requested by petitioner Zurich Company. Dr. Boehme examined Walters in his office in that city on February 13, 1926, and on behalf of the petitioner last named. In stating the second reason for his conclusions Dr. Boehme refers to an involvement of the epididymi on both sides, and gives this circumstance, together with the fact that the epididymi alone were affected, as a ground for concluding that "there must have been some infection in the past." As we have already pointed out, there was evidence that the epididymi were not alone affected, but also, at first, the right testicle. Moreover, while the expert states that a bilateral affection of the epididymi is characteristic of gonorrheal infection—for the context of his several statements shows that he referred to that species of infection—he does not say that such a condition might not result from a unilateral strain, if it be granted that orchitis or epididymitis may be superinduced at all by a nontraumatic force. Again, in the statement of his second reason the expert refers to the fact that "there was some discharge present a few days before admission to the hospital." This, however, was some time after the accident, and he does not say that a discharge might not have resulted without previous infection and solely from the condition in which the right testicle was at that time, as shown by the testimony of Walters, with which condition the expert was apparently unfamiliar. The third reason given does violence to much of the evidence in the record. There was abundant testimony that the "condition" came on immediately after the accident. Also, while it is true that the particular work of the crew with which Walters was employed was continued for but three days, the undisputed evidence is that he did not work during that period. Immediately following the accident he was taken to a tent, where, as he testified, he lay down for the entire three days, except that, as further testified by him, he "watched the pot, firing the boilers." He said further, "I didn't do any work; there wasn't any work to it." The head man on the job corroborated Walters' testimony as to his lying in the tent, for at least a part of the time. He testified, further: "There is no work to firing the boiler with the exception of a little gauge valve." This statement undoubtedly means that the boiler was "fired" by means of oil, the flow being regulated by the mere turning of a valve. The fourth reason given by the expert is likewise in defiance of a portion of the evidence. There was abundant testimony that Walters suffered extreme pain at the moment of the accident and continuously for a long time thereafter, and that he was immediately "forced to quit." The conclusions of Dr. Boehme, based, as they were, upon an improper hypothetical case, were practically of no value.

[2, 3] Walters testified that he had never been ill in his life. He said, specifically, that he had never had a venereal disease of any kind. This is the lay evidence to which peti-

tioners refer, as stated above, as not being proper for consideration in opposition to the testimony of the experts. The testimony given by Walters was not upon a subject which is for experts alone. 22 C. J. 618. Without the citation of authority, it would seem that a witness may testify whether he has had a particular disease as a matter of fact known to himself, and not as a matter of opinion.

[4] We can see nothing in this proceeding but a conflict of evidence. Under such circumstances, of course, the award made by the respondent commission cannot be disturbed.

Award affirmed.

We concur: CRAIG, J.; THOMPSON, J.

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81 Cal. App. 528

PEOPLE v. PADILLA. (Crim. No. 1445.)

(District Court of Appeal. Second District, Division 1. California. March 1, 1927.)

1. Criminal law 🔑736(1)—Whether showing warrants admission of testimony at preliminary examination rests in court's discretion (Pen. Code, § 686).

Decision of whether sufficient showing has been made as foundation for admitting in evidence testimony given by witness at preliminary examination of defendant in criminal action, under Pen. Code, § 686, lies within sound discretion of judge of trial court.

2. Criminal law 🔑543(2)—Evidence that witness was outside state, held to warrant reception of his testimony at preliminary examination (Pen. Code, § 686).

Evidence *held* sufficient to justify judge of trial court in concluding that witness who had testified at preliminary examination of defendant before committing magistrate was outside state at time of trial, so as to make prior testimony admissible under Pen. Code, § 686.

3. Criminal law 🔑543(2)—Prosecution need not show effort to secure attendance of witness outside state to have his testimony at preliminary examination admitted (Pen. Code, § 686).

In prosecution for robbery, where it was shown that witness who testified at preliminary examination of defendant before committing magistrate was outside state, prosecution need not show effort to secure his attendance as witness in order to have his testimony before committing magistrate admitted, under Pen. Code, § 686, since law does not require futile acts.

4. Criminal law 🔑772(6)—Evidence held insufficient to justify instruction to acquit if defendant was incited to commit robbery (Pen. Code, § 211).

In prosecution for robbery evidence *held* insufficient to justify instruction to acquit if defendant was incited or induced by others to commit such crime, where he robbed witness who had set trap to catch him as unlawful seller of narcotics of marked money with which she intended to pay him, in view of Pen. Code, § 211, defining robbery.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Frank Padilla was convicted of robbery, and he appeals. Affirmed.

M. M. Gordon and Antonio Orfila, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

HOUSER, J. [1, 2] Defendant appeals from a judgment of conviction of the crime of robbery and from an order denying his motion for a new trial.

The first point presented by appellant is made in connection with the introduction in evidence, over defendant's objection, of the testimony given by a certain witness at the preliminary examination of defendant before the committing magistrate.

Section 686 of the Penal Code is authority for the rule that the testimony of a witness taken at a preliminary examination of a defendant may be read at the trial in the superior court upon its being satisfactorily shown to the court that such witness cannot with due diligence be found within the state.

It is contended by appellant that "there was no evidence introduced that showed or tended to show that the witness E. Goldbaum Padilla could not, with due diligence, be found within this state." Specifically, it is urged by appellant that the testimony given by Helen Goldbaum Padilla to the effect that one week before the trial she received a letter postmarked at El Paso, Tex., from the witness whose testimony taken before the committing magistrate was sought to be introduced in evidence, was insufficient to meet the requirements of the statute to which reference has been had; furthermore, that no effort was made on the part of the prosecution to secure the attendance of such absent witness.

In support of such contention appellant cites the case of People v. Lewandowski, 143 Cal. 574, 77 P. 467, where, among other things, it is said that on the trial of a defendant in the superior court, before allowing the deposition of an absent witness taken on the preliminary examination of such defendant to be read in evidence, the trial court should be fully satisfied by the evidence that the absent witness cannot with due diligence be found in the state. Other cases are cited to the same effect.

With reference to the foundation laid by the prosecution for the introduction in evidence of the testimony given by the witness at the preliminary examination, it was shown by the witness Helen Goldbaum Padilla, in substance, that she was the wife of the absent witness; that she and said absent witness lived happily together, and that she was conversant with his affairs; that at the time of the trial he was not at his home in the city of Los Angeles, the place where the trial of defendant was conducted, but that he was in the city of El Paso, Tex.; that he left the state of California with a moving picture concern, and that he had been out of the state of California for some time; that the witness had received letters from the absent witness "from several towns"; and that the last letter which she received from him was from El Paso, Tex., at a time about a week before the time when the witness was testifying; and that she did not know when her husband would return to Los Angeles, as he was in business at El Paso.

The authorities appear to be unanimous in the declaration that the decision of whether in such a matter a sufficient showing has been made as a foundation for admitting in evidence the testimony given by a witness at a preliminary examination of a defendant in a criminal action lies within the sound discretion of the judge of the trial court. As an example, the following appears in the case of People v. Lederer, 17 Cal. App. 369, 374, 119 P. 949, 952:

> "It has been held that under the provisions of this section [686 of the Penal Code] the trial judge has discretion in determining whether or not a sufficient foundation has been laid entitling such testimony to be read in evidence, and that where there is any evidence to support the conclusion affecting that matter, the ruling cannot be disturbed on appeal. People v. Nelson, 85 Cal. 421 (24 P. 1006); People v. Witty, 138 Cal. 576 (72 P. 177); People v. Lewandowski, 143 Cal. 574 (77 P. 467)."

In the case of People v. Lewandowski, 143 Cal. 574, 576, 77 P. 467, 468, it is said:

> "The question, however, as to whether it is satisfactorily shown that such witness cannot with due diligence be found within the state is a question of fact that is addressed to the trial court, to be determined by it from evidence introduced before it (People v. Plyler, 126 Cal. 379 [58 P. 904]), and with the determination of that question of fact by the trial court this court will not interfere, unless the evidence thereon is such as to satisfy the court that the trial court abused the discretion confided to it in holding that due diligence had been used, and that the witness could not be found. (People v. Witty, 138 Cal. 576 [72 P. 177]; People v. Reilly, 106 Cal. 648 [40 P. 13])."

It is clear that the evidence in the instant case was sufficient upon which the judge of the trial court was justified in basing his conclusion that the witness in question was outside the state of California at the time the trial of defendant was conducted.

[3] Regarding the point that no effort was made by the prosecution to secure the attendance of the supposedly absent witness, as was remarked by the trial judge when such question was presented to him, "the law does not require futile acts." It having been made to appear that the witness was outside the state of California, it would have been useless for the prosecution to show what effort had been made by it to secure the attendance of the witness. In the case of People v. Caballero, 41 Cal. App. 146, 151, 182 P. 321, where a similar question was presented, the court said:

> "Counsel for appellant claims that due diligence was not exercised to produce the witness Wiedenbeck at the trial of this case. The obvious reply is that when it was shown that Wiedenbeck was without the state of California, by showing he was at that time at Camp Lewis in the state of Washington, the district attorney was discharged from further obligation to produce the witness at the trial, since there was no legal process by which he could have compelled such attendance. We hold, therefore, that sufficient foundation was established for the introduction in evidence of Wiedenbeck's testimony at the preliminary examination, and that the court did not err in overruling defendant's objection thereto."

[4] The further contention is made by appellant that the trial court erred in refusing to give to the jury, at defendant's request, two certain instructions in effect that if the jury should find from the evidence that defendant was incited or induced by certain persons to commit the crime charged in the information, the defendant should be found not guilty.

The evidence shows in substance that a trap had been set to catch the defendant as an unlawful seller of narcotics. The defendant agreed with a Mrs. Bryant to sell her 14 ounces of morphine for the sum of $1,200. It was arranged between defendant and Mrs. Bryant that the delivery of the morphine should be made at a certain time in a specified room in the Angelus Hotel in the city of Los Angeles. Thereupon Mrs. Bryant arranged with three police officers to be in hiding in a bathroom adjoining the room in which the proposed transaction was to take place in order that defendant might be then and there arrested. Near the appointed time defendant went to the hotel and telephoned to Mrs. Bryant, who was occupying a room therein, to meet him on the mezzanine floor of the hotel, to which suggestion Mrs. Bryant acceded. Before going to meet defendant, however, Mrs. Bryant had obtained the sum of $1,200 in marked currency from one of the officers, which money was placed by Mrs. Bryant in one of the stockings which she was wearing. After some conversation between defendant and Mrs. Bryant, defendant suggested that the "deal" be consummated on the mezzanine floor, which was negatived by Mrs. Bryant, she insisting that the sale take place in her room as previously arranged between them. Defendant then inquired of Mrs. Bryant whether she had the money with which to pay for the morphine; whereupon Mrs. Bryant lifted the edge of her skirt and showed defendant the money in her stocking. What then occurred is well explained by the testimony given by Mrs. Bryant as follows:

> "Q. And what did he say? A. He said all right, he would get the package, for us to walk around the hall a ways, and he would get this package.
>
> "Q. And did you walk around the hallway? A. We went around the hall and came to a door there. He opened the door and shoved me back, jumped in, came back almost immediately with a package, shoved the package under my arm, and as he did made a grab at me, grabbed me by the arms, and I fought back, and he reached down and took the money from my stocking, and I was fighting all the time to keep him from it. * * *
>
> "Q. Did he get the money from your stocking? A. He did.
>
> "Q. You didn't give it to him, did you? A. I did not. * * * Q. You say he struck at you? A. He did.
>
> "Q. Where did he strike you? A. Over the chest, shoulders, and face. * * *
>
> "Q. When the defendant got your money what did he do? A. He run down the hall, down the stairs, through the lobby and out the door. I ran after him."

By section 211 of the Penal Code robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear"

Assuming that the jury believed the testimony offered by the prosecution, it is clear that the jury was justified in finding defendant guilty of the crime of which he was charged, to wit, robbery. Although a part of the evidence might seem to warrant the inference that in setting the trap to catch defendant in the unlawful sale of narcotics either Mrs. Bryant or one of the police officers, or all of them, had induced or incited defendant to make such sale, the attention of this court has been attracted to no evidence from which it might be inferred that any one had enticed or induced or incited defendant to commit the crime of robbery. It is manifest that if, in the circumstances under which the crime of which defendant was convicted was committed, the crime of murder had been committed by him, the instructions in question would have been properly refused for the reason, if for none other, that the crime charged against the defendant would have been wholly unrelated to the crime in which he was sought to be entrapped. And so it is with reference to the crime of robbery of which defendant was convicted. The robbery of Mrs. Bryant was not the crime originally contemplated. It was entirely separate and distinct from the crime in the perpetration of which the police officers hoped to ensnare defendant. If defendant abandoned the thought of selling the morphine to Mrs. Bryant and instead thereof, of his own volition, committed the crime of robbery, which was wholly disconnected from the original plan to which reference has been had, even assuming (without conceding) (see People v. Heusers, 58 Cal. App. 103, 207 P. 908; People v. Barkdoll, 36 Cal. App. 25, 171 P. 440; People v. Tomasovich, 56 Cal. App. 520, 206 P. 119; People v. Norcross, 71 Cal. App. 2, 234 P. 438), that the instruction might have been proper had defendant been on trial for the unlawful sale by him of narcotics, it is apparent that, as there was no evidence upon which to base the instruction in question, it had no place on the trial of defendant on the charge of robbery.

No prejudicial error appearing, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

81 Cal. App. 676

LIERLY et al. v. McEWEN et al. (Civ. 5217.)

(District Court of Appeal, First District, Division 1, California. March 10, 1927.)

Appeal and error 🔑417(1)—Notice stating party desires and intends to appeal from judgment held sufficient to give jurisdiction to hear appeal (Code Civ. Proc. §§ 940, 953a).

Notice in conformity with Code Civ. Proc. § 953a, stating party desires and intends to appeal from judgment, *held* sufficient under section 940, relating to notice of appeal, to give appellate court jurisdiction to hear appeal; sections relating to appeal being liberally construed.

Action by W. S. Lierly and others against Daniel H. McEwen and others (substituted for the Security Trust Company) and the Security Trust Company. Judgment for plaintiff, and defendant first named appeals. On motion to dismiss the appeal. Motion denied.

Byron Coleman, of San Francisco, James Donovan, of Los Angeles, and John L. McNab, of San Francisco, for appellant.

William W. Kaye, of Los Angeles, for respondents.

TYLER, P. J. Motion to dismiss appeal on the ground of the insufficiency of the notice. The transcript and appellant's brief have been on file for nearly four years, and no brief has been presented by respondents. The language employed by appellant in his notice of appeal states that he "desires and intends to appeal from the judgment." The sole objection to the notice is that it merely conforms to the requirements of section 953a of the Code of Civil Procedure relating to a request for the preparation of the transcript and is insufficient as a notice of appeal as required by section 940 of the same Code. In support of the motion we are cited to several decisions of the Supreme and appellate courts. These cases are discussed and reviewed in Anderson v. Standard Lumber Co., 60 Cal. App. 445, 213 P. 65, and we do not deem a further discussion of them necessary. The notice involved in the case last cited read as follows: "You and each of you will please take notice that the plaintiff in the above-entitled action desires and intends to appeal * * * from the judgment. * * *" It is therefore practically the same form of notice as the instant one. It was there held that under the statutes as they now read the notice was sufficient to give the appellate court jurisdiction to hear the appeal, and the motion to dismiss was denied. The court, in disposing of the question, declared that it is the disposition of courts to hear appeals upon their merits, and the sections of the Code relating to the subject should be liberally construed with a view of promoting such purpose.

This decision has been followed with approval in the recent case of Wright & Hogan, Inc., v. Heide, 72 Cal. App. 16, 236 P. 219, where the same doctrine is announced.

The motion to dismiss is denied.

We concur: KNIGHT, J.; CASHIN, J.

81 Cal. App. 562

PEOPLE v. DE FEHR. (Cr. 930.)★

(District Court of Appeal, Third District, California. March 3, 1927. Rehearing Denied April 2, 1927. Hearing Denied by Supreme Court May 2, 1927.)

1. Infants 🔑16—Commitment of minor to reform school under Juvenile Court Law, after conviction of felony, does not involve criminal prosecution or judgment of sentence.

Where minor falling within purview of the Juvenile Court Law (St. 1915, p 1225), has been arraigned on or convicted of felony, and superior court, concluding to exercise juvenile court powers, suspends trial or pronouncement of judgment of sentence to imprisonment and commits him to reform school, proceeding does not involve criminal prosecution or judgment of sentence.

2. Infants 🔑16—Superior court committing minor convicted of felony to reform school under Juvenile Court Law may recall him for sentence if justified (Juvenile Court Law, §§ 7, 9).

Superior court, having committed minor convicted of felony to reform school under Juvenile Court Law, §§ 7, 9 (St. 1915, pp. 1230, 1232), retains jurisdiction of case, and may recall commitment and impose judgment of sentence on good cause; provisions of section 7 that reform school trustees may return minor for sentence if he is incorrigible not being condition precedent to recall.

3. Infants 🔑16—Recall of minor, committed to reform school under Juvenile Court Law, and sentenced to state prison, held not abuse of discretion (Juvenile Court Law, § 7; Pen. Code, § 1099).

Court *held* not to abuse discretion in recalling minor from reform school to which he had been committed for felony under St. 1911, p. 10. as amended by St. 1921, p. 96, under Juvenile Court Law, § 7 (St. 1915, p. 1230), and sentencing him to state prison, where he failed to testify in another case as he had promised; especially in view of Pen. Code, § 1099, permitting discharging one defendant to be witness for people where two or more are included in same charge.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Barney DeFehr was convicted of pimping and sentenced to the Preston School of Industry. From an order vacating and setting aside the order committing him to the Preston School of Industry, and from judgment of conviction and of sentence to the State Prison, he appeals. Affirmed.

T. A. Farrell and George E. McCutchen, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

HART, J. On the 16th day of November, 1925, an information was filed by the district attorney of Sacramento county, in the superior court of said county charging the defendant with the crime of pimping, as said crime is defined by an act of the Legislature of 1911 (Stats. 1911, p. 10) as amended by the Legislature of 1921 (Stats. 1921, p. 96). On the 17th day of November, 1925, the defendant was arraigned upon said information, entered a plea of not guilty thereto, and his trial for the offense so charged fixed and set for the 28th day of December, 1925, at the hour of 10 o'clock a. m. On the last-mentioned date, the case having been called for trial, the defendant, throught his counsel, asked for and was by the court granted permission to withdraw his plea of not guilty theretofore interposed to the information, and, being thereupon called upon to plead to said information, entered a plea of guilty to the crime therein charged. On the same day (December 28, 1925), the court, having upon investigation found that the age of the accused was between 18 and 21 years, made an order, under authority of section 7 of the Juvenile Court Law (Stats. 1915, pp. 1225, 1230), and with the consent of the accused, committing the lat-

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★Rehearing denied. Hearing denied by Supreme Court.

ter to the custody of the Preston School of Industry at Ione, state of California, "there to be detained * * * until he shall have attained the age of 21 years." The record shows that, under the authority of said order, the defendant was, within due time after the making thereof, committed to the custody of the above-named state reform school. Thereafter, on the 8th day of March, 1926, the court made the following order, the same being over the signature of the judge:

"To O. H. Close, Superintendent Preston School of Industry, Ione, California:

"You are hereby ordered and directed to produce Barney DeFehr in the superior court of the state of California, in and for the county of Sacramento, in department 1 thereof, at 10 o'clock a. m. on the 22d day of March, 1926, then and there to show cause, if any he has, why the order of this court heretofore made that he be confined in the Preston School of Industry in satisfaction of the judgment and sentence of this court on his plea of guilty to a charge of pimping should not be set aside and made void, and that he be on said judgment and sentence committed to the State Prison at San Quentin, for the term prescribed by law."

That the action of the court in making the above order may be understood, it is proper that there should now be presented a statement of the facts leading to the filing of the information against the accused as well as those occurring subsequently to the making of the order committing the accused to the custody of the reform school. It appears that early in the month of November, 1925, the defendant, accompanied by a girl of about 18 years of age, went to the city of Sacramento from the city of San Francisco, arriving in the first-named city near the hour of 7 o'clock in the evening. The twain took a room at a hotel in Sacramento, and together occupied said room. The record is not clear as to the period of time during which the couple lived together at the hotel referred to, but it is made to appear that, within a very brief period of time after they arrived in Sacramento, the defendant made arrangements with a woman by the name of Mitchell, who, it was and is claimed by the district attorney, was then maintaining a house of prostitution in Sacramento, whereby his young female companion was taken into said house of prostitution for the purpose of carrying on the malodorous business of a prostitute, and that she did for several days following her entrance into the house so occupy herself. These facts became known to the officers, and the young woman was removed from the place, put in proper hands, and both the defendant and the Mitchell woman were arrested, the first named charged, as we have seen, with the crime of pimping, and the last named with the crime of contributing to the delinquency of a minor female. The trial of the case of the Mitchell woman was taken up and proceeded with early in the month of February, 1926. The defendant was subpœnaed by the people to testify in said case, and the superintendent of the reform school, where the accused was then under restraint, returned him to the superior court for the purpose of testifying therein. The district attorney called the defendant to the witness stand in said case and proceeded to question him concerning his knowledge of the character of the house owned and conducted by the Mitchell woman and the circumstances under which the female minor referred to entered said house and her conduct while an inmate thereof. The defendant, in the first instance, stated, in response to his examination as a witness by the district attorney, that he did not know the premises numbered and designated "315-½" J street, in the city of Sacramento (the place where the Mitchell woman is alleged to have conducted a house of prostitution and to which the defendant had taken the female minor mentioned), and, further, that he had never been at said premises. After giving those answers, and at the afternoon session of the court, the defendant, upon resuming his place in the witness chair, stated in open court that he desired to correct the testimony given by him at the forenoon session of the court. Being permitted to do so, he stated that he was familiar with and had been at the premises of the Mitchell woman, at No. 315½ J. street, Sacramento, prior to his arrest upon the charge of pimping. The district attorney then propounded a number of questions pertinent to the Mitchell case, and the defendant in each instance refused to answer the questions, basing his refusal upon the ground that answers thereto would tend to incriminate him or subject him to prosecution for and conviction of offenses other than that to which he had theretofore pleaded guilty and for which he was then being held in custody by the authorities of the reform school. The district attorney made an application to the superior court for an order vacating and setting aside the order suspending the pronouncement of judgment in the case of the defendant, upon his plea of guilty to the crime of pimping, and committing him to the custody of the Preston School of Industry in lieu of imprisonment in the state penitentiary, and in support of said application filed an affidavit setting forth the facts above stated, and further, in substance: That, after the arraignment of the accused on the charge of pimping, his attorney called on the district attorney and assured that officer that the defendant was under the age of 18 years, and that he would change his plea to the crime of pimping, as charged against him if the district attorney would recommend to the judge of the superior court that defendant be sent to the Preston School of Industry "instead of being sentenced to imprisonment in the state prison";

that he (district attorney) replied that the defendant would be called as a witness in the case of the "People v. Vivian Mitchell, charged with the crime of contributing to the dependency of one ———, a girl under the age of 21 years" (referring to the young woman accompanying defendant to Sacramento and by the latter placed in the Mitchell house of prostitution); that "deponent further stated to the said T. A. Farrell that if the said Barney DeFehr, when called to the witness stand, would testify in accordance with a statement he made to deponent after his arrest on said charge of pimping with reference to a conversation had with the said Vivian Mitchell at her place of address, 315½ J street, in the city of Sacramento, which said statement the said Barney DeFehr stated to deponent was true, and which the deponent is informed and believes and therefore avers was true, that said deponent would recommend to said superior court that the said Barney DeFehr be sent to the Preston School of Industry; that thereafter, the said Barney DeFehr promised the said T. A. Farrell (his attorney) and Edwin Nicholas, county detective attached to the district attorney's office, that he would testify in the case of People v. Vivian Mitchell in accordance with said statement made to deponent after his arrest on the charge of pimping, to wit, that he visited the said Vivian Mitchell at 315½ J street, Sacramento, and made preliminary arrangements for said ——— (the minor female referred to), to practice prostitution at said 315½ J street; that on the 28th day of December, 1925, the said Barney DeFehr duly appeared in said superior court of the state of California, in and for the county of Sacramento, with his counsel, T. A. Farrell, and changed his plea of not guilty to guilty, and was by Hon. Charles O. Busick, judge of the superior court of the county of Sacramento, sent to the Preston School of Industry as punishment for the said offense."

The affidavit of the district attorney then proceeds to state facts relative to the conduct of the defendant when under examination as a witness for the people in the Mitchell Case, and which are set forth hereinabove, and in conclusion in effect alleges that the conduct of the defendant as a witness in the Mitchell Case, after being sent to the reform school instead of being sentenced to imprisonment upon the promise and condition that he would testify truthfully as to the facts within his knowledge pertinent to and in support of the charge against Vivian Mitchell, was such as to render "him an unfit person to be confined in the Preston School of Industry, and that his influence and example would be detrimental to the welfare of the inmates thereof."

The district attorney, in the proceeding looking to the annulment of the commitment of defendant to the reform school and the imposition upon him, after such annulment, of a judgment of imprisonment, testified that, upon the arrest of the accused and at some time antedating the order of commitment to said school, he interviewed the latter relative to the crime for which he had been arrested; that defendant admitted taking the young girl in question from San Francisco to Sacramento; that at the latter place the two took a room at a hotel; that they registered as "Mr. and Mrs. Reed"; that they were unmarried; that, while at the hotel, they had sexual relations; and that, well knowing that prostitution was habitually practiced at the house of the Mitchell woman, he called upon the latter and arranged with her for the entrance of the girl into her said house for the purpose of going "to work" there—meaning by the use of the word "work" that the girl was to be taken in by the Mitchell woman to practice prostitution as a business.

The detective connected with the district attorney's office testified in the same proceeding that he visited defendant in the county jail and asked him if he (defendant) was sent to the Preston School instead of the state prison he would testify in the case of Vivian Mitchell; that defendant asked the detective what he "wanted him (defendant) to testify to." In reply, the detective said, "Only the truth," to which defendant answered, "Well; I am willing to do that. The district attorney has my statement in his office (referring to the statement to which the district attorney testified and of which a brief recital is given above), and that is all I know about the case. I am willing to testify to those facts."

T. E. Morrin, assistant superintendent of the Preston School of Industry, who was made a witness by the defendant in this proceeding, testified that the accused was delivered to the custody of the reform school on the 1st day of January, 1926; that he was familiar with the conduct of the defendant during his confinement in said school, and that "it has been very good"; that the accused had, out of the 7,000 credits entitling an inmate of the school to be released from its custody, earned 600 credits, with no marks against him.

In disposing of the motion to set aside and vacate the order committing the defendant to the reform school, the judge by whom said order was made, presiding in the present proceeding, stated that, before making the order, he had knowledge of the fact that the defendant had promised that if sent to the reform school in the place of being sentenced to prison he would testify in the Mitchell Case on behalf of the people.

The defendant has brought the case to this court on an appeal from the order vacating and setting aside the order committing him to the Preston School of Industry and from the judgment of conviction and of sentence to the state prison.

The defendant, for a reversal, contends: (1) "That the court exhausted its power by the judgment and sentence pronounced December 28, 1925, and was thereafter without jurisdiction to impose further sentence;" (2) "that, even though jurisdiction be assumed, the evidence did not warrant the making of the order complained of;" and (3) "that the order is an illegal interference with the parole system at the Preston School of Industry."

The position of the defendant, as indicated by the foregoing enumerated points, requires a consideration of sections 7 and 9 of the Juvenile Court Act (Stats. 1915, pp. 1225, 1230, 1232). It is therein provided that where any person over the age of 18 years and under the age of 21 years is, by indictment or information, accused of a felony or a misdemeanor, except when the crime charged is a capital offense, or an attempt to commit such offense, the judge of the superior court of the county wherein such crime has been committed may, in his discretion, or with or upon the request of the accused, arrest said proceeding at the time of arraignment, or at any time previous to the empanelment of the jury, "and may proceed to investigate the charge against the defendant, and all the facts and circumstances necessary to determine the proper disposition to be made of said person, and shall determine whether such person shall be dealt with as a ward of the juvenile court under the provisions of this act. If the court is satisfied upon such investigation that said person should be declared a ward of the juvenile court and should be dealt with under this act, it may make such order or orders as herein provided for the disposition of such wards. If such person thereafter proves not to be amenable to the discipline of the state school to which he may be committed, and the trustees thereof shall determine that said person should be committed to a state penitentiary, such person shall be returned to the committing court, and thereafter proceedings shall be had upon the indictment or information commencing at the point at which proceedings were arrested," etc.

The second subdivision of section 7 makes like provision relative to a person over 19 and under 21 years of age, after his conviction of a felony or a misdemeanor charged by indictment or information, and also provides that the judge "may from time to time modify said probation orders, as is herein provided in the case of persons adjudged wards of the juvenile court." Said subdivision of section 7 further provides:

> "If such person during the period of his commitment to said state institution, proves to be incorrigible or not amenable to the discipline of such institution, and it shall be deemed advisable in the judgment of the trustees of such institution that said person be sent to a state prison, then said person shall be returned to the superior court in which the verdict was rendered, for sentence, and thereupon the court shall pronounce judgment."

Section 9 of said act reads:

> "Any order made by the court in case of any person subject to the jurisdiction of the court under the provisions of any of subdivisions one to thirteen inclusive of section one of this act may at any time be changed, modified or set aside as to the judge may seem meet and proper; provided, however, that nothing in this act contained shall be deemed to interfere with the system of parole and discharge that is now or may hereafter be provided by law, or by rule of the board of trustees of the Whittier State School, the Preston School of Industry or the California School for Girls, or any similar state institution or institutions, respectively, for the parole and discharge of wards of the juvenile court committed to the said schools or to any similar state institutions hereafter created, or with the management of the said schools, say that the court committing a ward to any of said schools may thereafter change, modify or set aside said order of commitment upon ten days' notice of the hearing of the application therefor being served by United States mail upon the superintendent of the said school to which said person has previously been committed, and providing that the court shall not then change, modify or set aside said order without due consideration of the effect thereof upon the discipline and parole system of said school or institution."

As is to be implied from the points urged for a reversal, as they are above stated, the argument of counsel for the defendant in support of the attack upon the action of the court in annuling its previous order committing the accused to the Preston School of Industry is substantially this: That, the defendant being of the age rendering him eligible in that respect to commitment to the reform school, and having pleaded guilty to the information charging him with a felony, the superior court or judge thereof was vested with the power to impose either one of two judgments of sentence, to wit, judgment of sentence to the state prison, or, if the conditions warranted, judgment of sentence to a reform school maintained by the state for the reform of juvenile offenders against public law and incorrigibles; that, having elected to commit the defendant to the reform school, and made an order accordingly, the court or the judge thereupon lost jurisdiction to set aside such order of commitment and in lieu thereof impose upon him a judgment of imprisonment in the state prison for the identical crime for which he had already been committed to the reform school; that, even if in such case it were in the power of the court or the judge to recall and cancel the order of commitment to the reform school, the court or judge would be without jurisdiction or authority to exercise that power until the trustees of the school to which the juvenile offender had been committed had determined that the person so committed had proved "to be incorrigible or not amenable to the discipline of such institution"; and for that reason it is advisable in the judgment of such trustees that such person be returned to the superior court for sentence, etc.

As is to be observed, the proposition first advanced by counsel for the defendant, namely, that, in making an order committing the accused to the reform school, the court below lost jurisdiction thereafter to pronounce judgment of sentence to the state prison upon the accused, proceeds upon the theory that the order of commitment to the Preston School of Industry involved penal punishment. Under the decisions in this state, as well as decisions of other states, the theory is not supportable. To the contrary, where a minor between the ages designated in the Juvenile Court Law has committed a felony or a misdemeanor of which the superior court has triable jurisdiction, has been committed to one of our schools of reform, the judgment of sentence to a penal institution which the court may impose in such case being suspended for such purpose, the purpose is (and such is the obvious purpose of the law authorizing such a course) not to punish the juvenile offender, but to reform and retrieve him by giving him such training and education as will constitute a foundation that will make him, after he has attained his majority and eligible to be discharged from the school, an upright and useful citizen. One of the first of our own cases to deal with the proposition in hand is that of Ex parte Ah Peen, 51 Cal. 280. In that case a complaint charging the petitioner therein, aged 16 years, with the crime of being a vagrant, was filed in the police court of the city and county of San Francisco. Ah Peen, upon the complaint so filed, could have been prosecuted and punished for the crime therein charged, but the police judge, under authority of a statute then existing, arrested proceedings against the defendant and committed him to an industrial school for the reform and education of incorrigible minors. It was contended by the petitioner in the Supreme Court that the course thus pursued by the judge involved an infringement of his constitutional right to a trial by jury, as guaranteed by certain provisions of the Constitution. The Supreme Court rejected that contention in the following language:

> "It is obvious that these provisions of the Constitution have no application whatever to the case of this minor child. The action of the police judge here in question did not amount to a criminal prosecution, nor to proceedings against the minor according to the course of the common law, in which the right of trial by jury is guaranteed. The purpose in view is not punishment for offenses done, but reformation and training of the child to habits of industry, with a view to his future usefulness when he shall have been reclaimed to society, or shall have attained his majority. Having been abandoned by his parents, the state, as parens patriæ, has succeeded to his control, and stands in loco parentis to him. The restraint imposed upon him by public authority is in its nature and purpose the same which, under other conditions, is habitually imposed by parents, guardians of the person, and others exercising supervision and control over the conduct of those who are by reason of infancy, lunacy, or otherwise, incapable of properly controlling themselves. Ex parte Crouse, 4 Whart. [Pa.] 1 [9]; Prescott v. State of Ohio, 19 Ohio [St.] 184 [2 Am. Rep. 388]."

The case of Matter of O'Connor, 29 Cal. App. 225, 155 P. 115, involves a discussion of the same proposition, and the conclusion arrived at therein was in accord with the conclusion announced in the case of Ah Peen. But the latest discussion of the question is in the case of In re Daedler, 194 Cal. 320, 228 P. 467, in which Mr. Justice Richards considers the question exhaustively. The petitioner, a minor a little over the age of 14 years, was charged with murder. After investigation, and without the usual trial, the superior court committed him to the Preston School of Industry. It was stoutly urged in the habeas corpus proceeding that the commitment of the petitioner was illegal, inasmuch as he was, by said order of commitment and his restraint by the industrial school authorities thereunder, sentenced to be punished and was being punished for a crime without having been convicted thereof. The contention was not sustained. After supporting its position by what we conceive to be unanswerable reasoning and by a reference to the California cases dealing with the question, the court, through Mr. Justice Richards, said:

> "When we turn from these decisions of our own courts dealing with the objects and purpose of juvenile court laws, we find a wealth of learning grouped and still growing around the statutory efforts of nearly every state in the Union to adequately deal with the problem of juvenile dependence and delinquency through the establishment and operation of juvenile courts; and while, as we have stated, there was some disposition in the earlier decisions of the courts of certain states to give strict application of the constitutional safeguards of trial by jury and due process of law to proceedings before the juvenile courts and to hold that the proceedings in the cases of minors brought before such courts were criminal in their nature, the main trend of modern authority has been away from this viewpoint and has been distinctly and almost universally in the direction pointed out by this court in the early case of Ah Peen, supra, and emphasized in its later decisions above noted."

[1-3] It is thus conclusively established that, where a minor falling within the purview of the Juvenile Court Law has been arraigned upon or convicted of a felony, the superior court, concluding to exercise its juvenile court powers in his case, suspends his trial or the pronouncement of judgment of sentence to imprisonment and commits him to a school of reform, the proceeding so adopted does not involve a criminal prosecution or a judgment of sentence. And it is equally clear that the Juvenile Court Law contemplates that, while the minor is in the custody of the reform school authorities and until he has attained the age of majority, the superior court shall retain jurisdiction of his case and may at any time recall the commitment to such school and impose a judgment of sentence upon the minor for the offense with which he was charged. Indeed, sections 7 and 9 of the Juvenile Court Law, as will be observed, expressly so provide. The language of those sections in this particular is not at all characterized by ambiguity. Of course, it is not to be understood from anything that is said herein that we are of the opinion that the superior court may arbitrarily or without just cause recall a commitment of a minor to the reform school ordered under the circumstances such as we have here. To the contrary, we are of the opinion that the court must have substantial reasons for recalling such a commitment and setting it aside and thereupon imposing judgment of sentence to a state prison. In such a case, though, the question would not be so much one of jurisdiction as it would be of whether or not the court had abused its discretion in adopting such a course. In this case it cannot be said that the court abused its discretion in setting aside the commitment to the reform school and sentencing the minor to the state prison. The evidence without contradiction shows that the defendant promised that if he were committed to the reform school rather than imprisoned in the state prison for the felony to which he pleaded guilty he would testify to certain material facts in the case of the People v. Vivian Mitchell, charged, as we have seen, with contributing to the delinquency of the minor female referred to above. At the trial of the case of Mitchell the defendant not only in the first instance falsified his testimony, but later, correcting the same, refused to testify on the ground that his testimony would tend to incriminate him. Under the circumstances of the case the reason for his refusal was not substantial, for while he could have been prosecuted for offenses other than the one to which he had pleaded guilty because of his conduct toward the minor female, it is not to be assumed that the district attorney would have proceeded against him for such other offenses if he had given the testimony as he agreed to. Indeed, the fact that he was committed to the reform school clearly warrants this conclusion and we are satisfied that the defendant must have so understood such to be the case when he was called as a witness. It was by the promise that he would testify to the facts in the Mitchell Case which he had narrated to the district attorney that the court was governed to some extent in committing him to the reform school in the place of sentencing him to the state prison. This course was not improper. Indeed, it was in accord with the principle at the bottom of section 1099 of the Penal Code, which provides that when two or more persons are included in the same charge the court may, at any time before the defendants have gone into their defense, on the application of the district attorney, direct any defendant to be discharged, that he may be a witness for the people. Of course, it is to be assumed that the court had found upon investigation that the defendant was a proper person to be taken into the Preston School of Industry. At any rate, it is true that in refusing to testify, as he agreed to do in the Mitchell Case, the defendant practiced deception upon the court, and the latter was therefore justified, after considering the whole situation, in concluding that he was not a fit person to be retained in a school of reform, the purpose of which is to reform refractory minors and to maintain a discipline that will accomplish such a result.

The provision of section 7 of the Juvenile Court Act to the effect that, when it appears to the satisfaction of the trustees of the reform school, the minor during the period of his commitment to said institution proves to be incorrigible or not amenable to the discipline of said institution, and it shall be deemed advisable in the judgment of the trustees of such institution that such person be sent to a state prison, then he shall be returned to the superior court in which he was convicted for sentence and thereupon the court shall pronounce judgment, was not intended as setting forth a condition precedent to the right of the court to put in operation its superior court jurisdiction to set aside the order of commitment and sentence the minor to prison for the offense charged. That provision, in our opinion, was intended to clothe the trustees of the reform school with the power of getting rid of an inmate whose incorrigibility would tend to disrupt the necessary discipline of the school. In other words, the Legislature intended to clothe the trustees with the power of returning the minor to the superior court when he proved to be incorrigible for sentence, notwithstanding the order of commitment made by the juvenile court. This proposition is mentioned because counsel for the defendant seem to be of the opinion that before the court could exercise its jurisdiction in the matter it was necessary that the minor should be returned to the superior court by the trustees of the reform school with a report of the fact of his incorrigibility and therefore his unfitness to remain as an inmate of the institution.

For the reasons herein given, the judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

HUNT v. L. M. FIELD, Inc. (Civ. 5134.)★

(District Court of Appeal, First District, Division 2, California. March 3, 1927. Rehearing Denied March 31, 1927. Hearing Granted by Supreme Court May 2, 1927.)

1. Sales ⚷52(7)—Purchaser of truck seeking rescission must show false representations of mechanical condition by clear and convincing proof.

Purchaser of truck, seeking rescission of contract of sale, must show false representations relative to mechanical condition by clear and convincing proof.

2. Sales ⚷38(7)—Plaintiff not showing reliance on fraudulent misrepresentations relative to contract for sale of truck held not entitled to rescind contract.

Plaintiff seeking rescission of contract for sale and lease of truck on ground of fraudulent misrepresentations was not entitled to relief, where evidence failed to show that alleged misrepresentations were believed and relied on by him to his injury.

3. Sales ⚷121—Purchaser loses right to rescind sale contract for misrepresentations by demanding performance after discovering falsity of misrepresentations.

In action to rescind contract for sale and lease of truck on ground of fraudulent misrepresentations in that defendant represented it had work for truck, plaintiff lost right to rescind when he demanded performance of contract after discovery that representation was false.

4. Sales ⚷125—Purchaser's default in obligation will not defeat his right to rescind for fraudulent misrepresentations.

In action for rescission of contract for sale and lease of truck on ground of fraudulent misrepresentations, that plaintiff was in default as to his obligations will not defeat his right to rescind.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Thomas Hunt against L. M. Field, Inc. Judgment for plaintiff, and the defendant appealed. Reversed.

Herbert Chamberlin, of San Francisco, for appellant.

S. T. Hogevoll, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued for the rescission of a written contract for the sale and lease of an automobile truck. Plaintiff had judgment, from which the defendant has appealed upon a typewritten transcript.

The complaint alleges that on February 28, 1922, the defendant represented to the plaintiff: (1) That it had for sale a certain motortruck and trailer having the power to transport a load of at least four tons of lumber four times each day over the public roads from the lumber mill of the La Honda Mill Company, a distance of approximately 21½ miles, at a compensation of 15 cents per ton per mile for a period of 8 months each year for 5 consecutive years, commencing on the 1st day of April, 1922; (2) that said truck and trailer were then and there in good mechanical condition for immediate delivery; (3) that said truck and trailer carried with its sale the manufacturer's warranty that the truck and trailer, and each of them, were properly constructed and that they were guaranteed against mechanical imperfection; (4) that if the plaintiff purchased said truck and trailer the said La Honda Mill Company would employ him to transport each day at least three truck loads of lumber, over four tons to each truck load, from their said mill at La Honda to said points of distribution in San Mateo county for a period of eight months each year, for a period of five consecutive years, commencing on the 1st day of April, 1922, for the said compensation of 15 cents per ton per mile. It was further alleged that all said representations were false and untrue; that the truck and trailer did not have the power and capacity alleged; that the defendant did not have any agreement with the La Honda Mill Company that it would employ the purchaser of said truck to transport said lumber from its mill; that the truck was not in good mechanical condition or ready for immediate delivery; that it did not carry the manufacturer's warranty that it was properly constructed or that it was in proper mechanical condition; that defendant knew said representations were false; and that they were made with the intention of defrauding plaintiff and with the intention of inducing him to enter into the contract which was executed on March 1, 1922; that plaintiff did not discover that said representations were untrue until April 14, 1922, and that he rescinded the contract and gave notice thereof to the defendant on April 29, 1922. One thousand dollars having been paid upon the purchase price of the truck, the plaintiff demanded the cancellation of the contract and judgment for return of the money paid under it.

The defendant denied all the material allegations of the complaint, and the cause went to trial before the court with the jury sitting in an advisory capacity. The jury having returned its verdict in favor of the plaintiff, the court made its finding of fact

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★Superseded by opinion of Supreme Court, 262 P. 730.

that all the allegations of the complaint were true, and entered judgment thereon as stated.

On this appeal the appellant stresses two points which he insists are covered by well-established rules of law relating to the rescission of contracts of this character: (1) That where a party to a contract seeks to rescind it upon the grounds of false representations or fraud, it is incumbent upon him to show that he relied upon such false representations or fraud to his injury; and (2) that a party who is himself in default in such a contract may not rescind.

As pointed out in the statement of the pleadings, the respondent pleaded four specifications of false representations inducing him to enter into the contract. As to the power or capacity of the truck and trailer, it was alleged that the appellant had represented that it was capable of transporting a load of at least four tons of lumber at least three times each day from the La Honda mill for a distance of 21½ miles to points of distribution in San Mateo county at a compensation of 15 cents per ton per mile for a period of eight months each year for five consecutive years. The trial court found this allegation to be true in its entirety, though the only proof offered in support of it was that it had been represented that the truck could haul 2,000 feet of lumber from the mill to San Francisco or to Redwood City and way points. Nothing was shown as to the mileage between these points nor as to the compensation which might be received therefrom or for the period of use of the truck. Manifestly, evidence of representations that the truck was capable of making two trips a day was not proof of the allegation that it had been falsely represented to the respondent that it would make three trips a day. But aside from this the record fails to show that the respondent believed or acted upon any representation as to the power or capacity of the truck to his injury.

[1] It was alleged that the truck and trailer were represented to be in good mechanical condition and fit for immediate delivery. This allegation was also found to be true, but the only evidence in support of it was that coming from the respondent as a witness in his own behalf to the effect that the agent of the appellant stated to him that he thought the truck was in good mechanical condition but that it would be given a general overhauling; that he, the respondent, went on numerous occasions to the appellant's place of business and directed the making of certain repairs; that he brought his own mechanic to examine the truck, and that he specified a list of repairs to be made, and that these were undertaken by the appellant. With reference to the mechanical condition of the truck, the evidence falls far short of meeting the demands in an action of this kind that the false representations must be shown by clear and convincing proof. There is no conflict in the evidence that at the time of the execution of the contract the appellant agreed to give the truck a general overhauling—to make such repairs as were found to be necessary—that thereafter the appellant agreed to and did make other repairs at the request and under the direction of the respondent.

In reference to the representation as to a factory warranty, the only evidence in the record is found in the written contract, which reads:

> "There is no warranty with this property except warranty in writing and delivered herewith, and further except the warranty of the manufacturer *on a new car*, which is hereby extended to lessee through lessor *without obligation on the lessor's part.*" (Emphasis ours.)

[2] In reference to each of the three foregoing specifications of false representations the record fails to show any evidence tending to prove that the respondent believed any one of them or that he relied upon them to his injury. The only answer which the respondent makes to this contention of the appellant is an incorrect quotation of testimony purporting to be found on pages 35 and 36 of the transcript. Reference to the transcript, however, discloses that the testimony there found related solely to the question of the representation relating to the employment of the respondent by the La Honda Mill Company. Having failed to bring forth any proof of reliance by the respondent on any of the representations referred to in the three specifications above mentioned, the case, as to them, comes squarely within the rule found in Pomeroy's Equity Jurisprudence, § 890, and reading:

> "Another element of a fraudulent misrepresentation without which there can be no remedy, legal or equitable, is, that it must be relied upon by the party to whom it is made, and must be an immediate cause of his conduct which alters his legal relations. Unless an untrue statement is believed and acted upon it can occasion no legal injury. It is essential, therefore, that the party addressed should trust the representation, and be so thoroughly induced by it, that, judging from the ordinary experience of mankind, in the absence of it he would not, in all reasonable probability, have entered into the contract or other transaction." Spinks v. Clark, 147 Cal. 439, 444, 82 P. 45; Maxon-Nowlin Co. v. Norswing, 166 Cal. 509, 511, 137 P. 240, and other authorities too numerous to mention.

[3] As to the alleged representation of employment of respondent by the mill company, the uncontradicted evidence is that though the appellant represented that it had the privilege of placing the owner of one of its trucks in a hauling job for the mill company, the respondent was notified by the appellant's agents to get in touch with the mill company before the execution of the contract and to see if the job could be had. There is

no evidence of any kind tending to prove the allegations of the complaint relating to the character of the work to be done for the mill company, or the compensation to be paid for the period of employment, as alleged in the complaint and found to be true by the trial court. It is in the evidence that the respondent believed the representations contained in a sign placed in the office window of the appellant to the effect that the appellant had the privilege of placing hauling jobs for the mill company to a man who would buy one of the appellant's trucks and drive it upon the job. No other evidence was offered that the appellant believed or relied upon any other representation contained in the complaint. If the representation contained in this sign was the same as that alleged in the complaint and found to be true, the rule heretofore cited from Pomeroy would not be applicable. but it is not necessary to analyze all the evidence relating to this specification, as the case must fall upon an equally well-established rule of law in rescission that when the fraud or deceit has been discovered by a party he loses the right to rescind when he elects to stand upon the contract, to ask additional favors of the other party, to demand and receive the performance of additional conditions by the other party, or to demand full performance of the contract as executed. Schmidt v. Mesmer, 116 Cal. 267, 271, 272, 48 P. 54; Monahan v. Watson, 61 Cal. App. 417, 420, 214 P. 1001; Tucker v. Beneke, 180 Cal. 588, 594, 182 P. 299.

Here the uncontradicted evidence is that the contract was executed on March 1, 1922; that the respondent talked with the mill people on March 12; that thereafter he ordered additional repairs to be made by the appellant upon the truck; that on March 28, 1922, he definitely learned from the mill people that he could not have the hauling job; that thereafter he ordered additional repairs to be made on the truck, and on April 11, 1922, took it out for trial and returned it with instructions to have other repairs made; and that on April 15, 1922, he addressed a letter to the appellant demanding delivery of the truck or the return of the money paid. In view of the allegation in the complaint found to be true by the trial court that the respondent discovered on April 14, 1922, that the representations and warranties were false and fraudulent, his specific demand for performance in accordance with the written contract was an election to stand upon that contract, waiving the alleged oral misrepresentations, and this terminated his right to rescind.

[4] It is conceded that at the time of the attempted rescission the plaintiff was in default as to his obligations under the contract, and the appellant insists that the respondent could not rescind because of the general rule that "the right to rescind a contract rests only with the party who is without default." Fairchild, etc., Co. v. Southern, etc., Co., 158 Cal. 264, 273, 110 P. 951, 955. But, in denying a transfer in De Bairos v. Barlin, 46 Cal. App. 665, 674, 190 P. 188, 192, the Supreme Court said:

> "We know of no case which holds that such rule applies to a case where the vendee in default on payments due on the contract seeks to avoid and rescind it for fraud of the vendor in procuring its execution, or for mistake inducing its execution. Payment by the vendee, after discovery of the fraud or mistake, might tend to show a waiver thereof, and thus defeat an attempted rescission, but a refusal to pay would be entirely consistent with the right of the vendee to rescind for such cause."

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

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81 Cal. App. 577

Ex parte SCOTT. (Cr. 1454.)

(District Court of Appeal, Second District, Division 2, California. March 4, 1927.)

1. Criminal law ⟹576(3)—Sixty-day period, within which accused must be tried, runs from time of determination of mistrial (Pen. Code, § 1382, subd. 2).

Sixty-day period, within which accused must be brought to trial under Pen. Code, § 1382, subd. 2, runs in first instance from filing of information; but another 60-day period starts from time of determination of mistrial.

2. Criminal law ⟹1144(7)—Accused is presumed to consent to trial more than 60 days after filing of information, where he was present and did not object (Pen. Code, § 1382, subd. 2).

Where accused was present and did not object when trial was set for date more than 60 days after filing of information, his consent is presumed, and conviction is valid, notwithstanding Pen. Code, § 1382, subd. 2.

Application by William H. Scott for a writ of habeas corpus prayed to be directed to the Sheriff of Los Angeles County. Writ discharged, and petitioner remanded.

Messrs. Light & Lane, of Glendale, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

THOMPSON, J. This is an application for the release of petitioner on habeas corpus, for the reason that he was not brought to trial within 60 days from the filing of the information, as provided in subdivision 2 of section 1382 of the Penal Code. The petition shows that the information was filed on August 6, 1926; and thereafter, without objection by petitioner, was set for trial for October 6, 1926; that on October 6, 1926, petitioner made a motion to dismiss because he was not brought to trial within the 60-day period, which motion was denied; that, after trial and a verdict of guilty, the court on October 21, 1926, granted a motion for a new trial, and set the cause for retrial on October 28, 1926, and on the last-mentioned day continued the cause until December 8, 1926.

[1] In the case of In re Begerow, 133 Cal. 349, 65 P. 828, 56 L. R. A. 513, 85 Am. St. Rep. 178, it was determined that the 60-day period in the first instance runs from the filing of the information or indictment, but that after a mistrial another 60-day period starts to run from the time of the determination of the mistrial. In this case the time would start to run on October 21, 1926, the date of the order granting the motion for a new trial. In the case just mentioned one of the controlling reasons for the construction adopted was the protection of defendant's right to a speedy trial after the first attempt resulted in a mistrial. The same construction was assumed in the case of Ex parte Ross, 82 Cal. 109, 22 P. 1086. We take such to be the settled law of this state. In this case the new 60-day period did not expire until December 20, 1926, and therefore the defendant's right in this particular was not denied him.

[2] And, in so far as the delay before October 6, 1926, is concerned, his petition shows that he was present and did not object at the time it was set for trial on that date. Under these circumstances consent is presumed. People v. Magee, 60 Cal. App. 459, 213 P. 513; People v. Rongo, 169 Cal. 71, 145 P. 1017; People v. Douglass, 100 Cal. 1, 34 P. 490; Ex parte Apakean, 63 Cal. App. 481, 218 P. 767; Shackleford, Ex parte, 64 Cal. App. 78, 220 P. 430.

Writ discharged and petitioner remanded.

We concur: WORKS, P. J.; CRAIG, J.

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81 Cal. App. 671

PEOPLE v. COYLE. (Cr. 1443.) ★

(District Court of Appeal, Second District, Division 1, California. March 10, 1927. Hearing Denied by Supreme Court May 9, 1927.)

1. Embezzlement ⚿4—Selling agent selling with fraudulent intent to appropriate property or proceeds is guilty of "embezzlement."

An agent authorized to sell or dispose of property who sells it with fraudulent intent to appropriate it or proceeds is guilty of embezzling it as much as if he was unauthorized to sell.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Embezzle—Embezzlement.]

2. Embezzlement ⚿44(2)—Evidence held to show agent made collateral loan on stocks with intent to appropriate proceeds.

In prosecution for embezzlement, evidence *held* to show that agent intrusted with corporate stock to procure loan thereon did not use it for purpose authorized, but made collateral loan with fraudulent intent to appropriate proceeds.

3. Criminal law ⚿517(4)—Proof of corpus delicti held prima facie and confession properly admitted.

In prosecution for embezzlement, where there was more than prima facie proof of corpus delicti, defendant's confession was properly admitted in evidence.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Burr Coyle was convicted of embezzlement, and he appeals. Affirmed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. The information is in eight counts, four of which charged the defendant with the crime of grand larceny of certain stocks, and the other four counts charged the defendant with the crime of embezzlement of the identical stocks mentioned in the larceny counts. The jury returned a verdict acquitting the defendant on the four counts charging grand larceny, and finding the defendant guilty on the four counts charging embezzlement. The trial court pronounced judgment and sentenced the defendant on count VIII, while sentence was suspended on counts II, IV, and VI. Defendant appeals from the judgment and from the order denying his motion for a new trial.

Defendant first urges that he is not guilty of the crime of embezzlement as charged in count VIII, and alleges that there is no proof of conversion of the Lincoln Mortgage Company stock as charged in said count, but that the defendant only carried out the instructions of the complaining witness, Mary Dwyer, in securing a loan on the stock used as collateral, for the purpose of buying other stocks as authorized by the complaining witness.

Examination of the record discloses that Mary Dwyer first met the defendant in August, 1925, to whom she delivered 50 units of Lincoln Mortgage Company stock, and authorized the defendant to secure a loan, using the stock as collateral, and to buy Sinclair Consolidated Oil stocks with the proceeds; the defendant stating that in his opinion the market price would rise in two or three months and that "she would make quite a little profit." The complaining witness states that the maturity date of the loan was at no time mentioned by the defendant.

⚿For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Hearing denied by Supreme Court.

On August 29th the defendant delivered to Mrs. Dwyer the following receipt:

> "Received of Mrs. Mary Dwyer 100 sh. N. Star Mng. Co. 50 units Lincoln Mortg. * * * to be used in the purchase of ten (10) shares Sinclair Cons. Oil Co. to be held in trust by me.
>
> "Dated Aug. 29, 1925.
>
> "Accepted Mrs. Mary Dwyer. Burr Coyle."

On the same date the defendant executed a collateral note, payable to J. H. Corbin & Co., in the sum of $200, due twelve months from date thereof, and as collateral delivered to Corbin & Co. the 50 units of Lincoln Mortgage Company stock owned by the prosecuting witness. It nowhere appears that defendant ever purchased the 10 shares of Sinclair Oil Company stocks as instructed, nor were these shares ever delivered to the complaining witness. Neither was the Lincoln Mortgage Company stock ever returned to Mrs. Dwyer. During the month of March, 1926, Mrs. Dwyer, having heard nothing from the defendant, telephoned to him and demanded the return of the Lincoln Mortgage Company stock. Defendant replied that he would see what he could do, but Mrs. Dwyer did not hear from the defendant thereafter.

[1] The prosecution introduced the confession of the defendant, from which it appears that the defendant's plan of operation at this time in this and similar transactions was to secure a collateral loan from Corbin & Co., mingle the proceeds with his own funds, and use a part of the money for his personal expenses, as well as buy and sell Sinclair Consolidated Oil stock, and deposit the proceeds in his personal account. In no instance did the defendant hold the stock "in trust" for his principal.

Defendant cites People v. Borchers (Cal. Sup.) 247 P. 1084, and People v. Hughes (Cal. App.) 250 P. 869, in support of his contention that the defendant cannot be found guilty of embezzlement, because he alleges there can be no conversion of the Lincoln Mortgage Company stock when the defendant merely followed the instructions of his principal in using the stock as collateral to a loan. The answer to this contention is to be found in one of the cases cited by defendant.

In People v. Hughes, supra, the court says, at page 871:

> "At first blush the question as to whether an agent may be said to have converted the property of his trust or the proceeds of a sale thereof frequently will appear difficult of determination, but the consensus of authority consistently holds that the solution of the question depends upon the point in time when criminal intent was first conceived. As said in 20 C. J. p. 431, § 18: 'Authority to do the act relied upon as a conversion is no defense, if it was done with felonious intent.' And in Agar v. State, 176 Ind. 234, 94 N. E. 819, where it appeared that the defendant, in lawful custody of public warrants, passed them to the auditor and received credit for the proceeds, it was said:
>
> " 'Authority to do the act relied on as conversion is no defense if it was done with felonious intent. The intent with which the act was done was the vital question in the case.
>
> " 'The rule is that when an agent or employee does with money or property in his possession only what he is authorized to do by the terms of his employment, having no felonious intent, he is not guilty of embezzlement. But the authority to sell property or to otherwise deal with it is no defense to a charge of embezzlement, if the agent or employee converts the same to his own use with a fraudulent intent. Therefore when an agent or employee has authority to sell or otherwise dispose of property, and does sell or otherwise dispose of it, not for the purpose authorized, but with the fraudulent intent to appropriate it or its proceeds to his own use, he is guilty of embezzling the property itself, as much as if he had no authority to sell or otherwise dispose of it, for the sale or disposition of the property with said fraudulent intent is a conversion. Leonard v. State, 7 Tex. App. 417; United States v. Sander, 6 McLean, 598, Fed. Cas. No. 16,219; 98 Am. Dec. 134, note; 2 Bishop's Crim. Law (5th Ed.) § 371; 2 Bishop's Crim. Law (7th Ed.) § 371; 2 Bishop's New Crim. Law, §§ 370, 371; Clark & Marshall on the Law of Crimes (2d Ed.) p. 520; 10 Am. & Eng. Ency. of L. 995, 996.'
>
> "Again, in State v. Baumhager, 28 Minn. 226, 9 N. W. 704, it is said: 'The distinction must be kept in view between the offense and the evidence of it. The first possession being lawful, the act of embezzlement consists, in a certain sense, in a mere act of the mind, without any outward and visible trespass, as in the case of ordinary larceny. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the defendant. Roscoe's Cr. Ev. 453.' "

[2] In the instant case we are well satisfied after reading the whole record that the defendant did not use the Lincoln Mortgage Company stock for the purpose authorized, but that he made the collateral loan with a fraudulent intent to appropriate the proceeds to his own use. It therefore follows that defendant was guilty of embezzlement of the Lincoln Mortgage Company stock as charged in the information, and that there is no variance between the allegation of the information and the proof.

[3] Appellant next urges that the corpus delicti was not established, and in connection therewith states the familiar rule that admissions of a defendant standing alone are insufficient to establish his guilt. In People v. Selby, 198 Cal. 426, 437, 245 P. 426, 431, it is said:

> "It is apparent from this review of the cases that the general trend of authority has been to hold that upon prima facie proof of the corpus delicti the extrajudicial statements, admissions, or confessions of the accused may be admitted in evidence and having been so properly admitted they may, with the evidence aliunde, be considered by the jury in its determination

whether or not all the elements of the crime and the connection therewith of the accused have been established to a moral certainty and beyond all reasonable doubt."

In this case we think there was more than prima facie proof of the corpus delicti, and that the confession was properly admitted in evidence and submitted to the jury for its consideration in determining whether the defendant was guilty beyond a reasonable doubt.

It is ordered that the judgment and the order denying the motion for a new trial be affirmed.

We concur: CONREY, P. J.; HOUSER, J.

81 Cal. App. 704

SMITH v. CHIN CHEW et al. (Civ. 3155.)

(District Court of Appeal, Third District, California. March 11, 1927.)

1. Landlord and tenant 🔑230(1)—Complaint to recover money for rent, failing to allege amount is unpaid, due, or owing, held not to state cause of action.

Complaint, in action to recover money due from rental of land, failing to show that amount sued for is unpaid, due, or owing, and not asking for amount in prayer, is fatally defective, and fails to state cause of action.

2. Pleading 🔑72—Prayer is not essential part of complaint, where answer is filed.

Where answer is filed, prayer of complaint is no longer essential part thereof.

3. Courts 🔑122—Where amended complaint in superior court showed jurisdiction only in justices' court, motion for dismissal for want of jurisdiction should have been granted.

Where action in superior court for money under defective complaint was dismissed as to one defendant partner on production of receipt of payment, and amended complaint stated cause of action, showing jurisdiction only in justice court, remaining defendants' motion for dismissal for want of jurisdiction should have been granted.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by H. Smith against Chin Chew and Chun Hee Tong. From judgment adverse to plaintiff, the plaintiff appeals. Affirmed.

C. D. McComish, of Colusa, for appellant.

Alva A. King, of Colusa, for respondents.

PLUMMER, J. The plaintiff began this action by filing a complaint against the defendant Chin Chew. Thereafter a first amended complaint was filed, bringing in the defendant Chun Hee Tong. The amended complaint bringing in the defendant Chun Hee Tong is, after the title, in words and figures following:

"Plaintiff complains of defendants, and alleges:

"I. That defendants became indebted to plaintiff within the four years last past in the sum of $427.55, of which sum $295 was for rent of land furnished to defendant Chun Hee Tong, and $132.55 was for labor and services and wood furnished to defendant, Chin Chew, all at the special request of defendants, who are partners.

"That no part of said sums has been paid except $——, and that the sum of $——, is unpaid, due, and owing.

"Wherefore plaintiff prays judgment against defendants in the sum of $—— and for costs of suit. [Signed] C. D. McComish,
"Attorney for Plaintiff."

Upon the case being called for trial, the plaintiff dismissed his action as against the defendant Chin Chew, and thereupon asked and obtained of the court leave to amend his complaint by inserting the figures $238.35 and $139.30, making the last paragraph of his complaint read as follows:

"That no part of said sums has been paid except $238.35, and that the sum of $139.30 is unpaid, due, and owing."

Thereupon the defendant Chun Hee Tong, through his counsel, moved that the action as against him be dismissed. This motion was denied. Later in the proceedings the motion was renewed on the ground that the court had no jurisdiction. This motion was also denied. During the course of the trial the following exhibit was introduced in evidence:

"Colusa, Cal., Nov. 13, 1925.

"Received of A. A. King the sum of three hundred dollars in full of all claims against Chin Chew and I agree to release the attachment against said Chin Chew's property in the case of H. Smith v. Chin Chew.
"C. D. McComish,
"Attorney for Plaintiff H. Smith."

At the conclusion of the trial the court ordered judgment that the plaintiff take nothing by reason of this action, not on the ground that the court was without jurisdiction, but upon the ground that the sum of $300 was accepted in full settlement of the $427.55 originally sued for in the action begun against the defendant Chin Chew. This appears from the following excerpt taken from the opinion of the trial court:

"Quite aside from this above discussion, I am of the firm opinion that, 'having settled with one partner' as is claimed, no action can now be prosecuted in this court as against another partner when the amount claimed is below the jurisdictional amount for this court. However, the decision herein is placed on the theory that full payment was made of the entire claim."

From the judgment that the plaintiff take nothing this appeal is prosecuted. It is urged upon our consideration that the court erred in holding that the receipt set out herein was any defense to the action as against the defendant Chun Hee Tong, or that the payment of the said sum of $300 constituted full payment of the sum of $427.55 sued for in the original complaint. It may be stated that there is nothing in the pleadings indicating a controversy over the amount due from the defendants to the plaintiff, or that the parties had accounts against each other, or that there was any accord and satisfaction, but we do not need to decide whether the court did or did not err in holding that the receipt of $300 paid by the defendant Chin Chew operated as a release of whatever claim the plaintiff may have had against Chun Hee Tong, for the following reasons:

[1, 2] The amended complaint under which the defendant Chun Hee Tong was made a defendant is manifestly insufficient to state a cause of action. There is nothing in the complaint showing that the amount sued for had not been paid, or that any sum whatever was unpaid, due, or owing. Had no appearance been made by the defendant Chun Hee Tong, no judgment by default could have been entered against him. It is true that, where an answer is filed, the prayer of the complaint is no longer an essential part thereof, as the plaintiff is entitled to the relief shown by his pleadings, but, in this case, the essential elements, to wit, the amount unpaid, the fact that the amount for which the defendant is alleged to have become indebted is not alleged to be unpaid, due, or owing, and no amount is asked for in the prayer. It is manifest that the complaint is fatally defective. "In a complaint upon an obligation to pay money an allegation that the money has not been paid is required, on the theory that a failure to pay constitutes the breach of the contract sued on." 20 Cal. Jur. p. 945, § 27. Likewise, in further considering the subject of an answer and allegations as to payment, the text-writer, in section 28, page 950, same volume, states the rule in this manner:

> "But where the allegation of nonpayment is wholly lacking or is fatally defective, the fact that no demurrer is interposed and that judgment goes by default is immaterial, since the decree goes to the statement of a cause of action."

In Burke v. Dittus, 8 Cal. App. 175, 96 P. 330, we find the following:

> "If there had been no attempt to aver nonpayment, either by an allegation amounting only to a conclusion of law or otherwise, the complaint would not have stated a cause of action; and this could be urged at any time, even without demurrer."

In Richards v. Travelers' Ins. Co., 80 Cal. 505, 22 P. 939, it is said:

> "A complaint in an action to recover a sum of money due under a life insurance policy, which contains no allegation that the policy is unpaid, is fatally defective, and is not cured by a verdict in favor of the plaintiff."

Likewise, in Hurley v. Ryan, 119 Cal. 71, 51 P. 20, it is held:

> "In an action upon contract to recover money, the breach of the contract to pay is of the essence of the cause of action, and must be alleged; and a complaint which does not allege that the debts sued upon have not been paid fails to state a cause of action."

[3] This was the status of the pleadings at the time the action was called for trial, at which time the plaintiff, through his counsel, asked leave to amend his complaint by alleging that there had been paid upon the indebtedness mentioned in the complaint, as having been incurred some time during the four years previous to the beginning of the action, the sum of $238.35, and that the sum of $139.30 is unpaid, due, and owing, thereby presenting to the superior court a complaint in the following language:

> "Plaintiff complains of defendants, and alleges:
>
> "I. That defendants became indebted to plaintiff within the four years last past in the sum of $427.55, of which sum $295 was for rent of land furnished to defendant Chun Hee Tong and $132.55 was for labor and services and wood furnished to defendant, Chin Chew, all at the special request of defendants, who are partners.
>
> "That no part of said sums has been paid except $238.35, and that the sum of $139.30, is unpaid, due, and owing.
>
> "Wherefore plaintiff prays judgment against defendants in the sum of $139.30 and for costs of suit. [Signed] C. D. McComish,
> "Attorney for Plaintiff,"

—which needs only to be read to establish the fact that by amending the complaint, which did not state a cause of action, the plaintiff stated a cause of action showing jurisdiction only in the justices' court.

The motion of the defendant Chun Hee Tong to dismiss should have been granted, but, as the court entered judgment that the plaintiff take nothing against said defendant by reason of his action, it follows that the judgment of the trial court should be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

81 Cal. App. 711

TURNER HARDWARE & IMPLEMENT CO. v. JUSTICE'S COURT OF TOWNSHIP NO. 1 IN SHASTA COUNTY et al. (Civ. 3251).

(District Court of Appeal. Third District, California. March 11, 1927.)

1. Justices of the peace ⚿81(1)—Letter held not to show agreement to perform contract in county of justice court action, authorizing service of summons in county of defendant's domicile (Code Civ. Proc. § 848, subd. 2).

Letter from defendant, stating that it was forwarding sign ordered by plaintiff addressee, *held* not to show agreement to perform in county of latter's residence, where justice court action was brought, so as to authorize service of summons at defendant's domicile in another county under Code Civ. Proc. § 848, subd. 2.

2. Justices of the peace ⚿81(1)—Justice court action for money paid under contract held not within statute authorizing service of summons in another county (Code Civ. Proc. § 848, subd. 2).

Action in justice court to recover money paid for electric sign, rejected by plaintiff as not of kind or quality ordered, was not on sale contract, but on assumpsit or implied contract for recovery of money paid, and hence not within exception in Code Civ. Proc. § 848, subd. 2, authorizing service of summons in county of defendant's residence, in action on contract to be performed in county of venue.

Original petition by the Turner Hardware & Implement Company, a corporation, for a writ of prohibition to the Justice's Court of Township No. 1, Shasta County, and R. P. Stimmel, Justice thereof. Writ granted.

Carr & Kennedy, of Redding, for petitioner.
Carter & Smith, of Redding, for respondents.

HART, J. This is an original petition for a writ of prohibition, the object of which is to prevent the respondents from proceeding with the trial of a certain action pending in respondent court, and wherein one Clara C. Kise is plaintiff and the petitioner herein is defendant.

It appears that, on the 23d day of September, 1925, said Clara C. Kise and a concern named "the O. F. Mitchell Company," engaged in business in Springfield, Ohio, entered into a written agreement whereby said company agreed to manufacture for and deliver to said Kise an electric sign for a hotel in the city of Redding, Shasta county, and for which said Kise agreed to pay the total sum of $102, of which amount a cash payment of $25 was to be paid on the execution of the agreement and the balance of the agreed price upon the delivery of said sign; that, in the making of said agreement, the O. F. Mitchell Company was represented by its agent, one J. A. Harbert, to whom Kise delivered the cash deposit or payment of $25, as required by the writing. It is further made to appear that, under date of February, 1926, the petitioner, from the city of Modesto, Stanislaus county, its place of business, addressed the following letter to said Clara C. Kise:

"Dear Madam: Mr. J. A. Harbert, formerly of the Mitchell Sign Company of Springfield, Ohio, has turned over to us your order for an electric sign.

"We have built this sign according to the specifications furnished us by Mr. Harbert, and today we are forwarding it to you by express, C. O. D. for $76.50.

"We trust that this sign will reach you in good order, and we know that you will be pleased with the same.

"Very truly yours,
"Turner Hdwe. & Impl. Co.,
"By S. H. Wentz, Credit Manager.
"SHW: AG."

The petitioner shipped the sign to Mrs. Kise, as indicated in said letter, through the American Railway Express Company, C. O. D.; that Mrs. Kise, upon the delivery of the sign to her by said company, paid to the latter for the petitioner and as express charges the sum of $81.75. Upon inspecting the sign Mrs. Kise found, according to her complaint in the action against the petitioner, and to prohibit the trial of which by the respondents is the purpose of the present proceeding, "that said sign was not constructed in accordance with said contract, and not the kind or character of a sign ordered by plaintiff, and was constructed of inferior material, and was smaller and less substantial than the sign ordered by plaintiff; that plaintiff immediately reshipped said sign to said defendant, and demanded that defendant pay to her the amount she was required to pay on account of said sign, to wit, the sum of $107."

The petitioner refused to return to Mrs. Kise the amount she had paid for the sign, and thereafter (on the 19th day of April, 1926) she instituted against the petitioner, in township No. 1 of Shasta county, the action to recover the money so paid, which it is the object of the present proceeding to prevent respondents from trying. On May 10, 1926, and subsequently to the service of the copy of the complaint and summons in said action on the petitioner, the latter filed with the respondents and served upon the attorneys for Mrs. Kise a notice that they intended to, and would, on the 15th day of May, 1926, move the respondent court to quash the summons and the service thereof upon petitioner upon the ground that the action by Mrs. Kise against petitioner does not fall within the class of justice's court actions referred to by section 848 of the Code of Civil Procedure in which summons may be served outside the county wherein such actions are brought.

Said motion was pressed by the petitioner and denied by the respondents.

Section 848 of the Code of Civil Procedure specifically enumerates, in as many subdivisions, five different and distinct exceptions to the general rule that the summons in actions brought in the justice's court cannot be served outside the county wherein the actions are brought. The respondents, however, rely entirely upon the terms of subdivision 2 of said section for the support of their contention that the summons issued in the case of Kise against petitioner herein may properly or legally be served upon the latter at the place of its residence, which, as seen, is in a county other than that in which said action was instituted. It is therefore, unnecessary to pay attention herein to the other subdivisons of section 848.

[1] The exception to the general rule as to the service of summons in justice court actions as set forth in subdivision 2 of said section is applicable in those instances where the action is brought against a party who has contracted in writing to perform the obligation upon which the action is founded at a particular place, and who resides in a different county. In such case, proceeds said subdivision:

> "The summons may be served in the county in which he (the party against whom the action is brought) resides."

[2] The respondents here argue that, even if it be conceded that the Mitchell Company did not in the original agreement between it and Mrs. Kise expressly agree to perform the obligation which was the subject of said agreement in Redding, Shasta county, it is, nevertheless, true that the petitioner, having accepted the transfer to it of said contract, did agree to perform the obligation in Redding by virtue of the letter from it to Mrs. Kise, and which is hereinabove quoted. We see nothing in said letter which sustains the position of the respondents in that particular. If, however, the letter could be so construed, the fact remains that the action brought by Mrs. Kise against the petitioner is not founded either upon the original contract or the letter referred to. Unquestionably, Mrs. Kise disaffirmed the contract, and sued upon an implied contract for the recovery of the money which she paid to the petitioner as for money had and received. See Fitzhugh v. University Realty Co., 46 Cal. App. 198, 200, 188 P. 1023; Hammond v. Ocean Shore Co., 22 Cal. App. 167, 133 P. 978. The contract between her and the Mitchell Company or between her and the petitioner is merely an incident to the action upon which she elected to rely, and, while it is true said contract would perhaps be important in her case as evidence of the price which she agreed to pay for the sign and the character of the sign which it was agreed should be made for her, still, further than that, the writing would be of no importance or significance. Since, therefore, her action is not upon the contract, but necessarily a disaffirmance or rescission thereof, and is upon assumpsit or an implied contract for the recovery of the money which she paid for the sign, it follows that her action does not come within the exception mentioned in subdivision 2 of section 848 of the Code of Civil Procedure, nor within any of the exceptions mentioned in said section, and, consequently, the service or attempted service of summons in said action upon the petitioner was and is void, and is of no force or effect. It results that the respondent court has not acquired, and cannot acquire, jurisdiction in said action of the person of the petitioner, and thus is without jurisdiction to try and determine said action or the issues thereof.

Let the writ issue as prayed for.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. RABE. (Cr. 1244.) ★

(District Court of Appeal, Second District, Division 2, California. March 8, 1927. Hearing Granted by Supreme Court May 5, 1927.)

1. False pretenses ⚿7(5)—Misrepresentations on sale of stock that company had bought land and procured certain individuals as directors held false pretenses (Pen. Code, §§ 950–952).

Misrepresentations in obtaining subscriptions of stock that company had bought harbor land, that bond issue had been arranged for, and that particular individuals had been chosen as directors, and that subscriptions were worth amount charged therefor, *held* false pretenses as representations of past facts; indictment charging such representations being in conformity with Pen. Code, §§ 950–952.

2. False pretenses ⚿15—False pretenses statute covering property real or personal held to extend to real property, despite provision that crime is punishable as for larceny of property so obtained (Pen. Code, § 532, as amended).

Pen. Code, § 532, as amended, providing every person knowingly defrauding any other person of property, whether real or personal, is punishable in same manner and to same extent as for larceny of money or property so obtained, *held* to include fraudulently obtaining real property, though real property is not subject of larceny; artificial distinction between real and personal property as to actions to quiet title being removed by 1921 Amendment of Code Civ. Proc. § 738.

3. False pretenses ⚿49(1)—Evidence held to sustain conviction for obtaining property by false pretenses.

In prosecution of person selling stock in corporation for obtaining property by false

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★For opinion of Supreme Court adopting opinion of Court of Appeal, see 261 P. 303.

pretenses, evidence *held* sufficient to sustain verdict.

4. Criminal law 🔑1032(7)—Claim of material variance could not be asserted for first time on appeal.

Claim of material variance not presented to trial court could not be asserted on appeal.

5. False pretenses 🔑38—Proof of one material misrepresentation will sustain conviction for false pretenses.

Only one material misrepresentation need be proved to sustain conviction for obtaining property by false pretenses.

6. False pretenses 🔑38—Where defendant made no claim that he did not receive money under check which he obtained, he could not complain of failure to prove cashing of check.

Where defendant, accused of obtaining property by false pretenses, made no claim that he did not receive money under check given him, he could not complain of failure to prove check had been cashed.

7. False pretenses 🔑38—That moneys were paid to defendant in capacity as trustee held not fatal variance in prosecution for obtaining money by false pretenses.

In prosecution for obtaining property by false pretenses, that evidence showed moneys were paid to defendant in capacity as trustee *held* not fatal variance with proof and allegation that defendant received money and property; it being unnecessary to show what defendant did with money.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Paul B. Rabe was convicted of obtaining money and property by false pretenses, and he appeals. Affirmed.

Gretchen Wellman and Frank G. Howe, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

THOMPSON, J. The appellant was charged with the offense of obtaining money and property by false pretenses. The indictment was in four counts, upon all of which the jury returned a verdict of guilty. Judgment was pronounced upon the verdict, the sentence was suspended upon the third and fourth counts, and after denial of appellant's motion for a new trial he instituted this appeal from the judgment and order denying his motion.

The first count charged the obtaining on August 1, 1924, of 200 shares of capital stock of the Moreland Truck Company and 20 shares of the capital stock of the First Federal Securities Company, taken together, of the total value of $4,000, from Elmer E. Owen. The second and third counts charged the obtaining on August 2 and 5, 1924, from Henrietta McGaw, of $1,250 and $4,000, respectively, and the fourth count, of obtaining on August 15, 1924, from the same person, a deed to real property of the value of $11,000. In each instance the money or property was advanced in payment of subscriptions for what was termed preorganization stock of a proposed corporation to be known and styled the Long Beach Dock & Terminal Company, which company was not incorporated upon any of the dates of the subscriptions or subsequently.

[1] The misrepresentations were the same in each instance and were as follows: (1) That defendant was taking preorganization subscriptions for the purchase of capital stock of the Long Beach Dock & Terminal Company; (2) that the company had bought and practically paid for 140 acres of harbor land, upon which to erect docks and warehouses; (3) that a bond issue of $6,000,000 had been "arranged for" to cover the cost of construction; (4) that Gen. George W. Goethals had been secured to act as chairman of the board of directors and as supervisor of construction; (5) that the promoters had secured the consent of Senator Shortridge, Congressman Lineberger, and C. H. Windham, city manager of Long Beach, to act as officers and directors of the company; (6) that the subscriptions were worth the amount charged therefor.

At the opening of the trial defendant objected to the introduction of evidence on the ground that the facts stated did not constitute a public offense; that matters were stated which constituted a justification; and that there was not a compliance with sections 950, 951, and 952 of the Penal Code. He now urges the same objections as insufficiencies of the indictment. His position may be stated as follows: That the indictment shows that the defendant was in fact taking preorganization subscriptions; that there is no allegation that the subscriptions were not of the value charged therefor; and that as to all other representations they relate to future acts, i. e., the organization in the future of a company to take over the land and to be officered by the individuals named. This thought runs all the way through appellant's brief and is the foundation upon which rests most of his argument. Such is not the effect of the allegations. They are very similar to the facts in the case of People v. Ballard (Cal. App.) 241 P. 596. From a bare recital of the allegations one would judge that all that remained to constitute the Long Beach Dock & Terminal Company a corporate entity was to comply with legal formalities; that to all intents and purposes the personnel of its directors had been determined; that its promoters were sufficiently financed to have purchased for it most valuable real property holdings and had arranged very extensive financing. All of these things were representations of past acts and present conditions and not outbursts of the prophet looking with optimistic eye into the distant future. They are all alleged to be false, and we can hardly imagine what might be added to bring it more squarely within the condemnation of the statute. The allegation of falsity not only covers the representation that it was preorganization stock, but also that it was worth the price charged.

[2] Outside of these objections, however, we do not find a serious question concerning the fourth count of the indictment. While appellant pays scant attention to the third and fourth counts by reason of the fact that sentence was suspended, there is sufficient in his brief that we have concluded that we must examine and pass upon them. As has been stated, the indictment shows the obtaining of a deed to real property of the value of $11,000. Counsel says that this count is fatally defective on the authority of People v. Folcey (Cal. App.) 247 P. 916, wherein it is held that no penalty is provided for obtaining real property by false pretenses. While a petition for a hearing of this case in the Supreme Court was denied, we feel that under the authority of People v. Davis, 147 Cal. 346, 81 P. 718, and Bohn v. Bohn, 164 Cal. 532, 129 P. 981, we are not bound to accept the language as precedent, but should give expression to the reasons for our dissent therefrom. The entire history of larceny, it is true, refers to the felonious taking and carrying away of personal property, so that there is no such thing as the larceny of real property. When on account of defects in the common law relative to cheats and expanding commerce it was found necessary to extend the law by statute, the similarity of the offense to larceny operated to confine the statute to personal property, in which condition section 532 of the Penal Code was found when the case of People v. Cummings, 114 Cal. 437, 46 P. 284, came before the Supreme Court. To remedy the deficiency thus existing in the law, and pointed out in this case, the Legislature amended section 532 to read as follows, the amendment being here set forth in italics:

> "Every person who knowingly and designedly, by any false or fraudulent representation or pretense, defrauds any other person of money, labor, or property, *whether real or personal*, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets possession of money or property, or obtains the labor or service of another, is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." (Italics ours.)

It will be noted, of course, that the concluding language was not changed, so that if there be a penalty for obtaining real property by false pretenses we must insert the words "like value" or some similar expression, after the word property, where it last occurs in the section, in which event the final portion would read as follows: "Is punishable in the same manner and to the same extent as for larceny of the money or property of like value so obtained." If this construction be not adopted the amendment is fruitless and the words "whether real or personal" mean nothing. It is not our understanding of the rules of construction that such should be the case, but that rather effect should be given to each word and phrase if fairly and reasonably possible. Many cases might be cited to support this rule. It has been said (Maguire v. Cunningham, 64 Cal. App. 536, 543, 222 P. 838) that the distinction between real and personal property, so far at least as actions to quiet title are concerned, is purely artificial. This particular artificiality was removed by amendment of section 738 of the Code of Civil Procedure in 1921, and in this age of industrial development, where it is almost as easy to defraud one of real property as of personal property, we think the plain intent of the Legislature to remove the artificiality under discussion should govern and that we should hold the fourth count of the indictment to be sufficient.

[3-5] The next assertion of appellant is that the evidence is insufficient to support the verdict. We have carefully examined the voluminous transcript and fail to see how the jury could have arrived at any other verdict. Concededly Senator Shortridge, Congressman Lineberger, and Mr. Windham had never consented to become officers and had never consented to the use of their names. The representations were freely made that "they," which "they" must mean the organizers or promoters of the proposed company, had purchased from the Union Pacific and practically paid for 140 acres of harbor land—and it was positively established that they had not purchased from the Union Pacific 140 acres or any other land. If the defendant or any one associated with him had purchased 140 acres of land from any other source not covered by his representation, it was his duty to present such evidence after proof of the falsity of the representation. Shemwell v. People, 62 Colo. 146, 161 P. 157. Instead, on the stand he denied having made the representation. Nor can the defendant avail himself of the claim that the proof shows a false representation that the purchase of 140 acres was made of the Union Pacific and that this proof is at variance with the allegation that they had purchased 140 acres, on this appeal, for the reason that if such amounts to a material variance, and we do not so believe, it was not presented to the trial court. People v. Fraser (Cal. App.) 253 P. 340; People v. Gonzales, 69 Cal. App. 609, 231 P. 1014; People v. Fuski, 49 Cal. App. 4, 192 P. 552. It is sufficient if one material misrepresentation be proved. People v. Fraser, supra; People v. Griesheimer, 176 Cal. 44, 167 P. 521. In

this case several misrepresentations were conclusively established.

[6] Nor can it be seriously argued that the subscribers received what they paid for. As has been indicated, every representation of fact, every suggestion, the entire scheme, was based upon the immediate organization of the corporation, which was never done. The subscribers got nothing except a subscription agreement which likewise was so artfully drawn as to leave out a time limit for incorporation, apparently because the actual incorporation was represented to be almost a closed incident. Lured on by the imposing distribution of a supposedly large capital, the subscribers parted with their money and property and received what they paid for only on the theory that they were subscribing for the "hole in the doughnut."

Attack is next launched upon the testimony specially directed toward count one, and it is claimed to be insufficient to show the obtaining from Mrs. McGaw of $1,250 in cash. The testimony shows that she had invested $1,500 with Harry C. Weist Company, with whom the defendant was at the time of investment associated. She executed an assignment of her claim for the return of the money to the defendant. Then when the check was made out to her—Mr. Farrell, an associate of the defendant, brought the check to her—she indorsed it; delivered it to Mr. Farrell, who in turn says he delivered it to the defendant. On August 18 the defendant wrote to Mrs. McGaw, saying that he had received confirmation of her subscription of August 1, which is the subscription in question. Under these circumstances we think the jury were fully justified in believing that the defendant had cashed the check. In the case of People v. Whalen, 154 Cal. 472, 98 P. 194, which was a case of obtaining money by false pretenses, it appeared that Mrs. Martin was induced to buy 100 shares of stock at the price of $1,000 and gave the defendant a check for $1,200 in payment for the 100 shares, plus 20 shares purchased by her sister. "The check was given on May 3, 1905. The defendant remained in Sacramento, where this transaction occurred, for several weeks thereafter, and, while there, hired men to go with him to the mines, which were in the state of Nevada, and for more than six months thereafter he was in charge of the affairs of the mining company, either at the mines or at Sacramento." The court says:

> "There was nothing disclosed by the evidence to indicate that the defendant experienced any difficulty or delay in obtaining payment of the check. The facts concerning the payment of the money were all elicited upon the examination in chief of the two witnesses. There was no cross-examination on that subject, nor any attempt, at any stage of the case, to show that the check had not been paid in the usual course of business. Under the circumstances, the jury were justified in construing the testimony of the prosecuting witness and her sister to mean that the money called for by the check had actually been paid."

While we think that this case is decisive of the question here, we call attention to another case where the charge was obtaining money by false pretenses and the check was drawn bearing a general indorsement the same as in the instant case, and the court says:

> "Before passing this phase of the case it might be well to call attention to the fact that the check bears a general indorsement, and there is nothing in the record inconsistent with the fact that it was paid in due course. The least that can be said, under the circumstances, is that the prosecution made out a prima facie case, and assuming, without deciding, that the defendant might properly make out a defense by showing that the maker was ultimately relieved from payment, the burden to do so, after the prima facie showing on the part of the prosecution, was cast upon him, and, not having done this, he cannot now complain." People v. Steffner, 67 Cal. App. 1, 11, 227 P. 690, 695.

No claim was made by the appellant here that he did not receive the money upon the check and for the reasons stated he cannot be heard to complain. Also, in the case of People v. Hutchings, 56 Cal. App. 397, 205 P. 480, it was held that proof of receipt of check sufficiently supports the charge of obtaining money in the absence of evidence that the check was not cashed.

Counsel argues that there is no causal connection between the false pretenses and the obtaining by defendant of the money and property of complaining witnesses. What has been said heretofore with respect to the immediate organization of the proposed corporation is applicable at this juncture. Furthermore, we think that the case of People v. White, 7 Cal. App. 99, 93 P. 683, is not at all in point for the reason that there is a connection alleged and proved in this case. There was a natural connection between the pretenses and the parting with their money and property by the complaining witnesses. Industrial corporations of the character contemplated in the scheme of the defendant owe their success or failure in many instances to the character, integrity and genius of the men composing the organization and to their ability to finance the organization with large sums of money, such as was proposed here. There can be no doubt that the representations here made were the inducing cause of the investment the complaining witnesses supposed they were making.

[7] The last argument advanced by appellant, that the subscription agreement, having recited that the moneys were paid to the defendant as trustee, that there is a fatal variance between the proof and the allegation that the defendant obtained the money and property is fully answered by the cases of People v. Bryant, 119 Cal. 597, 51 P. 960, and

People v. Griesheimer, supra, in which last case this language is used:

> "The crime charged against this defendant was complete upon his obtaining the money from Muck by false and fraudulent representations, and it was not necessary to show what defendant did with it."

Also, in the case of State v. Balliet, 63 Kan. 707, 66 P. 1005, quoting from an Indiana case:

> " 'The law does not make it an element of the offense of obtaining money or property under false pretenses that it shall be obtained for the person making the pretenses himself, or that it shall be intended to obtain it for another, for it is provided that "whoever shall obtain money or property" by false pretenses shall be guilty of a felony.' "

Judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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81 Cal. App. 427

HUTCHISON v. RECLAMATION DIST. NO. 1619 et al. (Civ. 5658.) ★

(District Court of Appeal, First District, Division 2, California. Feb. 21, 1927. Hearing Denied by Supreme Court April 21, 1927.)

1. Appeal and error 🔑662(2)—Statement of court in former action regarding record which it had before it is treated as conclusive, in absence of contrary showing.

Court's statement regarding record in former action will be considered conclusive where court had entire record before it, nothing to contrary being shown.

2. Judgment 🔑654—Money judgment against reclamation district after dismissal of trustees as for misjoinder held not res judicata of subsequent mandamus action to require trustees to issue warrant in payment of judgment (Pol. Code, § 3457, and § 3453, as amended by St. 1899, p. 9; Code Civ. Proc. §§ 1085, 1086).

Money judgment against reclamation district, under Pol. Code, § 3453, as amended by St. 1899, p. 9, after dismissal as for misjoinder as to defendants' trustees, joined with request for mandamus to compel them to issue warrants to pay the judgment, *held* not res judicata to proceedings, under section 3457, for mandamus to compel trustees to issue warrants to pay judgment, in view of Code Civ. Proc. §§ 1085, 1086.

3. Mandamus 🔑1—Mandamus is extraordinary remedy in nature of equitable interference.

Mandamus is extraordinary remedy in nature of equitable interference, supplementing deficiencies of common law.

4. Mandamus 🔑1—Issuance of mandamus is largely controlled by equitable principles.

Though classed as legal remedy, issuance of mandamus is largely controlled by equitable principles.

5. Mandamus 🔑7—Mandamus is matter for exercise of judicial discretion, not matter of right.

Remedy of mandamus is awarded, not as matter of right, but in exercise of sound judicial discretion.

6. Mandamus 🔑15—Mandamus may be denied where respondent shows willingness to perform act, or where public interest might be injuriously affected.

Mandamus may be denied where respondent shows willingness to perform act required without coercion, where public interest might be injuriously affected, or where party seeking relief does not come into court with clean hands.

7. Mandamus 🔑3(2)—Mandamus will issue only in absence of plain, speedy, and adequate legal remedy (Code Civ. Proc. § 1086).

As general rule, mandamus will issue only where there is no plain, speedy, or adequate remedy in ordinary course of law, in view of Code of Civ. Proc. § 1086, requiring its issuance in such cases.

8. Jury 🔑19(3)—Constitutional right of trial by jury does not apply in proceedings for mandamus (Const. art. I, § 7; Code Civ. Proc. § 1090).

Right of trial by jury, granted by Const. art. 1, § 7, does not apply to mandamus because of its nature as a special proceeding, though court may, in its discretion, under Code of Civ. Proc. § 1090, order question of fact affecting substantial rights of parties to be tried before jury.

9. Drains 🔑20—Allowing direct suit against reclamation district gave creditors new remedy, where former means of redress was proceeding by mandamus to compel issuance of warrant (Pol. Code, § 3457, and § 3453, as amended by St. 1899, p. 9).

Authorization by Legislature of ordinary action of law against reclamation district, by Pol. Code, § 3453, as amended by St. 1899, p. 9, *held* to provide new remedy to creditor of district where sole means of redress theretofore was suit by mandamus to compel issuance of warrant upon district's funds, under section 3457, under which claimant was not entitled to jury trial and granting of relief, was matter of discretion.

10. Drains 🔑20—Jury 🔑14(2)—Statute giving creditor of reclamation district right to sue district and recover money judgment included jury trial and judgment coextensive with right (Pol. Code, § 3457, and § 3453, as amended by St. 1899, p. 9).

New remedy, provided by Pol. Code, § 3453, as amended by St. 1899, p. 9, whereby creditor could sue reclamation district and recover money judgment, gave creditor right to jury trial and judgment depending on facts involved, not upon discretion of court or jury as under former statute, section 3457, which limited credi-

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★Hearing denied by Supreme Court.

tor's remedy to mandamus to compel issuance of warrant.

11. Mandamus 🔑14(1)—Mandamus to compel performance of duty imposed by law must be predicated upon prior demand (Code Civ. Proc. § 1085).

Mandamus, which lies only in case of failure to perform duty imposed by law, under Code Civ. Proc. § 1085, must be predicated upon prior demand to perform that duty.

12. Mandamus 🔑2—Statute, permitting suit against reclamation district, reduced former remedy by mandamus to compel issuance of warrant to ordinary action of mandamus (Pol. Code, § 3457, and § 3453, as amended by St. 1899, p. 9; Code Civ. Proc. §§ 1085, 1086).

Pol. Code, § 3453, as amended by St. 1899, p. 9, permitting suits against reclamation district, reduced former remedy of creditor by mandamus to require issuance of warrant, under section 3457, to ordinary action of mandamus, under Code Civ. Proc. §§ 1085, 1086, providing writ may issue to compel performance of act which law specially enjoins, and that it must be issued where there is no plain, speedy, or adequate remedy at law.

13. Mandamus 🔑3(4)—On entry of money judgment against reclamation district, court could not properly grant additional remedy of mandamus for issuance of warrant (Pol. Code, § 3453, as amended by St. 1899, p. 9).

Where, in action by creditor against reclamation district, court gave affirmative relief in nature of judgment against district, under Pol. Code, § 3453, as amended by St. 1899, p. 9, authorizing direct action against district, court could not properly grant creditor additional remedy of mandamus.

14. Mandamus 🔑102(1)—Judgment creditor held entitled to mandamus to require trustees of reclamation district to draw warrant in payment of final judgment after demand and refusal (Pol. Code, § 3453, as amended by St. 1899, p. 9).

Where creditor had recovered money judgment against reclamation district, under Pol. Code, § 3453, as amended by St. 1899, p. 9, which judgment had become final but remained unsatisfied, creditor *held* entitled to mandamus on showing that demand had been made upon trustees to draw warrant in payment of judgment, which trustees refused to do, there being no plain, speedy, or adequate remedy at law to require issuance of warrant.

15. Judgment 🔑585(5)—Judgment is not necessarily conclusive as to right accruing subsequent to former trial not in issue at trial, and not necessary to disposition of trial issues.

Former judgment is not necessarily conclusive of right accruing subsequent to former trial on which issue was not tendered, no determination thereof being necessary to complete disposition of issues tendered, as judgment, while conclusive upon issues tendered by plaintiff's complaint, is not always final as to every matter which might have been litigated in action.

16. Limitation of actions 🔑61—Statute of limitations against judgment creditor's right by mandamus to require trustees of reclamation district to issue warrant in payment of judgment ran from date judgment became final (Code Civ. Proc. § 339).

In action by judgment creditor for mandamus against reclamation district to require trustees to issue warrant in payment of judgment, action *held* not barred by two-year statute of limitations, under Code Civ. Proc. § 339, where suit was commenced within two years following date upon which judgment became final, it being immaterial as to when claim upon which judgment was based accrued.

17. Judgment 🔑4—Recovery of judgment creates new debt, distinct from original claim.

Recovery of judgment creates new debt or liability, distinct from original claim, which is not merely evidence of claim, but is thereafter the substance of the claim itself.

18. Appeal and error 🔑1191—Judgment appealed from becomes final on filing remittitur.

After appeal, judgment becomes final by filing of remittitur.

19. Limitation of actions 🔑61—Judgment against reclamation district created new debt against district, and limitations, as respects mandamus to compel payment, ran from final judgment (Pol. Code, § 3453, as amended by St. 1899, p. 9).

Judgment against reclamation district, in action under Pol. Code, § 3453, as amended by St. 1899, p. 9, permitting suit against district, created new debt or liability, distinct from creditor's original claim or demand, and statute of limitations, as respects mandamus to compel payment, ran from time judgment became final.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by W. W. Hutchison against Reclamation District No. 1619 and William T. Sesnon and others, trustees, and E. A. Bridgford, Secretary of the Reclamation District. Judgment for defendants, and petitioner appeals. Reversed.

J. E. Rodgers and A. F. Bray, both of Martinez, for appellant.

E. A. Bridgford and Albert Picard, both of San Francisco, for respondents.

NOURSE, J. Plaintiff sued in mandamus to compel the defendants to draw and issue to plaintiff their warrant upon the funds of the defendant reclamation district in payment of a judgment in favor of plaintiff and against the district in the sum of $2,116, and interest, rendered on July 10, 1922, and becoming final on July 28, 1924. The defendants answered, pleading the former judgment in bar to plaintiff's right to mandamus, and also pleading the bar of the statute of limitations. Judgment went for the defendants on both issues, and the plaintiff has appealed upon a typewritten record.

In support of the judgment the respondents argue that, inasmuch as the appellant in the former action sought mandamus to compel the issuance of a warrant, and as the court merely gave a money judgment against the district, we must assume that the court in that action found against the respondents' right to mandamus and that the judgment is to that extent "res adjudicata." It is also argued that as the present suit involves the same subject-matter as the former action (compensation for services rendered the district in 1919), this cause is barred by the statute of limitations. The appellant contends that the statute gave him two alternative remedies—to sue the district for a money judgment, or to sue the trustees in mandamus to compel them to issue a warrant; that he chose the former remedy and obtained a judgment against the district which is not a bar to the present suit. It is also argued on appellant's part that the present suit is one to require the issuance of a warrant in payment of an adjudicated claim, and that the statute of limitations runs from the time the former judgment became final rather than from the time when the work upon which the claim was founded was performed. The questions presented on this appeal are questions of law alone—as to whether the trial court correctly concluded that the appellant's action in mandamus was barred by the former judgment and by the statute of limitations.

The controversy arose over the refusal of the trustees of the district to pay appellant's claim for services rendered to the district at the special instance and request of the trustees. In the former action the trustees claimed that the district was not liable because they had not formally contracted with the appellant for the performance of the work. Judgment was rendered against the district, from which it appealed to the district court of the Third district. That court held (67 Cal. App. 488, 227 P. 787) that, the trustees having by resolution declared an intention to have the work done, one of them having by letter engaged appellant to perform it, all the members of the board having acquiesced in this action, the district having received the benefits, and the trustees having drawn their warrants for partial payments for the work as it progressed, a contract to pay for the entire work was implied which was binding upon the district. A petition for a transfer to the Supreme Court was denied, and the remittitur covering the affirmance of the judgment was filed in the superior court on July 28, 1924. In December, 1924, and again in January, 1925, the appellant herein demanded of the trustees that they draw their warrant for payment of the judgment and interest. This demand having been refused, this action was commenced to compel the trustees to draw their warrant as demanded.

The judgment roll in the former case was received in evidence for the purpose of showing that, though the action was commenced against the district and the trustees, the judgment was against the district alone. From this it is argued, that the judgment must be taken as an adjudication in favor of the trustees as to appellant's right to mandamus. From this judgment roll it appears that the complaint was not framed in mandamus. It pleaded two causes of action—one on an express contract and one for the reasonable value of services rendered. Though the complaint prayed for the issuance of a warrant against the funds of the district it did not plead the inadequacy of a legal remedy to entitle the plaintiff to the extraordinary remedy of mandamus. In the judgment we find the recital that the plaintiff had dismissed as to the trustees individually, and that the court "granted the motion of defendant reclamation district No. 1619 for a nonsuit as to the first cause of action." Nothing is said as to the trustees in their capacity as such, but in the opinion of the District Court of Appeal it is recited that:

> "The trustees of the district were included as defendants, but their motion for a nonsuit was sustained by the trial court and the cause of action as against them dismissed."

[1] That court having had the entire record before it, we may take its statement of the record as conclusive, since nothing to the contrary is shown here.

[2] The situation is this: The plaintiff sued the district (a public corporation) for a money judgment and joined the trustees in a prayer asking that they be required to draw a warrant on the district funds for the amount found due. The defendants answered, pleading a misjoinder of parties, and the trustees moved for a nonsuit, which was granted. Findings were made against the district and the judgment went against the district alone. Nothing appears in either findings or judgment favorable to the trustees except the notation of the dismissal as individuals.

Section 3453 of the Political Code, as amended in 1899 (St. 1899, p. 9), authorizes a direct action against the district for a money judgment. This section was thus amended following the decision of the Supreme Court in Hensley v. Reclamation District 556, 121 Cal. 96, 53 P. 401, which held that such an action could not be maintained. The effect of the amendment was recognized by the later decision of the Supreme Court in San Francisco Savings Union v. Reclamation Dist., 144 Cal. 639, 646, 79 P. 374, 376, where this amendment was treated as:

> "A new law giving a new remedy to the creditor, a right to obtain payment by an ordinary action against the district on the debt."

Theretofore the only remedy was to sue, under section 3457 of the Political Code, in mandamus to compel the trustees of the district to issue a warrant for the amount claimed to be due or to levy an assessment to provide necessary funds. In this section it was provided that:

> "In any proceedings for a writ of mandate to compel the trustees to issue a warrant, if a controversy arises as to the amount that may be due to the plaintiff, the court must determine the same in the manner provided for determining controversies in other civil actions."

[3-6] Mandamus is an extraordinary remedy "in the nature of an equitable interference supplementing the deficiencies of the common law." Potomac Oil Co. v. Dye, 10 Cal. App. 534, 537, 102 P. 677, 678. "Although classed as a legal remedy, its issuance is largely controlled by equitable principles." Duncan Town Site Co. v. Lane, 245 U. S. 308, 312, 38 S. Ct. 99, 101 (62 L. Ed. 309); Arant v. Lane, 249 U. S. 367, 371, 39 S. Ct. 293, 63 L. Ed. 650. It is a remedy which is awarded "not as a matter of right, but in the exercise of a sound judicial discretion." Duncan T. Co. v. Lane, supra; Fawkes v. City of Burbank, 188 Cal. 399, 402, 205 P. 675; Wilson v. Blake, 169 Cal. 449, 454, 147 P. 129, Ann. Cas. 1916D, 205; Cal. Highway Com. v. Riley, 192 Cal. 97, 112, 218 P. 579. Cases may arise "where the applicant for relief has an undoubted legal right, for which mandamus is the appropriate remedy, but where the court may, in the exercise of a wise discretion, still refuse the relief." Wiedwald v. Dodson, 95 Cal. 450, 453, 30 P. 580, 581. "One who seeks the aid of the court in obtaining this remedy must come into court with clean hands." 38 Corp. Jur. page 574; Bashore v. Superior Court, 152 Cal. 1, 4, 91 P. 801; Turner v. Fisher, 222 U. S. 204, 209, 32 S. Ct. 37, 56 L. Ed. 165.

[7] The writ may be denied when the respondent shows a willingness to perform the act without coercion (38 Corp. Jur. page 554), or where, in the opinion of the court, its issuance is unnecessary—where it appears that the petitioner will obtain the relief sought without the writ and the public interest would be injuriously affected if a writ should issue (38 Corp. Jur. page 550). As a general rule, the writ will issue only where there is no plain, speedy, and adequate remedy in the ordinary course of law. Code Civ. Proc. § 1086; Turney v. Morrissey, 22 Cal. App. 271, 272, 134 P. 335; Foster v. Traeger, 56 Cal. App. 339, 340, 204 P. 1089; Montgomery v. Neilon, 41 Cal. App. 184, 189, 182 P. 456; Oliver v. Superior Court, 67 Cal. App. 358, 362, 227 P. 647; Spangenberg v. Western, etc., Co., 166 Cal. 284, 285, 135 P. 1127.

[8] Because mandamus is a special proceeding, the constitutional right of trial by jury (Const. art. 1, § 7) does not apply, but by special enactment the Legislature has provided that when the answer to an application for mandamus raises questions of fact affecting the substantial rights of the parties and essential to the determination of the application, the court may, "in its discretion, order the question to be tried before a jury." Section 1090, Code Civ. Proc.).

[9] It is hardly necessary to say that in each particular above noted the special proceeding in mandamus differs from the ordinary action at law, and that when the Legislature, by the amendment of 1899, authorized a direct suit against the district it did, as pointed out by the Supreme Court in San Francisco Savings Union v. Reclamation Dist., 144 Cal. page 646, 79 P. 374, provide a new remedy to the creditor of the district, whereas, prior to the amendment, the creditor's only remedy was to sue the trustees of the district in mandamus to compel them to issue a warrant upon the funds of the district (or to compel the levy of an assessment), in which action he was not entitled to a trial of the issues of fact by a jury as of right, and in which action the granting of relief was a matter of discretion in the court, and not a matter of right.

[10] By the new remedy provided in the amendment to section 3453 of the Political Code, the creditor was entitled as a right to a trial by jury of the issues of fact involved, when the action was at law, and was entitled as of right to a judgment against the district, whether the issue was before the court or the jury, if he established the facts entitling him to that relief, and this right to a judgment did not depend upon the discretion of the court or the jury. When the Legislature gave the creditor this alternative remedy of suing the district for a money judgment, it is of no consequence that it did not expressly provide that in its judgment the court should include the mandate that the judgment should be paid by means of a warrant drawn by the trustees upon the funds of the district if available. In this connection it is fair to assume that, when a creditor had reduced his claim to judgment after a trial wherein the issues of fact in controversy and the questions of law involved had been determined, the warrant would follow as of course and without specific mandate because, as the trustees of the district constitute the only governing body of the district, and the only body which may draw warrants upon the funds of the district, as well as the only body which may defend the district in the action brought against it, all questions of both law and fact determining the action against the district would be res adjudicata and binding upon the trustees of the district as such, in any action brought against them, under section 3457, to compel the issuance of a warrant.

[11] It might be added that it would be difficult to conceive of a case where the trustees could be properly joined as parties defendant with the district in an action of this kind. Mandamus would only lie when the trustees had failed to perform a duty imposed upon them by law, and it must be predicated upon a prior demand to perform that duty. A demand that they draw a warrant to pay a judgment not yet rendered would be an idle act, and a refusal to comply with the demand would be fully justified.

[12] It would seem that, when the Legislature gave the creditor another remedy through the amendment to section 3453, it reduced the remedy, authorized by section 3457, to the ordinary action of mandamus, covered by sections 1085 and 1086 of the Code of Civil Procedure.

The plaintiff, in the original action, did not follow either of these remedies alone, but he endeavored to avail himself of both. He joined the trustees as parties defendant with the district itself and pleaded facts sufficient to bring him under section 3453, but he failed to plead facts sufficient to entitle him to any remedy in mandamus. This is so because he not only failed to allege that he had no other plain, speedy, and adequate remedy at law (an allegation which it is true is merely an allegation of a conclusion of law [Turney v. Morrissey, 22 Cal. App. 271, 272, 134 P. 335]), but failed to plead any facts which would negative the existence of such a remedy. Furthermore, upon the face of the complaint and by the joinder of the district as party defendant, it affirmatively appeared from the complaint itself that another remedy did exist (an action under section 3453), and before the plaintiff could be heard in mandamus it was necessary for him to plead and prove that this other remedy was not a plain, speedy, and adequate one. Turney v. Morrissey, supra.

The issues presented to the trial court in the first action were as to the first cause of action whether an express contract had been executed, and, if so, whether it had been legally executed on the part of the district; and as to the second cause of action, whether the district was legally liable upon an implied contract. Having determined these issues and having come to the conclusion that the plaintiff was entitled to a money judgment against the district, it is fair to assume that the court declined to issue a writ of mandamus against the trustees for any of the following reasons: That the trustees were improperly joined as parties defendant; that judgment against the district was a plain, speedy, and adequate remedy; that all questions of fact having been determined and the legal liability having been adjudicated a warrant would follow as of course in satisfaction of the judgment without a writ of mandamus; or that the defendants satisfied the court that the judgment would be paid without the issuance of a writ. It is impossible to conceive of how mandamus for a warrant could be denied on its merits, where the plaintiff was adjudged to be entitled to the sum of money named in the judgment.

[13] Though the record discloses that the trial court in the first action did not affirmatively pass upon the applicant's right to a writ of mandate, it also discloses that the court did give to the applicant affirmative relief in the nature of a judgment against the district. It follows from what we have heretofore said that, because of that remedy, the court could not have properly granted the additional remedy of mandamus, and whether the action was dismissed as to the trustees, or whether the plaintiff was nonsuited as to them, the court entered the only judgment which would have been proper under the circumstances.

[14] When the cause came before the trial court in the second action, it having been shown to the trial court that the judgment had become final, that it was unsatisfied, that demand had been made upon the trustees to draw a warrant in payment of the judgment as required by law, that the trustees refused to perform this duty, and that because of these facts the legal remedy provided in section 3453 of the Political Code was no longer a plain, speedy, and adequate one, the plaintiff presented a case which in every feature entitled him to the writ prayed for. On that hearing the question of res adjudicata would arise only on the matter of the liquidation of the claim for services and the legal liability of the district to pay for them.

[15] It is unnecessary to analyze the cases cited by respondent which support the general rule that a judgment is conclusive not only as to the subject-matter in controversy, but also as to every other matter that was or might have been litigated in the action. It is sufficient to say that this rule is not always applicable literally, but that:

> "What is really meant by this expression is, that a judgment is conclusive upon the issues tendered by the plaintiff's complaint." Concannon v. Smith, 134 Cal. 14, 18, 66 P. 40, 42; Brown v. Brown, 170 Cal. 1, 6, 147 P. 1168; Lang v. Lang, 182 Cal. 765, 768, 190 P. 181; Linforth v. Montgomery, 195 Cal. 49, 58, 231 P. 735.

Thus, where a right has accrued subsequent to the former trial, and an issue was not tendered or determined in the former trial and was not necessary to a complete disposition of the issues tendered, it could not be said that the former judgment would, in every case, be conclusive as to that issue.

[16] We find no merit in respondents' pleas of the statute of limitations. The action is to compel the trustees to perform a duty imposed upon them by law—to draw a warrant to pay a final judgment. The action was brought within a few months of the time when the judgment became final. It is not based upon the original claim for services rendered—that claim has long since been adjudicated by the judgment in appellant's favor. In support of the pleas respondents advance the argument that as the issue was raised in their answer, the allegations of which the trial court found to be true, that

finding is conclusive upon us on this appeal. This is a correct statement of the record so far as it goes, but the question here is really one of law—as to the correctness of the trial court's conclusion of law that the cause of action was barred by the statute of limitations. So far as the issues of fact are concerned, the pleas were based upon the theory that the relief demanded in the former action was the same relief as demanded here, that is to say, that the subject-matter of both actions was the liability of the district to pay for the services rendered to the district. It was stipulated that the subject-matter of the claim against the district was for work performed prior to May, 1920; that no other services were rendered by the appellant to the district since that date; and that the claim now urged against the district was based upon the same services involved in the prior action. These were the facts which the trial court found to be true, and that finding is not attacked. But when the trial court concluded therefrom that the appellant's cause of action was barred by the statute of limitations it overlooked the fact that, though both claims may have originated from the same services, they were really two different causes of action.

[17, 18] The general rule is stated in 34 Corpus Juris, page 755, that:

> "The recovery of a judgment creates a new debt or liability, distinct from the original claim or demand, and this new liability is not merely *evidence* if the creditor's claim, but is thereafter the *substance* of the claim itself." (Emphasis ours.)

Here the original claim was for $2,422 based upon an implied contract to pay the reasonable value of services rendered. Upon trial of that issue the court determined that the reasonable value of the services was $2,116, and judgment for that amount was entered on July 10, 1922, and drew interest at the statutory rate from the date thereof. This judgment became final by the filing of the remittitur on July 28, 1924. On December 11, 1924, demand was made upon the trustees for the payment of the judgment, and a similar demand was made on January 29, 1925. This action was commenced May 11, 1925, demanding payment of the judgment, with interest thereon from the date of its entry—July 10, 1922. The only question of the application of the statute of limitations involved here is, therefore, whether this suit was commenced within the statutory time following the date when the judgment upon which it is based became final. The shortest period of limitation pleaded is that provided in section 339, Code of Civil Procedure, which is two years from the time when the cause of action shall have accrued. Inasmuch as this action was commenced within one year from the accrual of the cause of action, it was manifestly brought within time.

The only authority upon, which the respondents rely in support of their plea is San Francisco Savings Union v. Reclamation District No. 124, 144 Cal. 639, 79 P. 374. In that case the Supreme Court had before it the question of the effect of the amendment to section 3453, Political Code, made in 1899. Actions had been brought in mandamus to compel the trustees to levy an assessment to pay claims against the district, and these had all resulted in judgments favorable to the trustees. When the amendment to section 3453 was enacted in 1899, the claimants commenced an action under that section against the district to adjudicate these claims, all of which had arisen prior to May 10, 1885. In holding that the amendment of 1899 was not retroactive the Supreme Court said that, the right to resort to the remedy of mandamus having been long barred by the statute of limitations:

> "It would be an impossible construction of the amendment of 1899 to hold that it not only gives the right to maintain an action against the district upon these stale claims, but also revives the right to maintain the suit for a writ of mandate to compel an assessment which had been previously barred by the statute of limitations. Such a construction could never be based upon implication merely, but would require express and distinct words to that effect." Page 649 (79 P. 377).

[19] The court did not have before it a case, such as we have here, where the action, under section 3453, was brought within the statutory period and judgment rendered against the district. We must hold that such a judgment follows the general rule of all judgments upon unliquidated claims, and that it created a new debt or liability against the district. Such being the case in any action on that judgment, the statute of limitations would begin to run from the time when the judgment became final, and not from the time when the original debt was created.

Judgment reversed.

We concur: KOFORD, P. J.; STURTEVANT, J.

81 Cal. App. 618

PEOPLE v. PARKINSON et al. (Cr. 957.)

(District Court of Appeal, Third District, California. March 5, 1927.)

1. Criminal law 🔑511(4)—Accomplice's testimony as to burglary held insufficiently corroborated by storekeeper's testimony that store was burglarized, and that clothing found on defendant's person corresponded to his stock (Pen. Code, § 1111).

In prosecution for burglary of store, testimony of accomplice *held* insufficiently corroborated by storekeeper's testimony that store was burglarized, and that articles of clothing found upon defendant's person were similar to articles he carried at store, in view of Pen. Code, § 1111, providing conviction cannot be had upon testimony of an accomplice unless corroborated by other evidence tending to connect defendant with commission of offense.

2. Criminal law 🔑511(2)—Testimony corroborative of accomplice must tend to connect defendant with crime (Pen. Code, § 1111).

In prosecution for burglary, testimony of accomplice, plus slight additional evidence from other sources, *held* insufficient to sustain conviction, under Pen. Code, § 1111, requiring that corroboration of accomplice's testimony to sustain conviction must tend to connect defendant with commission of offense, and that corroboration merely showing commission of offense or circumstances thereof is insufficient.

3. Criminal law 🔑742(2)—Where facts are undisputed, question whether witness is accomplice is for court.

Where facts are admitted or undisputed, question whether certain witness is or is not an accomplice is for court's determination.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Carlson Parkinson and Oscar Anderson were convicted of burglary, and the defendant first named appeals. Reversed and remanded for new trial.

Arthur H. McCurdy and J. S. Daly, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. On the 8th day of September, 1926, an information was filed in the superior court of the county of Sacramento, charging the above-named defendants with having, on the 22d day of July, A. D. 1926, in the county of Sacramento, burglarized a certain store owned by one J. E. Holst, situated in the town of Fair Oaks, in said county.

Upon arraignment the defendant Oscar Anderson pleaded guilty. The defendant Calson Parkinson pleaded "not guilty," was tried and convicted, and prosecutes this appeal from the judgment of conviction and the order of the court denying his motion for a new trial.

Two questions are presented for our consideration: (1) That the testimony of the accomplice, upon which the defendant was convicted, was uncorroborated, as required by section 1111 of the Penal Code; and (2) that the court erred in its instructions to the jury.

[1] The defendant Anderson, after pleading guilty and being sentenced to the state prison, went upon the witness stand and testified to the circumstances constituting the alleged burglary. His testimony is to the effect that he and the defendant Parkinson went to the store belonging to the said Holst in an automobile; that Parkinson remained in the automobile while he, Anderson, proceeded to enter the store and took therefrom certain shoes, socks, overalls, shirts, a few knives, cheap watches, and two flash lights; that he brought the things out of the building and put them in the automobile; that he and Parkinson then returned to Sacramento; that he did not know whether Parkinson took any of the articles mentioned. A pair of socks, a pair of overalls, and a pair of shoes, taken from the person of the defendant, were then exhibited to the witness Anderson, and the witness then testified that the socks were somewhat similar to the ones that he took from the Holst store at Fair Oaks; also, that the overalls and shoes were similar. It does not appear from the testimony that any of the other articles mentioned by the witness Anderson were exhibited to the witness, nor does the testimony show what disposition thereof was made by the witness Anderson or any other person

J. E. Holst, the owner of the store, was sworn and examined and testified that his store was burglarized about the time mentioned in the information; that certain articles were taken therefrom; that the socks, shoes, and overalls found upon the person of the defendant were similar to such articles carried by him in his store; that similar shoes and socks were taken from his store on the night in question; that, while he carried similar overalls, he could not swear that any overalls were taken from his store.

There is no other testimony in the transcript relating to the offense charged, or in any wise tending to implicate the defendant Parkinson in the commission thereof. It may be here stated that a witness by the name of Charles Jason, who was sworn and examined on the part of the defense, stated that he was employed during the months of May, June, July, and August of 1926 at the Arcade Clothing Company's store in the city of Sacramento; that said store carried clothing and furnishing goods for men; that said store carried the same kind of socks, shoes, and overalls that were found upon the person of the defendant; and that during said period of time he sold to the defendant similar socks, shoes, and overalls.

This testimony, however, cannot be considered in the determination of this cause further than to say that the testimony adduced by the prosecution to corroborate the testimony of the accomplice, Oscar Anderson, does not rise to the requirement of section 1111 of the Penal Code. That section reads:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

The testimony of the witness Holst, relied upon by the prosecution as corroborative, shows only the fact that his store was entered and similar wearing apparel taken therefrom. He was unable to identify the articles, or to testify that they came from his store. The testimony that one is wearing similar articles, such as socks, shoes, and overalls, in view of the fact that such articles are made in large quantities, identical in kind and character, demonstrates by the very statement that no corroboration whatever exists in this case. It is not a question of whether the appellant is or is not guilty of the offense charged, or whether the witness Anderson, who pleaded guilty to the offense, did or did not tell the absolute truth. The section of the Penal Code to which we have referred requires that there must be some testimony tending to connect the defendant with the commission of the offense before a conviction can be had upon the statements of an accomplice. The so-called corroborative testimony in this case scarcely rises to the dignity of a suspicious circumstance, but, assuming that it does, the requirements of section 1111 of the Penal Code are not thereby met. The cases are legion that suspicious circumstances are not sufficient to constitute corroborative testimony tending to connect the defendant with the commission of the offense charged. We have only to refer to the citations contained in Kerr's Cyclopedic Codes of California, appended to section 1111 of the Penal Code.

[2] As the case must go back for a retrial, it is necessary to consider the objections to an instruction given by the court, and also to a certain instruction requested by the defendant and refused. At the request of the people the court gave the following instruction:

> "You are instructed that while the testimony of an accomplice alone is not sufficient to convict the defendant, you are instructed that the testimony of an accomplice, plus slight additional evidence from other sources, may be sufficient to convict him."

In support of this instruction the case of People v. Kelly, 69 Cal. App. 558, 231 P. 767, is cited. An examination of the authorities cited in that case, however, discloses the fact that no such instruction has been approved. The court in that case follows the provisions of section 1111 of the Penal Code as to the requirements of the corroborative testimony, showing it must tend to connect the defendant with the commission of the offense, and in the course of considering this question it cites other opinions in other cases, where language is used to the effect that such testimony standing alone may not, in itself, be of any great weight, but, nevertheless, that standing alone, unaided by the testimony of the accomplice, it must tend to connect the defendant with the commission of the offense. The instruction as given does not require that the corroborative testimony must tend to connect the defendant with the commission of the offense, but simply that the testimony of the accomplice, "plus slight additional evidence from other sources, may be sufficient to convict him." While language of this kind might properly appear in the opinion of a court in discussing corroborative testimony, it is not a correct statement of the law to be given to the jury in the form of an instruction, as it omits the essential requirements of the Penal Code governing such testimony.

Upon this appeal it is urged that, as the court gave an instruction in the exact language of section 1111 of the Penal Code, no injury resulted from the giving of the instruction which we have cited. From the fact that the cause must go back for retrial for the reasons which we have hereinbefore stated, the consideration of whether such erroneous instruction is cured by the giving of a correct instruction becomes immaterial further than to state that the instruction which we have set forth herein is erroneous and should not be given. The defendant requested, and the court refused to give the following instruction:

> "You are instructed that the witness Oscar Anderson, is an accomplice as to the crime charged against the defendant Parkinson, and you cannot convict the defendant upon the testimony of the accomplice, Oscar Anderson, unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof."

[3] It appears from the record that in the refusal to give this instruction the court relied upon the case of People v. Allison, 249 P. 881, where this court, in discussing the question of whether a certain person was or was not an accomplice, stated, in substance, that where the facts are in dispute as to whether a certain witness is or is not an accomplice, then and in that case the determination of the facts are for the jury; but where the facts are admitted or undisputed

it is a question of law alone. The case of People v. Allison, supra, was before the Supreme Court (see People v. Allison, 253 P. 318), and the court there uses the following language, taken from opinions previously decided by the same court:

> "Whenever the facts themselves are in dispute, that is to say, whenever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not disturbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice."

In the case at bar the fact as to Anderson being an accomplice is undisputed, and the facts set forth in his testimony showing that he is an accomplice are undisputed. There was nothing left for the jury to decide upon this question, and the instruction refused by the court should have been given.

The judgment and order of the trial court are reversed, and the cause remanded for a new trial.

We concur: FINCH, P. J.; HART, J.

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81 Cal. App. 615

PEOPLE v. SPAULDING. (Cr. 1433.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1927.)

1. Criminal law ⟹507(4)—Engaging in scheme to detect and punish crime does not constitute one an "accomplice," requiring corroboration.

Merely engaging in a scheme for detecting, exposing, and punishing a crime does not constitute one an "accomplice," whose testimony requires corroboration.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

2. Criminal law ⟹507½—Evidence held to show that prosecuting witnesses were only feigned accomplices, not requiring corroboration (Pen. Code, § 288a).

Evidence in prosecution for having committed an infamous crime, defined by Pen. Code, § 288a, *held* to justify conclusion that, if prosecuting witnesses were accomplices, they were only feigned, and hence testimony was not required to be corroborated.

3. Criminal law ⟹742(2)—Question of whether prosecuting witnesses were accomplices is for jury on conflicting evidence.

Where evidence is conflicting, question as to whether or not witnesses were accomplices is one for jury, and, having been determined by them in the negative, their verdict is conclusive.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

F. J. Spaulding was convicted for having committed an infamous crime, defined by Pen. Code § 288a, and he appeals. Affirmed.

M. F. McCormick, of Fresno, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., Le Roy McCormick, Dist. Atty., of Visalia, for the People.

CRAIG, J. The appellant was charged by information with having committed in the county of Tulare the infamous crime defined by section 288a of the Penal Code. He was convicted by a jury, and appeals from the resultant judgment upon the grounds: (1) That the people's witnesses were accomplices, and that, aside from their testimony, "there was not a particle of evidence to show the commission of the offense charged in the information"; (2) that, assuming them to have entrapped the defendant, if they induced him to commit an offense which he would not otherwise have committed, the conviction cannot be sustained.

It appears that on January 31, 1926, appellant was engaged in conducting an automobile supply store known as Spaulding's Filling Station, on the state highway, northerly from the town of Earlimart, in Tulare county; that on the afternoon of said date two deputy sheriffs of Kings county, named Pefley and Lant, appeared in the latter's automobile at appellant's establishment, and purchased oil for the machine; that Lant retired to a lavatory in the rear of the store, and, while he was absent, Pefley sold the appellant four boxes of candy. Pefley testified that, when he first exhibited samples of the candy to Spaulding, the latter ignored them, making repeated indecent proposals to him, and that the defendant put his hand on the private parts of the witness; that thereafter Pefley told Lant of the occurrence, stating that Spaulding was a moral pervert, to which Lant replied, "I know he is; he tried to approach me." Lant testified that during the same visit the defendant made obscene advances toward him, and, when repulsed, said: "Don't tell your partner anything." "The next time you come through stop in and I will be glad to have you." Each of these witnesses swore that they had previously been deputized for special work by the sheriff of Kings county, and were narcotic and liquor investigators; that, as a result of the experiences above mentioned, they decided to return to Spaulding's auto station on the following day. They directly and positively testified that they did return at about 7:30 p. m. on February 1st, and asked for oil or gasoline; that Lant went to the lavatory, and returned to the car, whereupon Pefley alighted, and proceeded to the outhouse in question; that appellant soon followed, and was in the act of committing the offense with which he was charged in the information when Lant appeared upon the scene, and the defendant was arrested. It appears that Spaulding violently resisted the witnesses; that he fought, bit, and kicked them, and attempted to escape; that the witnesses struck him with an automatic pistol, tripped him, and one of the men held him down while the other held off several persons who collected in response to loud cries of the defendant for "Bryan," who later proved to be his son; and that Spaulding then protested that he was being robbed. During the struggle parts of the latticework about the toilet was torn loose, and the ground was deeply marked by the shoes of the three men. Lant testified that while at the supply station he saw two other automobiles, one of which drove away.

Pefley and Lant were corroborated in all respects, except as to the improper solicitations and the commission of the criminal act charged. Other witnesses testified as to the appearance of the other two machines, the struggle in the rear of the premises, and the loosening of the latticework; one of the defendant's own witnesses testified that Spaulding bore evidences of the fight, although another of his witnesses swore that the defendant did not leave the counter in his store, except to sell the oil for Lant's car. Still other witnesses testified to the footprints, and that "the ground had been scuffed up as though there had been a scuffle from that point to the west end of this latticework, inside of the latticework, and then south entirely outside of the latticework," as described by Pefley and Lant. The defendant took the stand, and denied any wrongdoing. He appears to have made the assertion that he had been robbed of about $30, but it was testified that when first apprehended he made no mention of money.

[1-3] The prosecuting witnesses emphatically stated under oath that their participation in the transaction was for the sole purpose of detecting the defendant in the commission of a criminal act which they had reason to believe he would commit. It is well established that merely engaging in a scheme for the purpose of detecting, exposing, and punishing crime does not constitute one an accomplice whose testimony requires corroboration. People v. Keseling, 35 Cal. App. 501, 170 P. 627; People v. Bolanger, 71 Cal. 17, 11 P. 799. Certain of the testimony amply justifies the conclusion that, if Pefley and Lant were accomplices at all, they were feigned ones only, and hence their testimony need not have been corroborated. People v. Keseling, supra; People v. Farrell, 30 Cal. 316. Where, as here, the evidence is conflicting, the question as to whether or not the witnesses were accomplices is one for the jury, and having been determined by them in the negative, their verdict is conclusive. People v. Demera, 64 Cal. App. 121, 220 P. 673. The jury were instructed upon the rules as to reasonable doubt, conflicting evidence, and the testimony of accomplices, and, as they found the defendant guilty as charged, we must accept as true the evidence offered by the People in this respect.

We do not deem it neccessary nor expedient to discuss at length the remaining ground assigned for reversal, since there is nowhere in the record any evidence tending to show that the defendant was induced to commit the offense. There is strong, positive evidence to the contrary, as we have indicated, and the defendant as positively insisted that no offense was committed. Authorities cited by appellant to this proposition are therefore not in point.

No error appearing, the judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

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81 Cal. App. 624

HAMBERGER–POLHEMUS CO. v. HIND, ROLPH & CO., Inc. (Civ. 5659.)

(District Court of Appeal, First District, Division 2, California. March 5, 1927.)

1. Money received 🔑17(1)—Pleading of indebtedness for money had and received as common count is sufficient against demurrer.

Pleading of indebtedness as common count, alleging indebtedness to plaintiff for money had and received by defendant for use of plaintiff is sufficient against demurrer.

2. Pleading 🔑317(5)—Uncertainty as to how indebtedness pleaded under common count arose must be raised by demanding bill of particulars.

Remedy of defendant, where indebtedness is pleaded as common count to raise point of uncertainty as to how indebtedness arose, is by demanding bill of particulars and not by demurrer.

3. Sales 🔑384(1)—Measure of damages for breach of contract to purchase sugar is difference between contract and market price (Civ. Code, §§ 3308, 3354).

Measure of damages in action for breach of contract to purchase sugar must be that fixed by Civ. Code, §§ 3308, 3354, being difference between the contract price and market price.

4. Damages 🔑142—To recover special damages, pleader must plead facts showing damages of character for which remedy is provided.

Where special damages only are sought, although measure of damages is statutory, it is necessary to plead facts which will show that pleader had sustained damages of character for which remedy was provided.

5. Sales 🔑377—Complaint in action for breach of contract for purchase and sale of sugar held demurrable for failure to plead special damages.

Complaint in action for special damages for breach of contract for purchase and sale of sugar *held* demurrable for failure to plead special damage of difference between contract price and market price and merely showing demand for payment of difference between purchase price of sugar specified in various contracts for sale and purchase with no facts showing on what basis amount prayed for was fixed.

Appeal from Superior Court, City and County of San Francisco; J. T. B. Warne, Judge.

Action by the Hamberger-Polhemus Company against Hind, Rolph & Co., Inc. Judgment sustaining a demurrer to the complaint, and plaintiff appeals. Affirmed.

Hadsell, Sweet & Ingalls and Lewis N. Mitchell, all of San Francisco, for appellant.

Ira S. Lillick, of San Francisco, for respondent.

NOURSE, J. Plaintiff sued upon a complaint pleading two causes of action "for breach of contract," one in the form of a common count for money had and received, and the other based upon five written contracts for the purchase and sale of sugar. The defendants' demurrer to the complaint was sustained without leave to amend, and the plaintiff has appealed upon the judgment roll.

[1, 2] The first alleged cause of action pleads that the defendant is indebted to the plaintiff in the sum of $613.25 for money had and received by said defendant for the use of plaintiff. This pleading of an indebtedness under the old form known as a common count is sufficient against demurrer under the rule of Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923, and cases there cited. The general demurrer should therefore have been overruled upon the authority of that case, and the special demurrer, inasmuch as it merely raised the point of uncertainty as to how the indebtedness arose, should likewise have been overruled upon the same authority (page 277); the remedy of the defendant being to demand a bill of particulars.

The second cause of action alleged that on June 19, 1924, plaintiff and defendant entered into two contracts designated "A" and "B," wherein the defendant agreed to buy and the plaintiff agreed to sell to defendant a total of 1,000 bags of sugar at the rate of $6.90 per hundred pounds; that on June 23, 1924, the same parties executed the contract designated "C," wherein the defendant also agreed to buy and the plaintiff to sell 1,000 bags of sugar at the price of $4.50 per hundred pounds; that delivery of the sugar mentioned in contracts A and B was to be at San Francisco; that on August 18, 1924, the same parties executed a contract designated "D," wherein the plaintiff agreed to buy and the defendant agreed to sell to plaintiff 1,000 bags of sugar at the price of $6.75 per hundred pounds, the delivery thereof to be at San Francisco; that on the same day the same parties executed contract "E" wherein the plaintiff agreed to buy and the defendant agreed to sell 1,000 bags of sugar at $4.37½ per hundred pounds, delivery thereof to be made at Vancouver, B. C.; that thereafter the date elapsed at which the sugar should have arrived at said ports, and that the time for delivery thereof had long since passed; that thereafter the plaintiff demanded of defendant that it deliver the lots of sugar mentioned in contracts D and E and at the same time informed defendant that plaintiff desired the delivery of said sugar so that it might redeliver to it the sugar agreed to be sold under contracts A, B, and C; that the defendant failed and refused to make delivery of the sugar as demanded; that the tare on said sugar amounted to one pound per bag, and that the net weight of each of said bags was 223 pounds; that plaintiff had demanded of defendant that it pay the difference between the purchase prices of said sugar specified in the five contracts mentioned, but that the same has remained unpaid. The prayer of plaintiff under this cause of action is $613.25, the same amount demanded under the common count.

In support of the judgment, the respondent urges that the appellant has mistaken its remedy and should have sued for the difference between the contract price and the market price of the sugar as provided in sections 3308 and 3354, Civil Code, that the complaint is insufficient because it does not plead any facts showing special damages sustained by the appellant, and that the contracts are void for want of mutuality.

[3-5] The complaint is designated as one for breach of contract. So far as the allegations of the second cause of action are concerned, the only breach alleged refers to contracts D and E, wherein the respondent was obligated to deliver sugar to the appellant upon payment of the purchase price thereof. It is alleged that contracts A, B, and C were executed prior to the date of execution of contracts D and E, but it does not appear but that these contracts were fulfilled prior to the commencement of the action. It is alleged that demand was made upon the respondent to deliver the sugar called for by contracts D and E, but it does not appear that the appellant at that time or at any time prior to the commencement of the action tendered payment as required by those contracts. But, on the other hand, from the allegation that at the time of the demand the appellant informed respondent that it sought delivery

merely for the purpose of fulfilling its obligation to deliver under contracts A, B, and C, it may be assumed that no tender of payment was made. Certainly, in an action for breach of contracts D and E, which is all that the complaint pretends to cover, the measure of damages must be that fixed by section 3308 and 3354 of the Civil Code. So far as anything appears from the pleading, the market price of sugar at the place of delivery may have been less than that which the appellant was called upon to pay under the contracts which it claims to have been breached. Manifestly, where special damages only are sought, though the measure of damages is statutory, it is necessary to plead the facts which would show that the pleader had sustained damages of the character for which the remedy is provided. In Judson Manufacturing Co. v. Lutge, 174 Cal. 566, 163 P. 1017, the Supreme Court had before it a pleading seeking damages for delay in delivery under a contract for the sale of material. It was pleaded "that, by reason of plaintiff's said breaches of its said contract with this defendant, this defendant has been damaged in the sum of $4,000." The court said: "The damage for which recovery is here sought is, under every rule of pleading and authority as to damage, one which must be specially and specifically pleaded" (citing cases)—and held that the defendant's failure to specifically plead this special damage justified the court's refusal to receive evidence upon it and demanded a finding and judgment against it. Here the pleading is merely that the appellant demanded of the defendant that it pay the difference between the purchase price of sugar specified in the various contracts, and the complaint closes with a prayer for judgment in the sum of $613.25, but no facts are pleaded to show whether this was the sum demanded or to show upon what basis the amount prayed for was fixed. Thus, though the action is one for special damages for breach of contract, the complainant does not plead damage and does not allege any facts upon which a claim for damages could be based.

The demurrer to the second cause of action was properly sustained, and, though the complaint might have been amended to meet the objections raised by the demurrer, it does not appear that leave to amend was asked or refused.

Though we have said that the demurrer to the first cause of action should have been overruled, we find that on this appeal the appellant has frankly stated that this cause of action is predicated upon the transactions set forth in the second cause of action, and that, if there is no recovery to be had in the second cause of action, then there could be no recovery on the first. It is frankly conceded that the entire transaction was a "wash sale," as that term is used in the trade, a transaction whereby the parties agree to settle by one of them paying the other the difference between the contract price and the market price at the time of delivery. Such a transaction has been declared to be merely a speculation upon the rise and fall of the market and as such contrary to public policy and void, at least where the transaction is made with the intention to speculate on the market and not to deliver the commodities contracted for. Though in reviewing the allegations of the complaint the intention of the parties to thus speculate upon the rise and fall of the sugar market is not clear, the defendant in his brief contends that such was the character of the transaction, and that this was within the knowledge of the parties from the beginning. If the cause should go to trial and these facts should appear, judgment would necessarily go for the respondent. On the entire record the appellant has failed to show prejudicial error, but it has presented a case where, though the ruling on demurrer may have been technical error, no harm resulted because, from the concessions in the brief, a trial upon the merits would have come to the same end.

Judgment affirmed.

We concur: KOFORD, P. J.; STURTEVANT, J.

81 Cal. App. 709

BOOTH v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

(Civ. 5776.)

(District Court of Appeal, First District, Division 1, California. March 11, 1927.)

1. Certiorari ⚷28(2)—Court, having jurisdiction of parties and action, did not exceed jurisdiction by ordering case placed on jury calendar (Code Civ. Proc. § 1068).

Where defendant failed to appear in response to petitioner's notice of motion to set case for trial, but subsequently moved for order placing case on jury calendar, *held* court, having jurisdiction of parties and action, did not exceed jurisdiction by granting such motion as affecting right to writ of review, under Code Civ. Proc. § 1068.

2. Certiorari ⚷5(1)—Order placing case on jury calendar, being reviewable on appeal from final judgment, held not reviewable by writ of review (Code Civ. Proc. §§ 956, 1068).

An order placing case on jury calendar, being one which could be reviewed on appeal from final judgment in the action (Code Civ. Proc. § 956), was not reviewable by writ of review, under section 1068.

Certiorari by H. T. Booth, petitioner, to review an order of the Superior Court of the City and County of San Francisco, Edmund P. Morgan, Judge. Writ denied.

Byrne & Lamson, of San Francisco, for petitioner.

James E. Colston, of San Francisco, for respondent.

CASHIN, J. A proceeding in certiorari to review an order of the superior court of the city and county of San Francisco, directing that an action pending therein be tried by a jury.

The action in the superior court was brought by petitioner to recover on several assigned claims for money had and received. The defendant therein answered, whereupon petitioner served a notice of motion to set the case for trial. The defendant failed to appear in response to the notice, and the cause was by order of the court placed on the trial calendar and a day fixed for the trial. Subsequently the defendant, upon notice to petitioner, moved the court for an order placing the cause upon the jury calendar for trial, which motion was granted.

Petitioner contends that the defendant, by failing to demand a jury at the time the cause was first placed on the trial calendar, waived his right thereto, and that in making its order therefor the court exceeded its jurisdiction.

A writ of review may be granted when an inferior tribunal has exceeded its jurisdiction and there is no appeal nor, in the judgment of the court, any plain, speedy, and adequate remedy. Code Civ. Proc. § 1068.

[1, 2] In the instant case, the trial court had jurisdiction both of the parties and the subject of the action, and the order in question, as in the case of a denial of a jury trial where a jury might be waived, was an exercise of such jurisdiction. Wittman v. Police Court, 145 Cal. 474, 78 P. 1052; Goodman v. Superior Court, 8 Cal. App. 232, 96 P. 395. Moreover, the order was one which may be reviewed on appeal from the final judgment in the action (Code Civ. Proc. § 956; Dickerson v. Superior Court, 41 Cal. App. 534, 183 P. 235), and the petitioner, if aggrieved, will thus be afforded a plain, speedy, and adequate remedy.

The petition is denied.

We concur: TYLER, P. J.; KNIGHT, J.

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81 Cal. App. 659

PACIFIC BONE, COAL & FERTILIZER CO. v. BLEAKMORE et ux. (Civ. 3111.) ★

District Court of Appeal, Third District, California. March 9, 1927.

Hearing Denied by Supreme Court May 5, 1927.

1. Appeal and error ⚷694(1)—Finding is conclusive on appeal, where testimony is not brought up.

Where testimony in lower court is not brought up, finding of lower court is conclusive on appeal.

2. Husband and wife ⚷138(9)—Wife held not to have ratified husband's purchase of fertilizer by retaining benefit, in absence of knowledge, until beyond power to restore benefits (Civ. Code, § 2310).

Where it is not shown that wife, owning pear orchard, had any knowledge concerning purchase of fertilizer by her husband, or that foreman employed by wife knew anything about purchase, or conveyed information to owner, she cannot be held liable therefor under Civ. Code, § 2310, on theory of ratification by accepting or retaining benefit of purchase until after use of fertilizer had placed it beyond her power to return or restore benefits received.

3. Principal and agent ⚷103(2)—To charge owner with foreman's act in using fertilizer on pear orchard, irrespective of knowledge of purchase, use must be shown as usual practice.

In order to raise inference that foreman of pear orchard, by reason of his employment, had general authority to purchase and use fertilizer so as to charge owner for any act that foreman might have taken in relation to such use, irrespective of knowledge as to its purchase, it must be shown that use of fertilizer was in accordance with usual practice in pear culture, and that giving foreman authority to purchase and use same was within contemplation of owner in employing him.

4. Principal and agent ⚷171(1)—Principal does not ratify agent's act, where it is beyond his power to restore benefits after knowledge.

There is no ratification if, at time it becomes known agent exceeded his authority, principal had put it beyond his power to return or restore benefits received.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by the Pacific Bone, Coal & Fertilizer Company against Lea Bleakmore and Helen Bleakmore. Judgment for plaintiff against defendant first named and for defendant last named against plaintiff, and from an order denying a motion to vacate judgment in favor of defendant last named, and from such judgment plaintiff appeals. Affirmed.

Hearing denied by Supreme Court; RICHARDS, CURTIS and PRESTON, JJ., dissenting.

Lovett K. Fraser and Arthur J. Dannenbaum, both of San Francisco, for appellant.

Herbert V. Keeling, of Lakeport, for respondents.

PLUMMER, J. Plaintiff had judgment against the defendant Lea Bleakmore, and the defendant Helen Bleakmore had judgment against the plaintiff. Plaintiff thereupon moved the trial court to vacate the judgment in favor of the defendant Helen Bleakmore, and to enter judgment against said defendant in favor of the plaintiff. This motion was denied. From this order and from the judgment in favor of the defendant Helen Bleakmore the plaintiff appeals.

Lea Bleakmore and Helen Bleakmore are husband and wife, residing in Lake county,

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★Hearing denied by Supreme Court.

state of California. Helen Bleakmore owns a pear orchard situate in the county of Lake. Her husband, Lea Bleakmore, owns no interest in said orchard. During the times mentioned in these proceedings the orchard was in charge of one Ed Stewart, as foreman, employed and paid by the defendant Helen Bleakmore. Ed Stewart had full charge of the pear orchard in question.

On or about the 14th day of March, 1923, the defendant Lea Bleakmore went to Los Angeles, and, while there, purchased from the plaintiff 15 tons of lupine No. 1 fertilizer, at the agreed price of $42.50 per ton, and requested that the fertilizer be shipped to Ed Stewart by way of Hopland. At the time of the purchase the defendant Helen Bleakmore was not present. Lea Bleakmore stated to the plaintiff that the fertilizing material was for his pear orchard. The fertilizer was shipped to Hopland at the request of Lea Bleakmore, and a teamster hired by the said Ed Stewart hauled the fertilizer from Hopland to the pear orchard belonging to Helen Bleakmore. The fertilizer was first dumped in a barn situated on the pear orchard premises, after which 14 tons of the fertilizer were by the said Ed Stewart, and a workman employed by him, hauled out and distributed so as to place a portion thereof around each pear tree of the orchard belonging to the defendant Helen Bleakmore. One ton of the fertilizer was left in the barn for over a year, and then subsequently used. The expense of hauling and distributing the fertilizer was paid by the defendant Helen Bleakmore in connection with other ranch work performed by the said Ed Stewart and the person employed by him. Whether there was any segregation or specification of the particular time spent in hauling and distributing the fertilizer, or wages charged and paid for such services, does not appear in the transcript. There is nothing in the transcript to show that Helen Bleakmore knew anything about the purchase of the fertilizer in question, nor is there anything in the transcript showing that Lea Bleakmore ever conveyed any information concerning his purchase of the fertilizer or of the manner in which it was purchased to Ed Stewart, the foreman of the defendant Helen Bleakmore. No demand was ever made by the plaintiff upon the defendant Helen Bleakmore for payment until the beginning of this action, nor does the record disclose that Helen Bleakmore ever had any information from any source relative to the purchase and use of the fertilizer until she was joined as a defendant in this action to recover the purchase price thereof.

The record shows that Helen Bleakmore was a resident of the county of Lake, and while the appellant, in his brief, states that Helen Bleakmore resided upon the pear orchard in question, there is nothing in the record before this court upon which such a conclusion can be predicated. The cause is before us upon an appeal upon the judgment roll, and there is nothing in the findings indicating where Helen Bleakmore resided other than that she was a resident of Lake county in the state of California.

At the conclusion of the trial the court made certain findings, and it is now urged upon appeal that upon these findings judgment should be ordered against the defendant Helen Bleakmore. The findings referred to are as follows:

"VI. That, at the time of said purchase by said Lea Bleakmore of said fertilizer, the defendant Helen Bleakmore was not present, and it was unknown to plaintiff at the time of sale that said fertilizer was purchased by Lea Blackmore to be placed around the pear trees owned by defendant Helen Bleakmore. That said Lea Bleakmore stated that he was purchasing the fertilizer for his pear orchard. That said Lea Bleakmore owned no pear orchard at that time nor since. That more than 90 days have elapsed since the delivery of said fertilizer to Helen Bleakmore's pear ranch.

"VII. The court finds that Lea Bleakmore purchased 15 tons of lupine No. 1 fertilizer at the price of $637.50, with instructions to ship said fertilizer to Ed Stewart at Lakeport, via Hopland. That Ed Stewart was instructed by Lea Bleakmore to place said fertilizer around each pear tree. That said 15 tons of fertilizer were hauled from Hopland to Helen Bleakmore's barn, and dumped in the barn by the teamster. That Ed Stewart, manager for Helen Bleakmore, and Robert Hudson, hired man, thereafter hauled 14 tons of said fertilizer from Helen Bleakmore's barn and placed it around each of her pear trees in her 30-acre orchard. That Lea Bleakmore owned no pear orchard, and no interest in Helen Bleakmore's orchard. That Helen Bleakmore was not present at the time Lea Bleakmore purchased said fertilizer, and said Lea Bleakmore never disclosed to defendant Helen Bleakmore that the fertilizer was to be placed on Helen Bleakmore's pear orchard. That Ed Stewart, Helen Bleakmore's foreman, has full charge over her said pear orchard, and defendant Helen Bleakmore gave no instructions in regard to her pear orchard. That defendant Helen Bleakmore paid Ed Stewart and Robert Hudson for the hauling of said 14 tons of fertilizer from her barn and placing it around her pear trees in connection with other ranch work. That one ton of fertilizer was kept in defendant Helen Bleakmore's barn for one year, and then placed around the pear trees in her orchard by her foreman, Ed Stewart, and she paid Ed Stewart for placing the one ton of fertilizer around her pear trees in connection with other ranch work.

"VIII. The court finds that defendant Lea Bleakmore was not authorized at any time to purchase fertilizer from plaintiff for defendant Helen Bleakmore. That defendant Lea Bleakmore did not purchase said fertilizer as an agent for or on behalf of said defendant Helen Bleakmore. That defendant Helen Bleakmore did not purchase any fertilizer from plaintiff."

[1-3] By finding No. 8 all inquiry as to whether Lea Bleakmore was authorized at any time to purchase fertilizer for the use and benefit of the defendant Helen Bleak-

more is foreclosed. The finding of the court is that he was not so authorized, and, the testimony not being brought up, the finding is conclusive upon this appeal. The finding is also to the effect that Helen Bleakmore did not purchase any fertilizer from the plaintiff. The plaintiff, however, relies upon section 2310 of the Civil Code, which reads:

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof."

It is upon the latter portion of said section that the appellant relies, to wit, "accepting or retaining the benefit of the act" of the defendant Lea Bleakmore. There is nothing in the record which indicates that the defendant Lea Bleakmore ever claimed or gave to any one the impression that he was acting for anybody but himself. There is nothing in the record which indicates, or tends to indicate, that the defendant Lea Bleakmore ever conveyed to the defendant Helen Bleakmore any knowledge or information concerning his purchase of the fertilizer in question. Likewise there is no finding, nor anything in the record, to indicate that Ed Stewart, the foreman of the defendant Helen Bleakmore, knew anything about how the fertilizer was purchased, or ever said anything to the defendant Helen Bleakmore about the same. It is argued that information to Ed Stewart, the foreman for Helen Bleakmore, constituted knowledge or information on the part of the defendant Helen Bleakmore, but there is nothing in the record, as we have said, showing any information or knowledge on the part of Ed Stewart. The fact that he hauled and distributed the fertilizer is all that appears in the transcript. Furthermore, there is nothing in the record indicating that the use of such fertilizer was or is in accordance with the usual and customary practice prevailing in that or in other localities relating to pear orchard culture, and therefore there is nothing in the record from which it could be implied or inferred that the foreman had authority to purchase and use such fertilizer arising from his position as general foreman in charge of the orchard. In order to raise the inference that the foreman, by reason of his employment, had general authority to purchase and use such fertilizer, and, therefore, that the defendant Helen Bleakmore should be charged for any act that her foreman might have taken in relation to the use of such fertilizer, irrespective of the knowledge as to its purchase, it must be shown that the use of such fertilizer was in accordance with the usual practice in pear culture, and that the giving of authority to the foreman to purchase and use the same was within the contemplation of the defendant Helen Bleakmore, in the employment of Ed Stewart as her foreman. As we have said, the record before us is silent as to all these matters. Again, there is an entire absence of any finding on the part of the court, or of any mention in the record, that the defendant Helen Bleakmore had any knowledge of either the purchase or of the use of the fertilizer in question, before rejection of the use of the fertilizer became impossible.

[4] As stated in 2 C. J. p. 496, § 116:

> "There is no ratification if, at the time it becomes known that the agent exceeded his authority, the principal has put it beyond his power to return or restore the benefits received, or if without his fault conditions are such that he cannot be placed in statu quo or repudiate the entire transaction without loss, or if the continued enjoyment of the benefits by the principal is unavoidable."

Again, as stated in said section, the rule of ratification by the acceptance of benefits implies the power of agents to accept or reject what has been received.

The finding by the court that the defendant Helen Bleakmore paid for the work of hauling and distributing the fertilizer in connection with other ranch work, if it be assumed therefrom that the defendant Helen Bleakmore then and at that time acquired information or knowledge of the purchase of the fertilizer, shows only the possibility of Helen Bleakmore having acquired such knowledge at a time when rejection of the transaction had become impossible, and therefore ratification could not be predicated upon any such assumed acquirement of knowledge. As stated in Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 26 P. 902 (one of the cases relied upon by appellant):

> "In order to constitute a 'subsequent ratification' of the act by the principal, it seems there must be evidence of previous knowledge on the part of the principal of all the material facts (McClelland v. Whiteley [C. C.] 15 F. 322; 2 Greenl. 66); and it would seem that a ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal."

In so far as the defendant Lea Bleakmore is concerned, the finding is conclusive that he was not acting as the agent of the defendant Helen Bleakmore, but was acting upon his own individual responsibility. If the plaintiff is to prevail against the defendant Helen Bleakmore, the case must rest simply upon the act of her foreman in hauling and distributing the fertilizer, but, as we have shown, there must have been previous knowledge on her part prior to the time when rejection of the benefits on her part became impossible. The case of Duerr v. Sloan, 40 Cal. App. 653, 181 P. 407, cited by appellant to the effect that knowledge on the part of an agent is knowledge on the part of the principal, and the fact that an agent fails to communicate certain knowledge to his principal, cannot change the rule of law that the knowledge of the agent is imputed to the principal, does not relieve the omission in the findings in this case that the agent of the defendant Helen Bleakmore, if such her foreman, Ed Stewart, may be held, had no knowledge in relation to the purchase of the fertilizer. To carry home to the principal, there must be some showing that the agent of the principal had knowledge. Upon the record before us, we have simply the unauthorized act of the defendant Lea Bleakmore going to Los Angeles and ordering the fertilizer upon his own responsibility, without anything in the findings whatever to indicate that he was acting as agent for an undisclosed principal. Were there anything in the findings or in the judgment roll showing that the defendant Helen Bleakmore was residing upon the pear orchard during the time the fertilizer was being hauled and placed in the barn situate on the premises, and thereafter taken therefrom and distributed around the several trees in the orchard, then and in that case there would be acts and circumstances from which the court could very properly draw the conclusion that the defendant Helen Bleakmore was aware of all the facts, possessed full knowledge of the transaction, and ratified the same. All this, however, is wanting from the record. A portion of it is contained in appellant's brief, but the judgment roll, including the findings and the judgment, fails to support such contention. That one lives in the same county in which a pear orchard is situated furnishes no basis for holding that one lives on the premises where the pear orchard is situated. In the note appended to section 2310 of the Civil Code, in Kerr's Cyclopedic Codes, is found an unbroken line of authorities holding that knowledge of circumstances and acquiescence with character of unauthorized acts are essential to ratification. Likewise, it is held that means of knowledge, of which the principal has negligently deprived himself, makes him chargeable with knowledge of all provisions of contract entered into by his agent. But, as we have said, it is here that plaintiff has failed. There is no finding that Helen Bleakmore has ever ratified any of the acts referred to, and whether the testimony at the trial was such as to have warranted a finding of ratification is immaterial, as the findings do not support the contentions of the plaintiff, and we are bound by the findings. The general rule on the question of knowledge is stated in 2 C. J. 495, § 115:

> "The mere fact that the principal has received or enjoyed the benefits of the unauthorized act will not amount to a ratification of the agent's acts, if he did so in ignorance of the facts."

Conversely, as stated in section 114, same volume, page 493, if the principal, with full knowledge of all the facts, takes and accepts the benefits, he cannot avoid the burden; that is, he cannot accept the benefits without paying therefor. We may also cite 1 Cal. Jur. § 61 et seq., on the subject of agency dealing with ratification, which supports what we have herein stated on the subject of knowledge, benefits, and the prerequisites necessary to support a finding of ratification.

The authorities are likewise uniform that the mere fact of showing the relationship of husband and wife does not establish the relationship of principal and agent, even though it is also held that less evidence is required in such cases than is ordinarily required. Rauer's Law & Collection Co. v. Berthiaume, 21 Cal. App. 670, 132 P. 596, 833. That case also holds that the relationship of principal and agent between husband and wife may be established by circumstantial evidence, and so justify a finding to that effect. This, however, does not aid the appellant, as we have no testimony before us. That knowledge must be had by the principal in time to enable the principal to reject the transaction and escape liability is further held in the case of Lindow v. Cohn, 5 Cal. App. 388, 391, 90 P. 485.

Our attention is called to the case of Gay v. Virginia-Carolina Chemical Co., 32 Ga. App. 720, 124 S. E. 364, as supporting the contention of the plaintiff, and as being a case involving the purchase and use of a shipment of fertilizer. In that case, however, it appears that the husband in purchasing the fertilizing material had it shipped to his wife, as consignee, and by the husband used upon the land belonging to his wife. Only the syllabus is found in that case. The report of the case itself includes only the words "judgment affirmed." There is no statement of the facts, but it would appear from what is said in the syllabus that the trial court held in that case that the facts established the husband as the agent of his wife, as undisclosed principal, and that the wife had full knowledge of all facts and circumstances from which the conclusion could be drawn that she had ratified either the act of her husband or that he was authorized to so act as her agent in the first instance. In order to justify the conclusion in that case, there must have appeared in the facts what this court, in the case of Hall v. E. W. Wells & Son, 24 Cal. App. 238, 141 P. 53, speaking through Mr. Justice Chipman, has said is essential:

> " 'The essence of either an election or ratification is that it was done advisedly with full knowledge of the party's rights' (King v. Lagrange, 50 Cal. 328); the party to be charged 'must have fully known what he was doing' (Brown v. Rouse, 104 Cal. 672 [38 P. 507]). We can discover no intention of defendant to ratify the contract relied upon, either in the correspondence or anything that took place between the parties."

This applies to the case at bar. We can discover nothing in the findings urged upon us by the appellant showing the requisite previous knowledge establishing either prior authorization or subsequent ratification. While the record shows that the defendant Lea Bleakmore had no pear orchard, there is nothing in the record indicating that he is not financially responsible, or was not financially responsible at the time of the purchase of the fertilizer in question, and amply able to purchase the same on his own responsibility. To raise a contrary inference, it must have been shown that he was wanting in such financial ability. The mere fact that he did not own a pear orchard was, and is, wholly insufficient.

The judgment and order of the trial court are hereby affirmed.

We concur: FINCH, P. J.; HART, J.

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81 Cal. App. 629

MacFADDEN et ux. v. COMPSON.

(Civ. 4159.)

(District Court of Appeal, Second District, Division 2, California. March 5, 1927.)

1. Appeal and error 🔑931(1)—Appellate court must resolve all intendments in favor of judgment.

All intendments must be resolved in favor of judgment on appeal therefrom.

2. Appeal and error 🔑1011(1) — Where evidence is directly contradictory, judgment will not be disturbed.

Judgment of trial court will not be disturbed on the weight of the evidence, where the evidence is directly contradictory.

3. Master and servant 🔑80(10)—Evidence held to sustain finding of contract to pay employees for services outside scope of duties.

In action by bookkeeper and cashier for services outside of the scope of his duties on an alleged verbal contract to pay him portion of proceeds of sale for disposing of certain moving picture films and securing return of unearned insurance premiums, evidence *held* to sustain findings for plaintiff.

4. Master and servant 🔑80(10)—Evidence held to authorize finding sale of property was not within duties of salaried employee claiming additional compensation.

Evidence *held* to authorize finding that disposal of motion picture films and securing return of unearned insurance premiums was not within scope of regular employment of a bookkeeper and cashier, so as to raise a presumption that services were part of regular duties and to preclude recovery therefor additional to salary.

5. Master and servant 🔑80(6)—Presumption that employee performed services within regular employment is rebutted by evidence of express inconsistent agreement.

Presumption that employee performed services within the scope of his regular employment so as to preclude his recovery of extra compensation therefor is overcome by evidence showing express agreement inconsistent therewith.

6. Master and servant 🔑80(15)—Findings that services alleged were not performed as employee, and that employee had not been paid, held not inconsistent.

In action by bookkeeper and cashier for services outside of employment, finding that services were not performed as employee, and that he had not been paid therefor, *held* not inconsistent, but an express finding that services were outside of duties, and that he was entitled to compensation.

Appeal from Superior Court, Los Angeles County; W. P. Cary, Judge.

Action for services by John MacFadden and wife against Lucime Compson. From an adverse judgment, defendant appeals. Affirmed.

McCarthy & Nolan and Earl L. Banta, all of Los Angeles, for appellant.

Randall, Bartlett & White and Thos. P. White, all of Los Angeles, for respondents.

CRAIG, J. The plaintiffs and respondents instituted an action in the superior court of Los Angeles county upon an alleged verbal contract of the defendant and appellant to pay the plaintiff John MacFadden a portion of the proceeds of sale for disposing of certain personal property, and of certain insurance premiums refunded. The transaction appears to have been wholly founded upon services claimed to have been rendered by John MacFadden for the defendant. We shall therefore designate him herein as the respondent.

The complaint alleged that the defendant employed the plaintiff John MacFadden to sell certain moving picture films, and to secure the return of certain unearned insurance premiums thereon, the property of the defendant, for which the latter agreed to pay him one-half of the proceeds of such sale, and of the preimums, which she might receive through such transaction. The defendant denied by answer the existence of any contract in the premises, and affirmatively alleged that, although the sale and collection mentioned were consummated, the services were performed by the plaintiffs as employees, for which they were paid wages, in the regular course of employment.

The respondent testified that he was appellant's cashier and bookkeeper at a salary of $75 per week, at the time he performed the services for which compensation was claimed; that appellant voluntarily agreed to allow him 50 per cent. of any amount for which he might be able to sell certain films, and of the unearned insurance premiums thereon if he could secure their refund; that the defendant departed for New York, leaving instructions that MacFadden be retained in his regular position as bookkeeper and cashier during her absence; that previously to her return he sold the films and collected the premiums, the proceeds of which aggregated $3,000, which he delivered to Miss Compson upon her arrival; that a few days thereafter he made demand for his share of the moneys, whereupon the defendant informed him that she had purchased a new automobile, had no funds left, and was unable to pay him, but that she later denied any knowledge of having agreed to compensate him for extra services, and refused to pay him therefor. One Grasso, the defendant's general manager, testified to various conversations between the plaintiff and defendant, and corroborated MacFadden's testimony as to the sale of the films and collection of the insurance premiums. This witness also admitted having seen the defendant receive two envelopes from the plaintiff, but averred that he did not see the money, although he heard Miss Compson mention that she would "fix it up." Mrs. MacFadden testified that she heard her husband state to the defendant over the telephone that he would perform the services for 50 per cent. of the amount to be realized from the films and insurance. The defendant testified that she was positive that she had never at any time promised to pay MacFadden for such services. She also denied all knowledge as to the entries in her books, and swore that she did not know where the books were at the time of the trial.

The case was tried before the superior court, without a jury, and judgment was rendered in favor of the plaintiffs for the sum of $1,500. The trial court found that the defendant employed the plaintiff John MacFadden "for and during the times referred to in the complaint herein, under a weekly salary or wage," but that the services upon which the suit was based were not performed as an employee of the defendant, and that he had not been paid therefor. The defendant appeals from the judgment upon the alleged grounds that it is not supported by the evidence; that the testimony of the respondent was inherently improbable; and that, if there was any agreement such as alleged and found by the court below, it was without consideration.

[1-3] We must resolve all intendments in favor of the judgment, and where, as here, the evidence is directly contradictory, the decision of the trial court will not be disturbed. Teresi v. Cavala, 64 Cal. App. 148, 220 P. 686. We do not concur in the contention of the apellant that the respondent's testimony was inherently improbable, nor that the evidence was insufficient to justify the court in finding and rendering judgment for the plaintiffs.

[4, 5] Appellant cites authority to the effect that an employee will be presumed to have performed services within the scope of his regular employment, and that he may not recover extra compensation unless the additional services be such as the servant is under no obligation to perform. We think the mere statement of these propositions suggests the obvious answer that under the conditions evidenced by the facts presented the trial court may well have concluded that the sale of surplus stock was not a service contemplated by the employment of respondent as bookkeeper and cashier. We are cited to no authority, nor are we aware of any, which holds that a salaried employee may not be engaged in and compensated for the performance of services foreign to his regular employment. Again, the presumption above mentioned may be rebutted, and is overcome by evidence showing an express agreement inconsistent therewith.

[6] The only remaining point of sufficient importance to require attention consists of the contention that one of the findings is inconsistent and vague, in that it recites that the services alleged were not performed by the plaintiff as an employee, and that he had not been paid therefor. It seems plain that this was an express finding that the services sued upon were outside of those for which respondent received a weekly salary, and that he was entitled to the compensation demanded in his complaint.

No error appearing, the judgment is affirmed.

We concur: WORKS, P. J.; THOMPSON, J.

NOLL v. BAIDA. (Civ. 4835.) ★

(District Court of Appeal, Second District, Division 1, California. March 7, 1927. Hearing Granted by Supreme Court May 5, 1927.)

1. Contracts ⚷270(2)—Rescission for fraud depends on prompt action after knowledge of fraud, or of facts putting prudent man on inquiry (Civ. Code, § 1691).

Under Civ. Code, § 1691, right to rescind contract for fraud in its procurement depends primarily on promptness with which injured party acts in essentials of remedy after having obtained either actual knowledge of facts from which fraud will be inferred, or knowledge sufficient to put prudent man on inquiry.

2. Contracts ⚷270(2)—Rescinding party must have knowledge of fraud or means of obtaining knowledge to be required to take appropriate action (Civ. Code, § 19).

Under Civ. Code, § 19, party desiring to rescind contract for fraud to be required to take appropriate action must have either personal knowledge of facts constituting fraud, or have ready means of obtaining such facts.

★Superseded by opinion of Supreme Court, 259 P. 433.

3. Sales 🔑126(2)—Buyer, consulting expert, who confirmed misgivings as to quality of rugs purchased, had actual notice of facts putting prudent man on inquiry of seller's fraud.

Where buyer of rugs consulted rug expert, who confirmed his misgivings from seeing color fading; that rugs were not as seller had represented them to be, buyer had actual notice of circumstances sufficient to put prudent man on inquiry as to whether he had been defrauded.

4. Sales 🔑126(1)—Buyer's delay of 7 months after being put on inquiry concerning seller's fraud in sale of rugs barred suit for rescission.

Delay of 7 months after discovery of facts putting buyer on inquiry as to seller's fraudulent representations in sale of rugs before action for rescission was commenced, barred right to rescind.

5. Contracts 🔑352(6)—Conclusion of promptness in rescinding contract for fraud may be one of law or fact, or of both law and fact.

Conclusion of promptness in taking action to rescind contract, after discovery of fraud, may be either one of law or of fact, or of both law and fact.

6. Appeal and error 🔑842(7)—Question of promptness in rescinding contract for fraud is for trial court if facts are conflicting, but, if not conflicting, question is one of law, reviewable on appeal.

If facts are in dispute respecting question whether prompt action was taken to rescind contract for fraud, decision on which conclusion of promptness depends is matter resting exclusively with trial court; but, if facts are not controverted or are stipulated by parties, conclusion as to whether they constitute promptness is purely one of law, which, if made by trial court, cannot be binding on appellate tribunal.

7. Contracts 🔑350(3)—Trial 🔑404(2)—Finding that contract was promptly rescinded after discovery of fraud held mere conclusion of law, or, if one of fact, unsupported by evidence.

Finding by trial court that plaintiff rescinded contract promptly on discovery of falsity of representations was conclusion of law, rather than determination of ultimate fact, but, even if considered as finding of fact, was not supported by evidence showing 7 months' delay in filing suit after discovery of facts constituting fraud.

8. Evidence 🔑97—Person seeking to enforce statutory right or remedy has burden of showing compliance with statute.

In enforcing either right or remedy provided by statute, person seeking relief should have burden of showing that he has complied with statute.

9. Contracts 🔑270(2)—Prompt action after discovering facts is condition precedent to right to rescission (Civ. Code, § 1691).

Under Civ. Code, § 1691, promptness by plaintiff in taking action to rescind contract after discovery of facts authorizing rescission is condition precedent to right to maintain action.

10. Cancellation of instruments 🔑45—Plaintiff, seeking rescission, has burden of proving prompt action after discovering facts entitling him to rescission (Civ. Code, § 1691).

Plaintiff, suing to rescind contract for fraud, has burden of establishing fact that he complied with Civ. Code, § 1691, requiring prompt action after discovery of facts entitling him to rescind.

11. Pleading 🔑48, 374—Every allegation necessary to maintenance of action must be pleaded and proved by plaintiff.

Plaintiff must plead and prove respectively every allegation necessary to maintenance of his action.

12. Cancellation of instruments 🔑43—Prompt action after discovery of facts entitling plaintiff to rescind contract must be pleaded and proved by plaintiff (Civ. Code, § 1691).

Under Civ. Code, § 1691, plaintiff, seeking to rescind contract for fraud, must plead and prove promptness in taking action after discovery of facts entitling him to rescind.

13. Contracts 🔑270(2)—Defendant, in action to rescind contract, is not affected by statute requiring plaintiff to act promptly after discovery of facts entitling him to rescission (Civ. Code, § 1691).

Civ. Code, § 1691, requiring plaintiff, seeking rescission of contract, to bring action promptly after discovery of facts entitling him to rescission, does not affect defendant in action.

14. Appeal and error 🔑842(7)—Appellate court had authority to pass on question of promptness in bringing action to rescind contract for fraud, where facts thereon were not in dispute.

Where no controversy existed as to fact whether plaintiff rescinded contract promptly after discovering facts entitling him to rescind, appellate court had authority to pass on question as to what constitutes promptness, and whether finding thereon is supported by evidence.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by G. E. Noll against Nich. G. Baida. Judgment for plaintiff, and defendant appeals. Reversed.

U. T. Clotfelter and Richard Hartley, both of Los Angeles, for appellant.

Neil S. McCarthy and Earl L. Banta, both of Los Angeles, for respondent.

HOUSER, J. This is an appeal from a judgment in a suit for rescission of a sale of certain Oriental rugs, whereby defendant was ordered to take back the rugs sold by him to plaintiff and to repay to plaintiff the purchase price thereof.

From the evidence it appears that some 5 or 6 months after the rugs were purchased by plaintiff he began to suspect the truth of certain material representations which had been made to him by defendant in inducing the sale and upon which representations plaintiff had implicitly relied. Thereupon he obtained the advice of an expert on Oriental rugs and was by him informed in effect that the suspicions entertained by plaintiff were well founded and that the representations made to him by defendant were false and untrue; which fact plaintiff immediately reported to defendant and requested of him that he take back the rugs and return to plaintiff the consideration paid by him to defendant therefor. After considerable conversation between the parties, plaintiff concluded that, at least temporarily, he would let matters stand as they were. Plaintiff's testimony on the subject of such conversation was that—

> "A. I told him that this large rug had faded, was fading, and he assured me it wasn't, and I told him that it was getting lighter all the time. He told me that wasn't fading; it was, I think he said it was dirty, or something like that, I don't just—but he tried to assure me that it was not fading. I told him that I was dissatisfied with the rugs on account of that reason; I wasn't going to do any more business with him. He told me at that time, he says, rather than have you dissatisfied, we will do what I said and take the rugs back and give you your money back. I said I wished him to do that, particularly with some of them, and then he cajoled me along until he got me believing he was honest about it. I says: 'I am going to find out about this; I will let it go, but if I find they are wrong, then, I will call on you again, for I believe that I am right about the rugs fading."

So far as may be ascertained, that conversation took place about 7 months before plaintiff commenced the present action. Following such conversation, and up to the date of the trial of the action, plaintiff used the rugs in his home in the same manner as he had done before the conversation occurred. After the expiration of 7 months from the date of the first examination of the rugs, plaintiff had the rugs re-examined by a second rug expert, who also assured plaintiff that he had been deceived and defrauded by defendant in the sale of the rugs. Thereupon plaintiff served on defendant a notice of rescission of the sale and again demanded the return of the purchase price, which being refused, plaintiff commenced the action which resulted in his favor as hereinbefore set forth.

For the purposes of this decision only, it may be assumed that the evidence satisfactorily established the fraud committed by defendant on plaintiff—leaving for the consideration of this court the main contention made by appellant that through the delay of plaintiff in the commencement of the suit he was precluded from obtaining any equitable relief.

[1] The right to rescind a contract for fraud in its procurement depends primarily upon the promptness with which the injured party acts in the essentials of the remedy after having obtained either actual knowledge of the facts from which the fraud will be inferred, or knowledge of facts and circumstances sufficient to put a prudent man on inquiry with reference thereto. Section 1691 of the Civil Code, among other things, provides as follows:

> "Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) He must rescind promptly, upon discovering the facts which entitle him to rescind. * * *"

Under the provisions of section 19 of the Civil Code:

> "Every person who has had actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

[2] It is therefore apparent that the foundational prerequisite of the law requiring that appropriate action be taken on the part of the party to the contract desiring to rescind it is that he have either personal knowledge of the facts constituting the fraud that has been practiced upon him, or that he have the ready means of obtaining such facts.

[3] With reference to the fraud of defendant, the evidence herein shows that after the suspicions of plaintiff had been aroused he consulted a rug expert, who confirmed plaintiff in his misgivings that the rugs were not as defendant had represented them to be. It is therefore manifest that from his own knowledge of facts with reference to the fading of the color of the rugs to which plaintiff gave testimony, together with the assurance by a man fully qualified in the business, plaintiff had "actual notice of circumstances sufficient to put a prudent man upon inquiry" as to whether he had been defrauded. The time of acquiring such constructive knowledge of the actual facts relating to the quality and manufacture of the rugs was at least 7 months before suit was commenced for the rescission of the contract. The first question, then, is as to whether the suit was commenced with sufficient promptness after discovery of the facts constituting the fraud in order that the requirement of the law in that regard be satisfied.

[4] Authorities in this state are not lacking to the effect that too great a time elapsed between the date of the constructive discovery of the facts constituting the fraud and the time when the suit for rescission was commenced. Without narrating the details of the several cases, it may suffice to state that in Bailey v. Fox, 78 Cal. 389, 20 P. 868, a delay of 4 months was held too great; in Marten v. Burns Wine Co., 99 Cal. 355, 33 P. 1107, 3 months' delay was held too long; in Gamble v.

Tripp, 99 Cal. 223, 33 P. 851, in the absence of some excuse therefor, 4½ months' delay was held fatal. In the case of Schneider v. Henley, 61 Cal. App. 758, 215 P. 1036, the delay was for a period of about 6 months; held too long. In the course of the opinion, it is said:

> "From an examination of authorities, it would appear that 30 days is about the utmost length of time which the courts are disposed to allow to the purchaser for rescission unless there are unusual circumstances in the case excusing longer delay."

See, also, Delano v. Jacoby, 96 Cal. 275, 282, 31 P. 290, 31 Am. St. Rep. 201.

In connection with the issue of promptness, the trial court found:

> "That promptly on the discovery of the falsity of said representations which, as aforesaid, had induced plaintiff to make the purchase of said eight Oriental rugs, plaintiff rescinded said contract of purchase of the said eight rugs. * * *"

It is contended by respondent that such a finding is conclusive on the point, and in support thereof he has cited French v. Freeman, 191 Cal. 579, 589, 217 P. 515, 519, where it is stated by the court that—

> "Whether or not the defrauded party has rescinded 'promptly' will depend upon all the circumstances of the particular case, and is, of course, a question primarily for the trial court."

The Supreme Court, however, thereupon proceeds to discuss the evidence relating to the promptness with which the plaintiff in that case acted on discovery of the alleged fraud, and from such evidence concludes that the trial court was justified in holding that the plaintiff offered to rescind within a reasonable time after the discovery of the facts which entitled him to rescind; from which circumstances it may be inferred that the Supreme Court did not consider itself concluded by the decision reached by the trial court with reference to the matter.

[5, 6] It is clear that the conclusion of promptness may be either one of law or of fact, or of both law and fact. If the facts respecting the determination of whether promptness has been exercised are in dispute—that is to say, that the evidence relating thereto is conflicting—without doubt the decision as to the truth upon which the conclusion of promptness depends is a matter which rests exclusively with the trial court. But if it appear that the facts are not controverted, or that they are covered by stipulation of the parties to the action, under such circumstances the conclusion as to whether they constitute promptness is purely one of law, which, if made by the trial court, cannot be binding upon the appellate tribunal. That such is the case, or at least that the question has been so considered, is made manifest by the numerous decisions (to some of which attention has been directed herein) which hold that the several delays respectively in those cases did not constitute promptness within the law relating thereto. Were the question of promptness always one for the conclusion of the jury or the trial court, it would be difficult, if not impossible, to ever obtain a ruling in an appellate court as to whether promptness had been exercised in any case. In the instant case no controversy exists as to the facts having to do with the determination of whether plaintiff rescinded the contract promptly upon discovering the facts which entitled him to rescind. His own testimony was:

> That it occurred "probably in January. * * * I am not even sure that it wasn't the last part of 1921. It was during the winter, during the winter. * * * It might be February; I wouldn't say that it was either one of those two months.
>
> "Q. Not later than February, 1922? A. I don't think so, but it might have been March, but I don't think so; I think Mr. Baida could tell you just when it was, because it was at the time when he was negotiating an exchange for a rug that time, and he might know when it is."

[7] And Mr. Baida, who, plaintiff said, could tell "just when it was," fixed the time as not later than the month of November preceding the date about which plaintiff was so uncertain and which date, thus determined, was at least 7 months before the suit was commenced. The trial court found no facts upon which to base its conclusion, its determination being merely, as hereinbefore stated:

> "That promptly on the discovery of the falsity of such representations, * * * plaintiff rescinded said contract. * * *"

In the premises, such finding was more in the nature of a conclusion of law, rather than a determination of an ultimate fact. But even if it may be considered as a finding of fact, in view of the state of the record herein, it may be subjected to the criticism that it is not supported by the evidence.

[8, 9] It is clear that in enforcing either a right or a remedy provided by statute the person seeking such relief should have the burden of showing that he has complied with the terms of such statute. One of the statutory requirements which must be met by one who seeks the rescission of a contract is that he act "promptly upon discovering the facts which entitled him to rescind." Section 1691, Civ. Code. In other words, after a discovery of the facts, promptness on the part of the plaintiff in bringing his action is a condition precedent to his right to maintain it.

[10] The authorities construing the statute are numerous. On the point that the burden is on the plaintiff to establish the fact that he has complied with the terms of the statute, rather than that proof of his failure to do so rests with the defendant, the following authorities appear to be pertinent:

In the case of Bancroft v. Bancroft, 110

Cal. 374, 42 P. 896, the plaintiff sought damages for fraud arising through the undue influence of the defendant in inducing the plaintiff to enter into a certain contract for the sale of stock in a corporation. A demurrer to the complaint in the action was sustained, and, the plaintiff having declined to amend the complaint, judgment was rendered for the defendant and the plaintiff appealed therefrom. It appears that the complaint was filed 19 months after the alleged cause of action accrued. No offer to rescind was ever made by the plaintiff. In affirming the judgment, among other things, the court said:

> "But, in addition to this negative [other] authority, it is clear upon principle that this present action should not be maintained, because to maintain it would be to violate the wholesome and fundamental doctrine that in such a case the party claiming to be aggrieved must promptly rescind, or offer to rescind, so as to put the other party in statu quo. * * *"

Chief Justice Beatty, in a concurring opinion, said, in part:

> "He [the plaintiff] had the choice to affirm it or to rescind it, and it appears that he affirmed it by failing to rescind promptly when freed from the undue influence by which his consent was obtained."

The case of McDougall v. Roberts, 43 Cal. App. 553, 185 P. 483, was one for rescission on the ground that undue influence had been exercised by the defendant in inducing the plaintiff to enter into a contract. The trial court sustained a demurrer and denied plaintiff leave to amend the complaint. The defendant had judgment and the plaintiff appealed. An opinion written by the judge of the superior court (later Chief Justice of the Supreme Court) was adopted by the Court of Appeal as its opinion on the appeal. Having to do with the question of promptness of the plaintiff in rescinding the transaction, the following language appears therein:

> "Prompt rescission and offer of restitution are essential to a recovery on the ground of undue influence. Neither is alleged in the complaint, and hence the complaint fails to state a cause of action for undue influence. * * *"

In the case of Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 737, 159 P. 163, 164, the court quotes with approval from McGue v. Rommel, 148 Cal. 539, 547, 83 P. 1000, 1003, where it is said:

> "While it is true that, where a rescission in pais under section 1691 is relied on, the party rescinding need not show that he has restored that which is worthless, yet he must always show that he has complied with the requirement to rescind promptly, and this implies some notice to the other party of such determination to extinguish the contract"—citing cases.

[11-13] It is a cardinal rule of both pleading and trial that the plaintiff is obliged to plead and prove respectively every allegation necessary to the maintenance of his action. By judicial construction of the statute the element of promptness on the part of the plaintiff is made an essential, not only in the matter of allegation of the complaint, but, as inevitably flowing therefrom, in the evidence adduced by the plaintiff in support of such allegation. Before he has a right to maintain an action for rescission of a contract or ultimately to succeed therein, it must at least affirmatively appear that he has acted with that promptness which is demanded by the statute. No express duty is incumbent upon the defendant in the action in connection with such requirement on the part of the plaintiff. So far as the statutory requirement is concerned, the defendant has no more immediate concern with the proper averment of the plaintiff regarding promptness upon the discovery of the facts than he has with any other essential allegation contained therein. He may either admit it or deny it; and, if he deny it, the burden necessarily devolves upon the plaintiff to prove it.

In the instant case, that plaintiff assumed the burden thus cast upon him is made manifest in his pleading, to wit:

> "That promptly on the discovery of the falsity of said representations which, as aforesaid, had induced plaintiff to make the purchase of said eight Oriental rugs, plaintiff rescinded said contract of purchase of the said eight rugs and notified the defendant that plaintiff had rescinded the same. * * *"

And that defendant recognized the true position of the plaintiff in the matter is shown by his allegation in the answer in which he denied "that plantiff, promptly or otherwise, on the alleged discovery of the alleged falsity of said alleged representations, rescinded said contract. * * *"

The issue of "promptness" on the part of plaintiff was thus clearly drawn, and the finding (or conclusion of law) by the trial court thereon, as hereinbefore set forth, was in the exact language of plaintiff's allegation with reference thereto.

[14] Based upon the decisions of the courts of this state, to which reference has been had, we conclude that it is competent and proper that this court pass upon the question of what constitutes "promptness," and whether the finding thereon is supported by the evidence. From what has heretofore appeared herein it is apparent that the proof failed: that the finding in effect that plaintiff had rescinded promptly on discovering the facts was not supported by the evidence; and that no sufficient excuse was shown for the delay in bringing the action.

Several other questions of importance are presented in the briefs filed herein by respective counsel for the appellant or respondent; but, as the question which has been discussed herein is determinative of the rights of the parties to the litigation, it becomes unnecessary to devote further attention to the appeal.

It is the order of this court that the judgment be and it is reversed.

We concur: CONREY, P. J.; YORK, J.

81 Cal. App. 648

PEOPLE v. BEALEY. (Cr. 1412.)

(District Court of Appeal, Second District, Division 1, California. March 9, 1927.)

1. Lewdness ⟹7—Evidence that defendant lived in adultery held for jury (Pen. Code, § 269a).

Evidence that defendant and woman were found in a living room attached to a private garage, that they had lived there three weeks and were often seen together, and that defendant admitted intercourse, *held* for jury on question whether defendant was living and cohabiting with woman in violation of Pen. Code, § 269a.

2. Lewdness ⟹1—"Living in state of cohabitation and adultery" means dwelling together and exercising rights and duties pertaining to marriage relation (Pen. Code, § 269a).

As used in Pen. Code, § 269a, "living in a state of cohabitation and adultery" means the living and dwelling together as husband and wife and exercising the sexual rights and duties implied by such relation when legally created; in other words, a counterfeit of the marriage relation.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Living in State of Cohabitation and Adultery.]

3. Criminal law ⟹1168(4)—In adultery case, refusal to strike out witness' conclusion as to where defendant lived was harmless error under facts.

Refusing to strike out witness' conclusion, in adultery case, that defendant lived "part of time in a house 200 feet away and rest of time in garage 50 feet away" from wife's residence, was harmless error under evidence of facts leading to the conclusion.

4. Lewdness ⟹7—In adultery case, testimony respecting silhouettes seen by witness who knew defendant held admissible without positive identification.

In adultery case, refusal to strike out testimony of witness who knew defendant that he saw silhouettes of persons similar to defendant and woman was not error; the question whether silhouettes were of defendant and woman being for the jury.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

C. R. Bealey was convicted of living in a state of cohabitation and adultery in violation of Pen. Code, § 269a, and he appeals. Affirmed.

Arthur C. Webb, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Dep. Atty. Gen., for the People.

HOUSER, J. Under the provisions of section 269a of the Penal Code, a jury found defendant guilty of the offense of living in "a state of cohabitation and adultery" with a woman who was not the wife of defendant. From the judgment and the order denying defendant's motion for a new trial, defendant appeals to this court.

While the evidence was somewhat conflicting, the jury was authorized to conclude therefrom that the following facts were established: That about a "quarter to 11" o'clock on the night of March 23, 1926, under authority of a search warrant for intoxicating liquor, two deputy sheriffs went to a private garage, which, in addition to housing an automobile, had a living room attached thereto and in which defendant and the woman in question were at least temporarily sojourning; that on arriving at the garage one of the deputy sheriffs several times demanded of defendant admittance into the room at that time occupied by defendant and the woman, to which demand the defendant responded, "What is your hurry; wait a minute; give me some time," all of which was repeated by defendant several times; that after waiting two or three minutes the deputy sheriff kicked in the door, and upon entering the room, which contained a bed, a dresser, an oil stove, a few dishes, and a lot of men's and women's clothing, he found defendant standing beside the bed putting on his coat and vest, and the woman was in the bed, with the bed covering and pillow next to the wall in a disordered condition, while the bed covering over the woman was pulled over her very smoothly; that defendant and the woman had been living in the garage for more than three weeks; that during such time it was the custom of defendant to leave the garage in the morning between 7 and 7:30 o'clock, return about noon, leave again about 1 o'clock p. m., and again return at about 5 o'clock in the afternoon; following which defendant and the woman would dress and go out together, and thereafter return to the garage at about 8:30 or 9 o'clock p. m., after which the lights in the garage would be extinguished; that on several occasions both defendant and the woman were seen in the garage dressing and undressing, and particularly that defendant was seen therein putting on his nightshirt, and that defendant had admitted that he had had sexual intercourse with the woman.

The principal contention of appellant is that the evidence was insufficient to support the judgment.

Section 269a of the Penal Code provides, in part, that—

> "Every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor. * * *"

[1] It is therefore necessary to determine whether the evidence to which reference heretofore has been had was sufficient to support the charge that defendant did willfully and unlawfully live and cohabit with the woman whose name is specified in the information.

[2] In the case of People v. Breeding, 19 Cal. App. 359, 362, 126 P. 179, 181, it is said:

> "As used in the statute, the words 'living in a state of cohabitation and adultery,' mean the living or dwelling together as husband and wife and exercising the sexual rights and duties implied by such relation when legally created—in other words, a counterfeit of the marriage relation. Hence, to justify the conviction of defendants it should appear from the evidence that there existed between them an adulterous cohabitation. * * *"

See, also, to the same effect, People v. King, 26 Cal. App. 94, 95, 146 P. 51.

In the case of People v. Scarpa, 32 Cal. App. 453, 163 P. 882, 883, a judgment of conviction was upheld by the District Court of Appeal and a petition for rehearing in the Supreme Court denied on facts which possibly were less convincing than those presented by the evidence in the instant case. In the Scarpa Case it appeared that each of the guilty parties was married, and that during all the time in question Scarpa was actually living with his wife, and the woman with whom he sustained the adulterous relation was also living with her husband; that Scarpa and the woman were "often seen riding or driving together, and on several occasions were observed in attitudes and actions which were strongly suggestive of an undue and illicit intimacy"; that on a number of occasions the defendant took the woman to his home during his wife's absence and there remained with the woman overnight; that on one of such occasions, in the morning the woman went to a butcher shop and bought meat for breakfast, having it charged to the defendant; that on one occasion the defendant boasted to a friend that he "had a chicken up at his ranch"; that finally the defendant and the woman visited a nearby city, called at several stores and eating places, walked arm in arm down the street, and thereafter went to a hotel where the defendant registered himself and his companion as "J. Jones and wife, Mountain View," and secured a single room, which the pair occupied together for about three days, at the end of which time their apartment was entered by detectives, who found them in a state of undress and apparently occupying the same bed. Concerning the sufficiency of the evidence in the Scarpa Case, the court, in part, said:

> "We are of the opinion that section 269b of the Penal Code, as amended in 1911, was intended by the legislature working its amendment through the elimination from the former section of the words 'open and notorious,' to have application to those persons who, while each was simulating continence in their marital relations, were at the same time maintaining such a course of illicit and adulterous conduct with another of the opposite sex as would constitute a counterfeit of the marriage relation. We think that such a state of cohabitation and adultery would not only be possible, but that the evidence in the case before us was amply sufficient to have justified the jury in finding that such a condition existed between the defendant and the woman in the case * * * and we think that * * * such a continuous course of illicit conduct had existed as would amount to their living together in a state of cohabitation and adultery, and as thus sufficing to satisfy the terms of the Penal Code rendering such conduct criminal."

From the law as announced in the foregoing authorities, and considering that the jury had a right to assume that the facts in the instant case were as hereinbefore have been set forth, it is clear that the verdict was fully justified and that it was supported by the evidence.

[3] Appellant also specifies error in that the trial court denied defendant's motion to strike out as a conclusion the answer of a witness in substance that defendant "lived a part of the time in a house 200 feet away, and the rest of the time in a garage 50 feet away" from the house in which the wife of defendant resided. While in a sense the answer was a conclusion, not only did the particular witness testify to facts from which such conclusion would follow, but several other witnesses did likewise. It is therefore apparent that no harm resulted to defendant by reason of the ruling to which exception was taken.

[4] Appellant urges additional error committed by the trial court in denying defendant's motion to strike out a portion of the testimony of another witness relating to what he saw through a window of the garage. The alleged objectionable testimony, in effect, was that at night the witness could see silhouettes of persons very similar to defendant and the woman "dressing and undressing, combing their hair and washing, whatever they were doing, cooking." The basis of the motion made by defendant was that the persons whose silhouettes were seen by the witness were not identified as the defendant and the woman in question. While the identification was not absolute in that the witness stated, in effect, that he could not determine from what he saw through the window "whether or not it was the defendant," the witness did testify "that they were very similar to the two persons themselves"; that he had known the defendant for about four years, knew that he was living in the garage, which was located about 100 feet from the home of the witness; that before the time

the witness saw the silhouettes he "had seen Mr. Bealey and the woman go to the garage and not come out"; and that he had thus observed the defendant through the window "practically every night; * * * that he (defendant) was there during the month of March or previous * * * several nights."

It thus becomes manifest that the question of whether defendant and the woman were the persons whose silhouettes were seen by the witness was a proper one for the consideration of the jury, and that no error was committed by the trial court in refusing to strike out the testimony to which exception was taken.

No prejudicial error appearing in the record, it is ordered that the judgment and the order denying the motion for a new trial be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

81 Cal. App. 506

PEOPLE v. O'CONNOR et al. (Cr. 952.)

(District Court of Appeal, Third District, California. Feb. 28, 1927.)

1. Criminal law 🔑620(2)—Court cannot order joint trials of defendants, not jointly charged by information or indictments (Pen. Code, §§ 954, 1098).

Court has no power to order joint or simultaneous trials of defendants, not jointly charged by informations or indictments, either under Pen. Code, § 954, or section 1098.

2. Criminal law 🔑619—Indictments cannot be consolidated when against different defendants; "consolidation of indictments;" "joint trials."

Indictments cannot be consolidated when against different defendants, though offense was joint and they might have been jointly indicted; though after proper consolidation there is but one complaint, information, or indictment, as distinguished from "joint trials," where identity of each case is maintained.

3. Criminal law 🔑622(½)—In determining rights of parties to separate trials, court can look no further than language of informations.

In determining rights of parties to separate trials and correlative rights which pertain thereto, trial court can look no further than language of informations.

4. Criminal law 🔑1186(4)—In joint trial of defendants not jointly charged, refusal to allow each as many peremptory challenges as he would have had if tried alone held prejudicial error (Const. art. 6, § 4½); "substitution of procedure;" "mistake in procedure."

In joint trial of defendants not jointly charged, refusal to allow each as many peremptory challenges as he would have had if tried alone was denial of right of trial by jury and prejudicial error, under Const. art. 6, § 4½, since it was "substitution of procedure," rather than "mistake in procedure."

5. Criminal law 🔑1186(4)—It is reversible error for court to disregard usual procedure and adopt new and entirely different manner from that recognized by law (Const. art. 6, § 4½).

Under Const. art. 6, § 4½, providing that no judgment shall be set aside for error as to matter of procedure, in absence of miscarriage of justice, court cannot disregard usual procedure and adopt new and entirely different manner from that recognized by law.

6. Criminal law 🔑422(1)—Information against codefendant, his plea of guilty, sentence, and statements to officers in defendant's absence held inadmissible.

Where two persons were jointly indicted and one pleaded guilty, no testimony as to information against him, his plea, sentence, or statements to officers in codefendant's absence is admissible against codefendant.

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

James O'Connor and others were convicted of burglary and robbery, and they appeal. Reversed, and new trials ordered.

J. H. Laugenour, J. G. Bruton, Neal Chalmers, Percy Napton and A. C. Huston, Jr., all of Woodland, for appellants.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. Appellants were convicted in the trial court and prosecute appeals from the orders denying new trials and from the judgments of conviction.

On the 24th day of March, 1926, an information was presented to the trial court and thereafter filed with the clerk thereof jointly charging the defendants Herbert Fitzgibbons and James O'Connor with two offenses, to wit, the crime of burglary alleged to have been committed by the said Herbert Fitzgibbons and James O'Connor on or about the 28th day of February, A. D. 1926, in that in the county of Yolo, in the state of California, said defendants did then and there feloniously, etc., enter a certain dwelling house owned and occupied by one W. A. Lillard; and, for a second offense in the second count, the said Herbert Fitzgibbons and James O'Connor were charged with having on the 28th day of February, 1926, in the county of Yolo, forcibly and feloniously taken from the possession and immediate presence of W. A. Lillard, Mrs. W. A. Lillard, and Tom Lillard certain personal property, to wit, jewelry, United States money, personal effects, firearms, and other personal property, then and there of the value of $100; that said taking was accomplished by said defendants by means of force, violence, intimidation, etc.

On the 5th day of April, 1926, the said James O'Connor and Herbert Fitzgibbons were arraigned, attorneys appointed to defend the respective defendants, and, upon being arraigned, the said defendants, respectively, pleaded "not guilty," and the court then set said case for trial for June 2, 1926, at 10 o'clock a. m.

Thereafter, and on the 20th day of April, 1926, an information was filed in the superior court of Yolo county against the defendants John Franks and Edward Brock, in which information said defendants were jointly charged first with the crime of burglary, in that the said John Franks and said Edward Brock did, on or about the 28th day of February, in said county of Yolo, unlawfully, feloniously, etc., enter a certain dwelling house of W. A. Lillard, with intent to commit the crime of larceny, and, in the second count in the same information, said John Franks and Edward Brock were accused by the district attorney of Yolo county of the crime of robbery, in that the said John Franks and Edward Brock, on or about the 28th day of February, A. D. 1926, in the county of Yolo, did then and there willfully, unlawfully, forcibly, etc., take from the possession and immediate presence of W. A. Lillard, Mrs. W. A. Lillard, and Tom Lillard certain personal property, to wit, jewelry, United States money, personal effects, firearms, and other personal property, then and there of the value of $100; that said taking was accomplished by means of force, violence, and intimidation.

On the 26th day of April, 1926, the said defendants John Frank and Edward Brock were arraigned upon the information jointly charging them with the offenses herein named, and, upon being arraigned, the defendant John Franks pleaded guilty and the defendant Edward Brock pleaded not guilty. The court thereupon set the trial of the defendant Edward Brock for June 2, 1926, at 10 o'clock a. m., "to be tried jointly with the defendants O'Connor and Fitzgibbons."

Upon the 2d day of June, 1926, Herbert Fitzgibbons and James O'Connor, jointly charged, as aforesaid, appeared with their counsel and objected to the trial of said defendants with the defendant Edward Brock, jointly charged with the defendant John Franks. The defendant Edward Brock, jointly charged with John Franks, likewise objected to being tried jointly, or at the same time with the defendants James O'Connor and Herbert Fitzgibbons, jointly charged in the first information herein referred to. The court overruled the objections of the respective defendants, and also denied the motions of each one of said defendants for separate trials. The defendants were each, respectively, found guilty of burglary, and also of robbery, and, following their convictions they entered motions in arrest of judgment and motions for new trials, all of which were denied. From these orders and the judgments of conviction, appeals are prosecuted.

[1] The record shows that the two informations referred to, to wit, the one jointly charging O'Connor and Fitzgibbons and the one jointly charging Franks and Brock, were read to the jury, and separate verdicts as to each one of the defendants submitted to and found by the jury, and separate judgments entered against each one of the defendants. Whether the trial court has power to order joint or simultaneous trials of defendants not jointly charged by informations or indictments is the vital question involved in this appeal.

On the part of the people it is urged that section 954 of the Penal Code, while not expressly permitting such a course, is sufficiently broad and comprehensive in its terms to justify the trial court in directing a joint, or from what appears in this case to be a simultaneous, trial of defendants charged in different informations or indictments. On the part of the appellants it is argued that section 954, supra, authorizes no such procedure. It is further contended by the appellants that section 1098 of the Penal Code is the only provision of the Code referring to the trial of defendants jointly charged, and that defendants not jointly charged cannot be jointly or simultaneously tried against their objections.

Section 954 of the Penal Code referred to reads as follows:

> "The indictment or information may charge two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the indictment or information, but the defendant may be convicted of any number of the offenses charged, and each offense upon which the defendant is convicted must be stated in the verdict; provided, that the court, in the interest of justice and for good cause shown, may, in its discretion, order that the different offenses or counts set forth in the indictment or information be tried separately, or divided into two or more groups and each of said groups tried separately."

In the construction of this section, section 7 of the same Code, wherein it specifies that the singular number includes the plural, must be read in connection therewith, in so far as the word "defendant" is used, i. e., the word "defendant" in section 954 includes the plural "defendants," as well as the singular number "defendant," and therefore relates to informations or indictments, which charge one or more persons with the commission of certain offenses. Thus, in the case at bar, take the information wherein the defendants O'Connor and Fitzgibbons are jointly charged with the crime of burglary and the crime of robbery. If separate informations had been filed against said defendants charging them jointly in one information with burglary and in a second information charging them jointly with robbery, the section of the Code referred to authorizes the court to consolidate such informations and thereafter try said informations as one information containing two counts. There is nothing in the language of the section of the Code, unless we read into it an intendment of the Legislature, which authorizes the consolidation of separate informations against separate and distinct defendants. The only section of the Penal Code relating to joint trials is section 1098, which reads as follows:

> "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials. In ordering separate trials, the court in its discretion may order a separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant. If the defendants are tried jointly, the state and the defendants shall be entitled to the number of challenges prescribed by section one thousand seventy of this Code, which challenges on the part of the defendants must be exercised jointly. Each defendant shall also be entitled to five additional challenges which may be exercised separately; the state shall also be entitled to additional challenges equal to one-half the number of all the additional separate challenges allowed the defendants, any fraction to be regarded as an additional challenge."

This section is by its express terms restricted to the joint trial of the defendants jointly charged. It contains no reference whatever to the joint trial or trials of defendants separately charged. Under the terms of section 1098, supra, where defendants are jointly charged and jointly tried, the defendants named in the informations or indictments are entitled first to ten challenges, if the offense is other than that which necessarily carries a sentence of death or life imprisonment, which must be exercised jointly, and, in addition thereto, each defendant is entitled to five challenges to be exercised separately. In support of the theory that the section referred to authorizes joint trials of defendants separately informed against or indicted, our attention is called to the cases of Turner v. United States (C. C. A.) 66 F. 280; Dolan et al. v. United States (C. C. A.) 133 F. 440; Pointer v. United States, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208; Bennett v. United States, Fed. Case No. 14572; Williams v. United States, 168 U. S. 382, 18 S. Ct. 92, 42 L. Ed. 509. In the case of Turner v. United States, supra, it was held that two indictments may be consolidated under the terms of U. S. Revised Statutes, § 1024 (U. S. Comp. St. § 1690), but an examination of the facts in that case shows that the two indictments were both against the same defendants, and the indictments, being consolidated, were treated as one indictment with four counts against the defendants, who were jointly indicted in both the indictments. In Dolan et al. v. United States, supra, it was again held that section 1024, U. S. Revised Statutes, which authorizes the joinder in one indictment of charges and the consolidation of indictments against the same person for the same act or transaction, or for two or more acts or transactions connected together, or of the same class of crimes or offenses "which may be properly joined," permitted the consolidation of the offenses charged in that case. Here again, however, the indictments were all against the same defendants and were not separate indictments against separate and distinct defendants. In Pointer v. United States, 151 U. S. 396, 14 S. Ct. 410, 38 L. Ed. 208, only one defendant was involved, and he was charged with two murders committed at the same time and by the same means. In the case of Bennett v. United States, Fed. Case No. 14572, supra, the indictment contained separate counts against one person, and it was held that the charges set forth in separate counts were proper to be included in one indictment. In Williams v. United States, 168 U. S. 382, 18 S. Ct. 92, 42 L. Ed. 509, the two indictments involved in that case were against the same defendants, and it was held that the district court committed no error in ordering their consolidation. It is there, however, pointed out that the case under consideration differs from those wherein the indictments are against different persons. In Betts v. United States (C. C. A.) 132 F. 228, we have a case very similar to the one at bar. There it was ordered that the several indictments should be tried together, and upon each indictment separate verdicts were returned. This was held error. The court refers to the section relative to the consolidation of indictments and says:

> "Plainly the indictments were not consolidated, because the record shows that there were separate verdicts and cumulative sentences, so that each proceeding retained its identity. The entire effect of the order was only that the various indictments were tried together by the same jury."

There was no order made in the case at bar for the consolidation of the informations. It was simply an order for the trial of the defendants jointly, which was, in effect, that they were to be tried together before the same jury, the identity of each information was mentioned throughout the trial, separate verdicts, sentences, etc. In view of these circumstances, the court in Betts v.

United States, supra, uses the following language:

> "We have not referred to section 1024 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), which relates especially to consolidations of indictments. This section originated in 1853, while section 921 (U. S. Comp. St. 1901, p. 685) originated in 1813. So far as we can discover, both sections, under proper rules of construction, have full effect. So far as the topic we are discussing is concerned, section 1024 makes no provision for trying indictments together, but only that the court may order them to be consolidated. If this means anything more than was done in the present case, it certainly could have no just application to the indictments at bar."

The court then cites a number of cases wherein consolidations were permitted, as we have herein stated, and also cases wherein consolidations were not permitted, being cases where the indictments were against different defendants. In McElroy v. United States, 164 U. S. 76, 17 S. Ct. 31, 41 L. Ed. 355, separate indictments against separate defendants were consolidated, and upon appeal such consolidation was held error and the judgment reversed. In considering the consolidation of such indictments, the court there said:

> "It is admitted by the government that the judgments against Stufflebeam and Charles Hook must be reversed, but it is contended that the judgments as to the other three defendants should be affirmed, because there is nothing in the record to show that they were prejudiced or embarrassed in their defense by the course pursued. But we do not concur in this view. While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same, and where the offenses are in no wise parts of the same transaction, and must depend upon evidence of a different state of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions. The order of consolidation was not authorized by statute, and did not rest in mere discretion."

[2] This case goes farther than is warranted by the circumstances of the case at bar, but the general language used therein, to the effect that indictments cannot be consolidated when against different defendants, is pertinent. In United States v. Durkee, Fed. Case No. 15008, we have an exactly parallel case, presenting the same questions which we are here considering. It was there held that, whenever there are several charges against one person or persons for the same act or transaction, the whole may be joined in one indictment in separate counts, and, if two or more indictments shall be found in such cases, the court may consolidate them, but this does not authorize the consolidation of separate indictments against different persons, although the offense was joint and they might have been jointly indicted. For the error of the court in consolidating the indictments the judgment was reversed. In United States v. McConnell (D. C.) 285 F. 164, the same ruling was had as laid down in the Case of Durkee, supra. In De Luca v. United States (C. C. A.) 299 F. 741, the court, on page 744 of the same volume, in relation to consolidation of indictments, states:

> "The statute refers to several charges, which shall be against the same person, and when the charges are against more than one person, there can be no consolidation by the court, unless all the defendants are identical in all the indictments."

The authorities which we have herein referred to are cited in the opinion of that case. It will be noted that the court held that to authorize the consolidation of indictments, the defendants in the several cases must be identical. The rule that the defendants must be identical to warrant consolidation of indictments is also found in section 1042 of Bishop's Criminal Procedure. In the absence of a statute, the question whether a defendant may be tried upon two indictments at the same time, the indictments being consolidated, there is a diversity of opinion. See Lucas v. State, 144 Ala. 63, 39 So. 821, 3 L. R. A. (N. S.) 412. Where the indictments, however, are against different defendants, there appear to be no cases holding that such indictments may be consolidated or a joint trial on each indictment had against the objections of the defendants. While there appears some loose language as to the meaning of the terms "consolidating indictments and joint trials," they are separate and distinct, as pointed out in the case of Betts v. United States, 132 F. on page 234, supra. Where consolidation is had, there is thereafter but one complaint, information, or indictment, but where joint trials are had, the identity of each case is maintained. This definition is taken in that case from proceedings had in civil cases, but it is there held that the same interpretation applies to criminal trials.

In the case at bar, neither information refers to the other, that is to say, the information jointly charging O'Connor and Fitzgibbons with the commission of the specified offenses makes no reference to any participation therein by either Franks or Brock. Likewise, the information jointly charging Franks and Brock with the commission of said offenses makes no mention of the participation therein of either O'Connor or Fitzgibbons; that is to say, so far as the initiatory proceedings are concerned and the fixing of the rights of the parties to their trials, there is nothing appearing in the record to indicate that the offenses were not entirely separate and distinct. Under such circumstances, it would appear that the reasoning of the court in People v. Degnen, 70 Cal. App. 567, 234 P. 129, applies. It is there said that in determining the effect of an information consisting of two counts, one charging assault with intent to commit murder and the other rape, as against a demurrer on the ground that more than one offense is attempted to be charged in said indictment, except as provided in section 954 of the Penal Code, in this, that the said indictment charges or attempts to charge two different offenses, which do not appear from said indictment to be different statements of the same offense, etc., the appellate court may only look to the face of the pleadings.

[3] In determining the rights of the parties to separate trials and the correlative rights which pertain thereto which we are soon to consider, the trial court can look no further than the language of the informations. It is manifest that the right which the law gives under the informations or indictments cannot be withheld or denied, simply because in the course of the trial evidence may be adduced, which would have authorized the prosecutor to have filed a different information or a grand jury to have presented a different indictment, which would have subjected the defendant to a more limited or different exercise of his rights during the initiatory and preliminary course of the trial.

In Taylor v. State, 20 Ala. App. 133, 101 So. 93, the court, in considering the question of consolidation of indictments in felony cases where the defendants were not the same in each indictment, used this language:

> "We know of no law which authorizes the consolidation of felony cases where the parties are not jointly indicted, and in this case, taking the records of the court as importing verity, it was not done."

For this reason, the judgment of the trial court was reversed.

There is an entire want of decisions in this state where the question has been presented in the form it now comes before us for consideration, but, in the case of People v. Plyler, 121 Cal. 160, 53 P. 553, the opposite side of this issue was presented, and the holding there supports the reasoning which we have herein set forth. In the Plyler Case:

> "The defendant and one Schoedde were together held over for trial. In due time the district attorney filed separate informations against them. This precluded a joint trial, and defendant insists that it was error. The argument advanced is that after the defendants had been jointly held for trial the district attorney had no power other than to file a joint information against them. The defendants were of right entitled to a joint trial, and each to the aid and assistance of the other in his defense. This right was denied them by the course which the prosecuting officer adopted. It is further said that the law gives to defendants jointly charged the privilege of separate trials (Pen. Code, § 1098), but secures no such right to the people. It is true that the law, contemplating the embarrassments which may arise to defendants upon joint trials, and the desire which one may have to make a defense not acceptable to his codefendants, has humanely accorded the privilege of separate trials. But that is aside from the vital question. Is it mandatory upon the district attorney under the indicated circumstances to file a joint information? We are not advised of any law so declaring. It is within his discretion to inform against them either jointly or severally. The state may determine whether it will proceed against defendants accused of the commission of a single crime, either jointly (with the privilege to each of them of securing a separate trial) or separately, as was done in this instance. Unquestionably a grand jury may so return indictments, and the same course should be and is open to the district attorney."

Thus, in that case, the election of the people to file separate informations fixed the rights of the parties and, in the language of the opinion, "precluded a joint trial." The opinion in that case further shows that the defendants jointly participated in the commission of the offense charged, but the rights of the parties separately informed against were fixed and determined according to the Code provisions relating to the trial of separate defendants and the right to a joint trial under such circumstances did not exist. The conclusion seems inescapable that if the right of a joint trial does not exist where the informations or indictments are separate, the court has no power or authority to order a joint trial. The court, in passing upon this question, cites section 1098 of the Penal Code as the one governing the question of joint and separate trials. This section of the Code has been amended since the rendering of the opinion on the Plyler Case, but not as to anything included in that case. The amendment relates only to the elimination of separate trials where the defendants are jointly indicted and providing for the exercise of challenges in such cases.

The status of the rights of the defendants, as fixed by the informations, directly bear upon and determine the challenges that may be exercised by the defendant or defendants upon the impanelment of the jury. There is no Code provision in this state relating to the challenges to be exercised by defendants jointly tried upon separate informations. Section 1098 of the Penal Code relative to challenges relates only to defendants "jointly charged." In such cases, the defendants jointly charged are entitled to exercise ten joint challenges and five separate challenges each, except where the offenses charged allow twenty joint challenges. Thus, O'Connor and Fitzgibbons, being jointly charged, were entitled to exercise ten joint challenges and were then respectively entitled to five separate challenges, aggregating twenty challenges in all. The defendant Brock, being separately charged, was entitled, there being nothing in the Codes to the contrary, to the number of challenges given to him by the Codes, based upon the information filed against him and had separate and distinct right to ten peremptory challenges. Thus, if the law permitted and authorized the joint trial of the defendants, when separately informed against, the number of peremptory challenges allowed by law in this case would have been thirty. The court limited the defendants to twenty-five peremptory challenges in the following manner: Ten challenges to be exercised jointly by all the defendants, five challenges each separately. By the ruling of the court, the defendants O'Connor and Fitzgibbons were limited to seventeen peremptory challenges, three of the challenges of the first ten counted by the court as joint challenges exercised by the attorney for the defendant Brock was counted as against the defendants O'Connor and Fitzgibbons. Defendants O'Connor and Fitzgibbons sought to exercise the challenges which we have just stated that section 1098 of the Penal Code accorded them, but the exercise of this right was denied by the court. It does not appear that the defendant Brock sought to exercise the full number of ten challenges, which, we have stated, he was entitled to, nor that the defendant Brock sought to exercise all the peremptory challenges which the trial court was ready to permit. It does appear, however, that upon the beginning of the impanelment of the jury, and, also, upon the beginning taking of testimony, the defendants O'Connor and Fitzgibbons, jointly charged, objected to any proceedings being taken and had concerning the trial of Brock upon the information upon which he alone was charged, and likewise that the defendant Brock made the same objections.

[4] The rule relating to the number of challenges to which defendants may be entitled when jointly tried, in the absence of a statute relating thereto, is thus stated in 35 C. J. § 472, p. 412:

> "The general rule, in the absence of statute, is that, where several defendants are jointly tried, each may challenge peremptorily the full number of jurors to which he would be entitled if tried alone,"

—and decisions supporting this statement of the law are there cited and are too numerous to be set forth herein. The common-law rule relating to the right of said challenges, in the absence of a statute providing therefor, is thus stated by Justice Story, in United States v. Marchant, 12 Wheat. 480, 6 L. Ed. 700, reported in the note to People v. Caruso, 170 Mich. 137, 135 N. W 968, and as reported in Ann. Cas. 1914A, at page 860:

> "'Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one is withdrawn from the panel as to all the prisoners on the trial. * * * This is the rule clearly laid down by Lord Coke, Lord Hale, and Sergeant Hawkins, and, indeed, by all the elementary writers.' The right of each joint defendant to the full number of peremptory challenges allowed to a defendant tried alone has been sustained in every case decided under the common law or under a statute not plainly indicating an intent to establish a different rule."

See the cases cited on page 860, Ann. Cas. 1914A.

From what has been said, the conclusion necessarily follows that the defendants were compelled to submit to a trial against which they had a legal right to object and against which they did object and, therefore, that the jury was not impaneled in this case as provided by law, and the trial court was not authorized to proceed with the trial with the jury in the impanelment of which the rights of the defendants were not allowed to be exercised. Meeting these objections as to the want of authority to order a joint trial herein and of the limiting of the challenges by the defendants, it is argued that section 4½ of article 6 of the Constitution is applicable, wherein it provides that:

> "No judgment shall be set aside, or new trial granted, * * * for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

As generally defined, "procedure" includes in its meaning whatever is embraced by the three technical terms, pleading, evidence and practice. 32 Cyc. 405. Had there been no denial of the exercise of any peremptory challenges, we seriously question whether this section has any application to the cause before us. This section must refer to pleading and procedure, as authorized by the Codes. Thus, to make it applicable to the pleadings, had there been any defects in the informations not affecting the substantial rights of the parties, as accorded by law, then, and in that case, the error should be held harmless.

[5] Likewise, if the court omitted to follow the procedure embodied by the Codes for the arraignment and trial of the defendants upon the informations filed against them and had committed some error in so doing, which did not affect the substantial rights of the parties, then such error in procedure would likewise be held harmless, but, it cannot reasonably be held that section 4½ of article

6 is so broad in its meaning as to permit the trial court to disregard the usual and ordinary procedure in the trial of a cause and adopt a new and entirely different manner from that recognized by law. Such a course is not a mistake in procedure, it is a substitution of procedure. What would excuse a mistake in procedure would not and could not be held to allow the creation of a course unprovided for by law. Mistake is one thing; a substitution is an entirely different thing. As we have said, the defendants were deprived of the right of trial by jury, as it should have been constituted by law, in that they were compelled to go to trial before jurors whom they were entitled to reject, which brings it in principle on a parallel basis with decisions of courts relative to the right of trial by jury. In Farrell v. City of Ontario, 39 Cal. App. 351, 178 P. 740, the court, speaking through Justice Myers, touching this right, said:

> "The right to trial by jury thus guaranteed was the right as it existed at common law. Koppikus v. State Capitol Commrs., 16 Cal. 248, 253; Cauhape v. Security Savings Bank, 127 Cal. 197, 202 (59 P. 589). The purpose of the amendment of 1874 to section 592 of the Code of Civil Procedure was to make it conform thereto. Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 556 (147 P. 238). It follows, therefore, that the common-law rule respecting the right to trial by jury as it existed in 1850 is the rule of decision in this state. Pol. Code, § 4468; Martin v. Superior Court, 176 Cal. 289 (168 P. 135, 136 L. R. A. 1918B, 313)."

And, further along in said opinion, the court said:

> "Respondent urges that the decision of the court, as embodied in the findings and conclusions drawn by it, is a just one under the evidence, and that, therefore, its reversal is precluded by section 4½, article 6, of the Constitution. It may be doubted that this section applies to a situation such as is here presented; but assuming that it does, we do not hesitate to hold that the denial of the right of trial by jury to a party entitled thereto is, in itself, a miscarriage of justice."

See, also, 15 Cal. Jur. 328, § 7.

In passing upon the questions here being considered, this court in the case of People v. Wismer, 58 Cal. App. 679, 209 P. 259, has held that:

> The "right of trial by jury is fundamental, a right which came to us from the common law and as such guaranteed by the Constitution—and inseparably connected therewith * * * is the right to a trial by a jury consisting of unbiased and unprejudiced persons."

In that case the trial court had denied a challenge for cause, which should have been allowed, and it was held that where a defendant in a criminal action, notwithstanding he has exercised all his peremptory challenges, is compelled to accept a juror, who is disqualified by reason of actual bias, section 4½ of article 6 of the state Constitution has no application. In other words, to give the section of the Constitution application, the juror impaneled must be such a juror against whom the defendant has no legal objection and against whom he is not deprived of exercising any legal objection or right accorded him by law. Again, in the case of People v. Carmichael, 198 Cal. 534, 246 P. 62, the Supreme Court, quoting from People v. Wismer, supra, followed the ruling had in that case and reaffirmed the statement that section 4½ of article 6 cannot be relied upon to prevent reversal where the defendant has been deprived of a fundamental right in the impanelment of a jury.

[6] The evidence in this case disclosed that five persons were engaged in the commission of the offenses charged; that after the commission of the offenses the defendants escaped in an automobile which was wrecked a few miles distant from the commission of the offense, one of the occupants killed and the others so seriously injured as to render escape impossible. It is argued upon this appeal that the testimony is insufficient to warrant the conviction of the defendant Brock. However, from what we have said, it is unnecessary to go into a consideration of the testimony further than to call attention to one matter, lest error might be committed upon a subsequent trial hereof. The people were allowed to introduce testimony of the clerk of the court and of an officer showing the information against the defendant Franks, his arraignment, plea of guilty, sentence to the penitentiary, and also, statements that were made by Franks to the officer, relative to the number of persons engaged in the commission of the offenses. This testimony appears to have been stricken out by the court, for the reason that one of the Lillards, who recognized Franks during the robbery, was not in court at the time that Franks pleaded guilty and was sentenced, and therefore could not say that it was the same person. Lest this alleged defect in the testimony /be supplied upon a subsequent trial and testimony to which we have referred be again admitted, we deem it necessary to state that no testimony in reference to the information filed against Franks, his plea of guilty, his sentence thereon, and what he might have said to the officers in the absence of other defendants is admissible, whether the alleged missing link were supplied that the Franks, who was recognized at the robbery, was identified as the same Franks who pleaded guilty. As the alleged defects in the instructions will not occur upon trials separately had upon the informations presented against the respective defendants, we deem it unnecessary to consider the objections thereto further than to state that instruction No. 28, while harmless, is

not a full and complete statement of the law and should be omitted or redrafted. The orders and judgments appealed from are reversed and new trials ordered of the defendants O'Connor and Fitzgibbons, upon the information jointly charging them with the commission of the offenses therein stated, separately from a trial against the defendant Brock on the information filed against him, and, likewise, a trial of the defendant Brock, separately from the trial of Fitzgibbons and O'Connor.

We concur: FINCH, P. J.; HART, **J.**

SCOTT v. BECK. (Civ. 5205.)★

(District Court of Appeal, First District, Division 1, California. March 9, 1927. Hearing Granted by Supreme Court May 5, 1927.)

1. Quieting title 🔑44(4) — Plaintiff's title, sought to be quieted, held prima facie established by deed to plaintiff from immediate and remote grantors who were in actual possession at time of transfer.

In action to quiet title, evidence of deeds conveying property to plaintiff's grantor and to plaintiff, and testimony of plaintiff's grantor that it and its grantor were in actual possession of entire tract at time of transfer to plaintiff, was sufficient prima facie to establish ownership in plaintiff.

2. Taxation 🔑615 — Code sections comprise complete plan for selling property for taxes, and must be considered together (Pol. Code, §§ 3764, 3771, 3785b [St. 1913, pp. 556–558]).

Pol. Code, §§ 3764, 3771, 3785b (St. 1913, pp. 556–558), comprise complete plan for sale of property for nonpayment of taxes, and must be considered and construed together.

3. Taxation 🔑658(3)—Published notice of tax sale must name person to whom delinquent taxes were assessed at time of sale (Pol. Code, §§ 3764, 3771, 3785b [St. 1913, pp. 556–558] and § 3786, subd. 5 [St. 1911, p. 1102]).

Under Pol. Code, §§ 3764, 3771, 3785b (St. 1913, pp. 556–558), requiring name of person to whom delinquent taxes were assessed at time of tax sale, and none other, to be recited in deed, which by section 3786, subd. 5 (St. 1911, p. 1102), was made primary evidence of proper sale of property, and specially providing for notice by mail to person to whom property was last assessed next before sale, delinquent person whose name was required to be stated in published notice of tax sale was person to whom delinquent taxes were assessed at time of sale.

4. Taxation 🔑658(2)—Tax collector is not concerned whether notice of tax sale is received, though mailing is necessary to authorize sale.

Though mailing of notice of tax sale to person to whom delinquent taxes were assessed at time of sale is a necessary fact to authorize tax collector to make sale of property, tax collector is not concerned whether person to whom notice is mailed receives it.

5. Taxation 🔑789(1)—Tax deed is admissible to support claim of title under tax sale, and is prima facie evidence that copy of notice of sale was properly mailed.

In action to quiet title to realty, where defendant bases his claim to property on tax sale, tax deed from state is admissible in support of claim of title, and is prima facie evidence of fact that copy of notice of sale was mailed to person to whom property was last assessed.

6. Taxation 🔑789(1)—Defendant, to establish title under tax deed, was not required to produce deed to state as well as deed from state.

In action to quiet title to land claimed by defendant under tax deed, it was not necessary for defendant, to establish his title, to produce in evidence deed to state as well as deed from state.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Georgia E. Scott against S. Beck. Judgment for plaintiff, and defendant appeals. Reversed.

McKenna & McKenna, of Los Angeles, for appellant.

Andreani & Haines and John L. Bisher, Jr., all of Los Angeles, for respondent.

CASHIN, J. An action to quiet the title to lot 93 in tract No. 909, situated in the city of Los Angeles.

The complaint alleged title in the plaintiff with the right to possession. The averments of the complaint were denied by defendant, who alleged title in himself through a tax deed from the state of California. Neither of the parties to the action was in actual possession of the lot, which was unimproved. Judgment was entered for the plaintiff, from which the defendant appeals on the ground that the evidence was insufficient to sustain the allegations of the complaint and the conclusion of the trial court that defendant had no title to the property.

[1] The plaintiff, in support of her complaint, introduced in evidence a deed dated October 16, 1911, executed by Clara G. Spring et al., which in terms transferred the tract mentioned to Lizzie J. Brent, a deed from the latter and her husband to Brent Investment Company, a corporation, conveying the same property, together with a deed from the corporation to plaintiff of the lot in question, the latter transfer being dated April 3, 1913. The testimony of an officer of the corporation sufficiently shows that Lizzie J. Brent was in actual possession of the entire tract, and that the corporation likewise was in possession at the time of the transfer to the plaintiff. This evidence was sufficient prima facie to establish ownership in the plaintiff. Holthoff v. Freudenthal, 22 N. M. 377, 162 P. 173; Mitchell v. Titus, 33 Colo. 385, 80 P. 1042; Rockey v.

★Superseded by opinion of Supreme Court, 266 P. 951.

Vieux, 179 Cal. 681, 178 P. 712; Pearson v. Hellman Commercial T. & S. Bank (Cal. Sup.) 249 P. 10; Kilfoil v. Warden, 46 Cal. App. 502, 189 P. 303.

Defendant claims title as grantee under a tax deed dated August 4, 1919, executed by the tax collector of Los Angeles county. The deed recited that the lot described was duly assessed for taxation in the year 1913 to Lizzie J. Brent, and was thereafter, on the 3d day of July, 1919, duly sold to S. Beck by W. O. Welch, tax collector of the county of Los Angeles, for nonpayment of delinquent taxes which had been legally levied in the year 1913 and were a lien thereon; further stating the total amount for which the same was sold and that all taxes levied and assessed against the property prior to the year 1919 had been paid and discharged. The deed was in the form, and contained the recitals, provided by section 3785b of the Political Code (Stats. 1913, p. 558).

It appears from the evidence that the lot was assessed to the plaintiff in the years 1916 to 1920, inclusive, and that the taxes levied thereon after the year 1913, to and including the first installment of the year 1921, were paid by her with the exception of the second installment of 1919, which became delinquent, and the lot was again sold to the state in 1920. Defendant redeemed the property from the latter sale, and, after the year 1920, the taxes levied thereon, with the exception of the first installment of 1921, were paid by him. The proceedings leading to the sale to defendant on July 3, 1919, were conducted under the provisions of sections 3764 and 3771 of the Political Code as amended in 1913 (Stats. 1913, pp. 556, 557). In the addenda attached to the published tax list and notice of sale appeared the name of Lizzie J. Brent, the person to whom the lot which was therein described was assessed for the delinquent taxes of 1913. The name of the plaintiff, who was the record owner in the years 1918 and 1919, and to whom the property was last assessed next before the sale in question, did not appear in the list or in the notice mentioned above. Furthermore, it was not directly shown at the trial that the tax collector complied with the provisions of section 3771 of the Political Code by mailing a copy of the list or publication to the last-known post office address of the plaintiff. It is contended by the plaintiff that it was essential to the validity of the published notice that her name, as the owner and the person to whom the property was last assessed next before the sale, be inserted therein, and that the evidence was insufficient to show a compliance with the statutory requirement of notice by mailing.

It was provided by section 3764 of the Political Code (Stats. 1913, p. 556) that on or before the 5th day of June of each year the tax collector must publish the delinquent list, which must contain, among other things, "the names of persons and a description of the property delinquent," and that before its publication the tax collector and auditor should jointly arrange the list so as to designate in some particular manner the property contained in the list which was sold to the state five years previous under the provisions of section 3771 of the Political Code.

It was provided by section 3771 of the Political Code (Stats. 1913, p. 557) that the property contained in the advertised list, as provided by section 3764 of the Political Code, which had not been redeemed from the previous sale to the state, be sold by the tax collector at public auction, and, further, that within five days after the first publication of the list the tax collector should mail a copy of the list or publication, postage prepaid thereon and registered, to the party to whom the land was last assessed next before such sale at his last-known post office address. It was further provided by section 3785b of the Political Code (Stats. 1913, p. 558) that the tax collector should execute to the purchaser a deed to the property sold, this deed to contain certain recitals, those here material being as follows: That the property was duly assessed for taxation, the year assessed and the name of the person to whom assessed being stated, and was thereafter, on the date of the sale, sold by the tax collector to the grantee named for nonpayment of the delinquent taxes which had been legally levied in the year first mentioned, and were a lien on the property, no provision being made for a recital of the name of the owner or of the person to whom the property was last assessed next before the sale. It was also provided that no matters other than those stated in the section need be recited in the deed, which by subdivision 5 of section 3786 of the Political Code (Stats. 1911, p. 1102) was made primary evidence that "at a proper time and place the property was sold as prescribed by law, and by the proper officer."

[2-5] Sections 3764, 3771, and 3785b of the Political Code comprise a complete plan for the sale of property for the nonpayment of taxes, and must be considered and construed together. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195. It is evident from the provisions of these sections that the delinquent person whose name was required to be stated in the published notice of sale was the person to whom the delinquent taxes were assessed at the time of the sale to the state; this conclusion being supported by the fact that the statute required the name of that person and no other to be recited in the deed, and that special provision was made for a notice by mail to the person to whom the property was last assessed next before the sale. As stated, a compliance with the latter provision was not directly shown, and it was testified by the plaintiff that no such notice was received. While the mailing of the notice is one of the facts necessary to authorize the tax collector to make the sale (Smith v. Furlong, 160 Cal. 522,

117 P. 527), there is no provision in the statute making it any concern of the tax collector whether the person to whom the notice is mailed receives it (Healton v. Morrison, 162 Cal. 668, 674, 124 P. 240); and in an action to quiet title to real property, where the defendant bases his claim to the property on a tax sale, the tax deed from the state is admissible in support of his claim of title, and is prima facie evidence of the fact that a copy of the notice of sale was mailed to the person to whom the property was last assessed (Jacoby v. Wolff, supra).

[6] We find no merit in plaintiff's contentions that the proceedings for the assessment and collection of the taxes involved in the action for the year 1913 were irregular or invalid, nor that it was essential that defendant, in order to establish his claim of title, produce in evidence a deed to the state as well as a deed from the state (Jacoby v. Wolff, supra).

The record sufficiently shows that the tax proceedings were valid and resulted in a transfer of the title to the defendant, and that the findings to the contrary were unsupported.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

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81 Cal. App. 734

PEOPLE v. HALE et al. (Cr. 1344.)

(District Court of Appeal, First District, Division 2, California. March 15, 1927.)

1. **Criminal law 🔑404(3)—Pistols found in defendants' rooms five days after robbery held admissible to show availability of means for crime.**

Pistols found by police officer five days later in rooms occupied by defendants and companions were properly admitted in evidence, where victims testified they resembled those used by the defendants at time of robbery, for purpose of showing defendants had means available for crime committed.

2. **Criminal law 🔑404(1) — Identification, which is sole proof of object's use, distinguished from identification to prove availability of means for act.**

Distinction is to be drawn between case where identification of object is the only evidence of its use in an act, and where, its use having been proved by other testimony, it is offered only to show availability of means for committing the act.

3. **Witnesses 🔑396(1)—Recross-examination to discredit witness' repudiation of admission on cross-examination was proper though detailing witness' crimes not involving defendants.**

Recross-examination of defendants' witness to show his repudiation upon redirect of written statement, admitted on cross-examination, was proper, though it showed witness to be robber of extensive experience, in crimes not involving defendants.

Appeal from Superior Court, City and County of San Francisco; Percy S. King, Judge.

Willard Hale and John Daly were convicted of robbery, and they appeal. Affirmed.

J. W. Ehrlich, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KOFORD, P. J. The defendants appeal from a judgment of conviction of the crime of robbery and from an order denying a new trial.

[1] The appellants contend that the court erred in admitting into evidence two automatic pistols. One of the victims of the robbery testified that both of the defendants had guns (pistols), and the other victim testified as to the weapon held by the defendant who handled him at the time of the robbery. On being shown the weapons in court, these witnesses testified that they resembled those used by the defendants at the time of the robbery, and testified further as to the shape, appearance, and general description of the weapons used. Neither could positively identify the pistols. A police officer testified to having taken the weapons immediately after the arrest of defendants from the rooms in which the defendants lived with two women companions. This was five days after the robbery.

It is claimed that the pistols were not admissible because not sufficiently identified by the witnesses, because they were found five days after the robbery not in the presence of the defendants, and because other persons, namely, the two women mentioned, had access to the rooms. Appellants cite no authority except State v. Kehr, 133 Iowa, 35, 110 N. W. 149. In that case it was held that mere possession by the defendant more than two months after the crime, and with no other evidence tending to identify the weapon, was insufficient as a foundation for its admission in evidence. Appellants' objection to the evidence goes more to its weight than its admissibility. The preliminary proof is not required to amount to clear and positive identification. People v. Winters, 29 Cal. 659; People v. Szafcsur, 161 Cal. 636, 119 P. 1083.

[2] A distinction is to be drawn between a case where the identification of the object is the only evidence of its use and where the use of the object has been proved by other testimony. The identification of the object in the latter case is merely for the purpose of showing that the means were available to

do the act in the manner independently testified to by witnesses. In this case the discovery of the pistols in the rooms of the defendants, and such identification as was made by the victims of the robbery, do not constitute proof that the defendants used pistols at the time of the robbery. These witnesses had testified to the use of pistols by the defendants in the robbery, and the weapons were admissible for the purpose of showing that the defendants had the means of doing what the witnesses had charged them with doing. It was said in People v. Billings, 34 Cal. App. 549, 168 P. 396, and approved in People v. Mooney, 177 Cal. 654, 171 P. 690:

> "The fact that the cartridges found in the room of the defendant after the commission of the crime were of the same character and caliber of those found in the bodies of the victims of the explosion was admissible, as tending in a measure to show that the defendant had the means at hand to commit the crime charged against him in the manner and by the means which it was shown were employed to commit the crime. 1 Michie on Homicide."

[3] Defendants called a witness from San Quentin State Prison, where he was serving a term for robbery. He testified, on direct examination, that the pistols were his and were placed by himself where found by the police. On cross-examination, he admitted making and signing a written statement, a portion of which was read, containing statements contradictory to his testimony regarding the pistols. On redirect examination, he excused his written statement by saying he was mentally and physically ill at the time on account of being deprived of his customary morphine. On recross-examination, the entire statement as signed by him was read part by part and the witness asked as to each part whether it was true, and when he answered affirmatively, whether there was anything wrong with his mental or physical condition at the time he made the various statements contained in the writing. The statements (there were two made on two successive days) contained a record of the witness' activity as a robber over a considerable period of time. None of the robberies involved the defendants. The direct and legitimate purpose of this recross-examination was to show the witness' repudiation of his written statement to be untrue, but incidentally it proved him to be a robber of extensive experience. Appellants' ground of objection to this testimony was that it was immaterial, the crimes mentioned by the witness not involving the defendants in any way. The testimony was properly admitted.

The prosecution had the right to discredit, on recross-examination, the explanation, given by the witness on redirect, of his inconsistent statement admitted on cross-examination. If, incidentally, this brought in facts immaterial to the main issues in the case, the defendants cannot complain. Even where testimony admitted in this manner has been injurious to the character of the defendants, it has been held proper. People v. Smith, 134 Cal. 453, 66 P. 669; People v. Smallman, 55 Cal. 185.

The judgment and order appealed from are affirmed.

We concur: STURTEVANT, J.; NOURSE, J.

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81 Cal. App. 668

PEOPLE v. PRICE. (Cr. 1345.)★

(District Court of Appeal, First District, Division 1, California. March 10, 1927. Hearing Denied by Supreme Court May 9, 1927.)

1. Indictment and information ⚷71—Information stating acts constituting offense plainly and concisely, so that person of ordinary understanding would know what was charged, is good.

An indictment or information is sufficient if it gives a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of ordinary understanding to know what is intended.

2. Indictment and information ⚷110(13)—Information charging embezzlement in language of statute is sufficient (Pen. Code, § 508).

An information charging embezzlement, under Pen. Code, § 508, is sufficient, where the crime is substantially charged in the language of the statute.

3. Embezzlement ⚷26—Information accusing embezzlement of shares by obtaining same from owner as his agent and appropriating to defendant's use, contrary to trust, held sufficient.

Information charging that defendant, while acting as agent of another, obtained from such person shares of stock for a certain purpose and appropriated same to his own use, in violation of the trust and contrary to statute, *held* to sufficiently inform defendant of crime charged.

4. Indictment and information ⚷154—Failure of defendant to demur waives indefiniteness of information.

Where defendant makes no objection to information for indefiniteness, such objection must be deemed to have been waived.

5. Embezzlement ⚷44(6)—Evidence that defendant sold and kept proceeds of stock, obtained by him to exchange, held to sustain embezzlement conviction.

Where defendant, charged with embezzlement, was shown to have received certain stock for the purpose of exchanging for other stock and to have sold such stock and appropriated the proceeds to his own use, and there was evidence of defendant's admissions of embezzlement, conviction was sustained.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

★Hearing denied by Supreme Court.

E. L. Price was convicted of embezzlement, and he appeals. Affirmed.

Grant R. Bennett, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Emery F. Mitchell, Deputy Atty. Gen., for the People.

TYLER, P. J. Defendant was charged by information with the crime of embezzlement, it being alleged that by virtue of his employment as an agent there came into his possession and control 10 shares of stock of the American Telephone and Telegraph Company of the value of $1,400, the property of one W. S. Fitch, and that defendant unlawfully embezzled and appropriated the same to his own use. He was found guilty as charged. He appeals from the judgment of conviction and from an order denying a new trial. As grounds for reversal it is claimed that the information is insufficient in that it does not allege the terms and conditions of the trust whereby defendant held possession of the property. It is also claimed that there is a variance between the allegations of the information and the proof, and that the trial court erred in giving certain instructions to the jury.

[1] With reference to the first objection, it is sufficient to say that an indictment or information is good if it gives a statement of the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of ordinary understanding to know what is intended. Under our practice, the prolixity of the common-law pleading is avoided.

[2-4] It is well established that an information, under section 508 of the Penal Code, is sufficient, where the crime is substantially charged in the language of the statute. Here, in concise language, defendant is accused, while acting as the agent of another, with having obtained from such person certain shares of stock of a described corporation for a certain purpose, and then appropriating and embezzling the same to his own use in violation of the trust, and contrary to the force and effect of the statute. The information therefore sufficiently informed defendant of all the material elements of the crime charged against him. Moreover, no demurrer was interposed by defendant to the information. Under these circumstances, the objection must be deemed to have been waived. People v. Schroeder, 43 Cal. App. 623, 625, 185 P. 507.

[5] Equally without merit is the claim that there is a variance between the information and the proof. In this connection it is urged that defendant has been deprived of two substantial rights. First, the right to be tried in the county of his residence, and where the evidence shows the crime to have been committed; and, second, the right to be charged by the information with such crime as was disclosed by the evidence. The facts as revealed by the evidence, briefly stated, show, in substance, that defendant was a friend of Fitch, the prosecuting witness, and knew that he was the owner of the shares of stock in question. Fitch was employed by the Southern Pacific Railroad Company as a flagman at a street crossing at San Jose, and the stock represented practically his entire life's savings. Defendant, in company with his agent, one Ormand, recommended to Fitch that he exchange his telephone stock for shares in the Monolith Portland Cement Company and finally persuaded him to do so. The stock was indorsed by Fitch, and the defendant instead of procuring the exchange agreed upon, sold the same and embezzled the proceeds. Defendant claims that the evidence shows that he was intrusted with the stock with authority to sell it and with the proceeds of such sale to purchase other stock, and that, under such circumstances, the stock itself was not embezzled, but the crime committed was a misappropriation of the proceeds received from its sale.

While there is some evidence that might tend to support this claim, the evidence fairly construed as a whole, including a written agreement of exchange executed by the parties, shows that the stock was delivered to defendant for the express purpose of making the exchange agreed upon, and not for the purposes of sale. It further shows that defendant admitted to Fitch and to his attorney that he had embezzled the stock. We do not deem a review and analysis of the evidence necessary. There is also ample evidence in the record to show that the offense was committed in Santa Clara county, and that a demand was there made for the return of the stock. Nor is there any merit in the objection that the instructions of the court relative to venue and demand are confusing and misleading. The instructions, as a whole, fully and correctly state the law upon the subject.

The judgment and order are affirmed.

We concur: KNIGHT, J.; CASHIN, J.

81 Cal. App. 653

HAVENS v. FOSKETT et al. (Civ. 2994.)

(District Court of Appeal, Third District, California. March 9, 1927.)

1. Bills and notes 🔑343—Knowledge that drawer is not dealer in commodities does not put purchaser on inquiry, though trade acceptance recites purchase of goods.

A recital in a trade acceptance that the obligation arises out of purchase of goods from the drawer does not put purchaser on inquiry, though he knows the drawer to be a dealer in commercial paper and not in commodities.

2. Bills and notes 🔑362—Finance company's assignee, after maturity of trade acceptances, had all rights of company as holder in due course (Civ. Code § 3139).

Assignee, after maturity, taking from finance company, a holder in due course, trade acceptances indorsed in blank by the drawer, had all rights of the finance company, under Civ. Code, § 3139, providing that holder who derives his title through a holder in due course, and is not a party to fraud affecting the instrument, has all rights of the former holder.

3. Bills and notes 🔑338—Finance company, purchasing trade acceptances from dealer in paper for value before maturity without notice of defect, held holder in due course.

Finance company, purchasing trade acceptances from dealer in paper for value before maturity without notice of facts to put it on inquiry, was a holder in due course.

4. Bills and notes 🔑188—Negotiable instrument indorsed in blank is payable to bearer and negotiable by delivery (Civ. Code, § 3115).

A negotiable instrument indorsed in blank is payable to bearer and may be negotiated by delivery, under Civ. Code, § 3115.

5. Bills and notes 🔑155—Recital that acceptance belonged to series, with acceleration clause applicable to entire series on single default, did not destroy negotiability.

A clause in each of six trade acceptances that the instrument was one of a series, and that failure to pay any when due would give the holder option to declare any or all due and payable, did not destroy their negotiability.

6. Bills and notes 🔑155—Acceleration clause does not destroy negotiability of instrument.

An acceleration clause in a promissory note does not destroy its negotiability.

7. Bills and notes 🔑155—Clause accelerating maturity of series of negotiable instruments on default in one does not affect negotiability of each instrument.

Where notes of different maturities, belonging to one transaction, form a series, the negotiability of one is not affected by provision that, on maker's default as to any one, the entire series shall become due and payable.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by M. J. Havens against W. L. Foskett and others to recover amount of trade acceptances. From a judgment for defendants, plaintiff appeals. Reversed.

G. C. Ringole, Samuel Hamburg, and Henry Heidelberg, all of San Francisco, for appellant.

Stephen P. Galvin, of Los Banos, for respondents.

FINCH, P. J. The plaintiff, as assignee of Central Finance Company, a corporation, brought this action to recover the amount of six trade acceptances drawn by J. B. Vallen, doing business as Cadillac Manufacturing Company, upon defendants and duly accepted by them. They are all of one series, dated February 2, 1923, and payable 65, 70, 75, 80, 85 and 90, days, respectively, after date. They are all identical in amount and in terms except as to time of payment. The first one of the series reads as follows:

"Trade Acceptance.

"$105.00. San Francisco, California, Feby. 2, 1923.
Date of Sale.

"To Ives Hdw. Co.
Dealer's Name.
"6th St., Los Banos, Calif.
Street Address Town and State
"Sixty-five days after date pay to the order of our
days or months
selves at San Francisco, Cal., one hundred and five and no/100 dollars.

"This is one of a series of trade acceptances. Failure to pay any when due gives holder the option to declare any or all of the series due and payable. If action is instituted hereon, the undersigned promise to pay a reasonable attorney's fee in any such action.

"Accepted at Los Banos, Calif., on Feb. 2, 1923.
Dealer's Town Same Date of Order.
"Payable through Portuguese American Bank.
Name of Dealer's Bank.
"Cadillac Mfg. Co.
"Located at Los Banos, Calif.
"Ives Hdw. Co.
Signature of Acceptor or Trade-Name.
"By W. L. Foskett. J. B. Vallen.
Authorized Buyer.

"The obligation of the acceptor hereof arises out of the purchase of goods from the drawer."

All of these acceptances were sold to the Central Finance Company February 6, 1923, for a valuable consideration. They were indorsed on the back thereof:

"Cadillac Mfg. Co., by J. B. Vallen, Mgr. Demand, notice, nonpayment and protest hereby waived. Cadillac Mfg. Co., by J. B. Vallen, Mgr."

All of the instruments, after the maturity thereof, were assigned by the Central Finance Company to the plaintiff for collection. Vallen procured the instruments through fraud and the goods in payment for which they were given were never delivered. The court found:

"That each of said six trade acceptances or bills of exchange provided that, upon the default in the payment of any one of the series, said acceptances setting forth the fact that each was one of a series, all others would become due and payable at the option of the holder of the one whereof default in payment had been made; that said trade acceptance or bills of exchange did not in any way identify any of the others of the series, and the court finds that said trade acceptances or bills of exchange are nonnegotiable, * * * that the plaintiff took each and all of said trade acceptances or bills of exchange after maturity and at a time more than one month after the first one became due; that no consideration therefor was paid by the plaintiff; and that the plaintiff took by an assignment, not made or indorsed upon the original trade acceptance nor upon any paper attached to the same."

Judgment was entered in favor of the defendants and the plaintiff has appealed therefrom.

[1-4] Respondents contend that the fact that the trade acceptances were given for the purchase price of goods "was sufficient notice to put the purchaser, Central Finance Company, on guard to ascertain if in fact goods had been sold by the drawer. The Central Finance Company knew Vallen, and knew him to be a dealer in paper, for it had bought other paper from him prior to this transaction. * * * It knew that Vallen was not a dealer in commodities. Why, then, should he have paper reciting the fact that he sold commodities? With these facts before it, the Central Finance Company cannot truthfully say that it took paper as a bona fide holder for value and without notice." Respondents have not called attention to any evidence to the effect that "Vallen was not a dealer in commodities" and none has been discovered. The purchase of the instruments by the Central Finance Company appears to have been made in the usual course of the business in which it was engaged and the record does not show anything to create a suspicion even which should have put the company on inquiry, it purchased the instruments for their full value, less a discount of 5½ per cent. If the facts were as stated by respondents they would not show that the company is not a holder in due course. 8 C. J. 501; Popp v. Exchange Bank, 189 Cal. 296, 303, 208 P. 113; Goodale v. Thorn (Cal. Sup.) 249 P. 11, 13; Silberschmidt v. Moran (Cal. App.) 250 P. 205, 207. It is further to be observed in this connection that the court did not find that the Central Finance Company was not a holder in due course. The fact that the plaintiff, if he be treated as the owner of the instruments rather than as the assignee thereof for collection, took by assignment without indorsement upon the instruments by the Central Finance Company, is immaterial. The company took by indorsement and became a holder in due course. The indorsement was in blank. "An instrument so indorsed is payable to bearer, and may be negotiated by delivery." Civ. Code, § 3115. "A holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter." Civ. Code, § 3139.

[5] Respondents' main contention is that the acceleration clause in the instruments rendered them nonnegotiable. In support of this contention several California cases, decided before the enactment of the Uniform Negotiable Instrument Law, are cited. In Utah State National Bank v. Smith, 180 Cal. 1, 179 P. 160, the court had under consideration the effect of an acceleration clause in a single promissory note. The court said:

> "The note in question was dated and payable in Utah, and its negotiability must be determined by the law of the place of payment. * * * The terms of the Utah statute are shown in evidence, and, so far as the question here involved is concerned, are substantially the same as the Uniform Negotiable Instrument Law enacted in California in 1917. * * * Before the enactment of this law the great weight of authority was that under the law merchant the clause accelerating the due date did not destroy its negotiability. [Citing cases.] All the decisions based upon the Uniform Negotiable Instrument Law, so far as we are advised, hold that the clause in question does not destroy the negotiability of a promissory note. * * * Nor are we called upon to prophesy what the courts of Utah may do when the same question comes before them under the Uniform Negotiable Instrument Law. The question simply is: What interpretation do we place upon the language of the Utah statute in proof in this case? * * * The note was negotiable under the law of Utah."

This decision is in effect an interpretation of the Uniform Negotiable Instrument Law of California. Respondent relies on the case of Iowa National Bank v. Carter, 144 Iowa, 715, 123 N. W. 237. There were involved in that case three notes, each containing a clause that in case of default in payment thereof the payee "shall have the option to declare any or all other notes given for the purchase price of said property to be at once due and payable," and another clause that, "if at any time the said party of the second part * * * shall deem themselves insecure, then the whole amount of said sum of money in said notes mentioned, which shall not have been paid, * * * shall be immediately due and payable." The section of the Negotiable Instrument Law of Iowa under consideration was identical with section 3085 of the Civil Code of California. The court did not base its decision upon the fact that the accelerating clause related to the three notes and was not limited to the note in which the clause appeared. It is said:

> "Before the adoption of the Negotiable Instruments Law, we had held that these provisions in a note and mortgage rendered it nonnegotiable. * * * Since the general adoption of the Negotiable Instruments Act, the courts have held to the same doctrine."

[6, 7] Respondents also cite Wayne County National Bank v. Cook, 73 Ind. App. 404, 127 N. E. 773. The note involved in that case did not contain an acceleration clause, but it was held to be nonnegotiable by reason of other conditions contained therein. The Iowa case is in conflict with the decision in Utah State National Bank v. Smith, supra, in so far as it seems to hold that an acceleration clause in a promissory note destroys its negotiability. The latter case follows the well-established rule that an acceleration clause in a promissory note does not destroy its negotiability. No reason appears for holding that a different rule should apply to a series of notes, each containing such a clause. "Where several notes maturing at different times belong to a single transaction and form a connective series, the negotiability of one of them is not affected by the provision that, on the failure of the maker to pay any one of the notes of the series to which it belongs, the rest shall become due and payable to the holder." 8 C. J. 140; Chicago Railway Equipment Co. v. Merchants' National Bank, 136 U. S. 268, 10 S. Ct. 999, 34 L. Ed. 349; Commerce Trust Co. v. Guarantee Title & Trust Co., 113 Kan. 311, 214 P. 610; Farmers' Bank & Trust Co. v. Dent, 206 Ky. 405, 267 S. W. 202; Schmidt v. Pegg, 172 Mich. 159, 137 N. W. 524; Walter v. Kilpatrick, 191 N. C. 458, 132 S. E. 148; White v. Hatcher, 135 Tenn. 613, 188 S. W. 61; Bright v. Offield, 81 Wash. 442, 143 P. 159.

The judgment is reversed.

We concur: PLUMMER, J.; HART, J.

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81 Cal. App. 678

THOMSON v. THOMSON. (Civ. 3122.)

(District Court of Appeal, Third District, California. March 10, 1927.)

1. Trial 🔑395(5)—Finding probative facts merely is insufficient, unless ultimate facts are necessary inferences therefrom.

It is not sufficient to find merely probative facts, unless ultimate facts are necessary inferences therefrom.

2. Trial 🔑395(5)—Inference to be drawn from probative facts is finding of fact to be made by trial court.

If different inferences may be drawn from probative facts found to exist, inference to be drawn therefrom is finding of fact to be made by trial court.

3. Husband and wife 🔑43—Wife, using separate funds for family expenses or voluntarily permitting husband to so use them, cannot require husband to reimburse her.

Where wife uses her separate funds in payment of family expenses or voluntarily permits her husband to so use them, without any agreement or understanding as to repayment, she cannot require her husband to reimburse her.

4. Trusts 🔑89(1)—Evidence held to establish that certain moneys turned over to husband by wife were in trust for investment purposes.

In wife's action to establish trust in certain properties held by husband, and for an accounting, evidence *held* sufficient to sustain finding that certain moneys were turned over to husband in trust, as agent for wife, to be invested by him for her benefit, except such moneys as she voluntarily permitted him to use for family and other expenses.

5. Limitation of actions 🔑103(2)—Wife's cause of action to establish trust in property purchased for her by husband held not barred, where trust was never repudiated.

Where husband had never repudiated trust arising from purchase of property with moneys turned over to him by wife for such purpose, wife's cause of action was not barred by statute of limitations.

6. Trusts 🔑374—Interest on moneys intrusted to husband by wife for investment not traceable into specific property should be in proportion to profits realized.

Where wife, in action to establish trust in property purchased for her by husband, did not charge fraud or mismanagement of moneys and properties intrusted, rate of interest allowable on moneys not traceable into specific property should be in proportion to profits actually realized, if amount thereof can be shown.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by Vera B. Thomson against Presson W. Thomson. Judgment for plaintiff, and defendant appeals. Affirmed in part, and in part reversed, with directions.

Minor Moore, of Los Angeles, for appellant.

Louis F. Laberere and Hill, Morgan & Bledsoe, all of Los Angeles, for respondent.

FINCH, P. J. The parties intermarried June 25, 1902, and ever since have been and now are husband and wife. The plaintiff was then of the age of 22 years and the defendant was 31. At the time of the marriage the plaintiff owned securities of the value of $4,000. The defendant's property at that time, together with that acquired by him as his separate property shortly thereafter, was of the approximate value of $4,000. Beginning with the fall of 1907 the defendant attended law school for about 2 years, during which period his earnings were negligible in amount. During the other years since the marriage his average annual earnings, as a teacher prior to 1907 and as a lawyer since 1909, have been approximately $1,200. Subsequent to the marriage the plaintiff received as gifts from her mother and invested in real estate, which is clearly her separate property, the sum of $22,000. Neither this sum nor the property purchased therewith is in serious controversy. In addition to such gifts and in addition to the property owned by the plaintiff at the time of her marriage she has received gifts or legacies as follows: December 31, 1905, $4,000; December 31, 1905, $21,000; July 31, 1912, $250; December 10, 1913, $3,000; December 31, 1916, $2,100.

The complaint alleges that these various sums "were by the plaintiff turned over to the defendant as the agent and trustee of the plaintiff, for the purpose of investment by the defendant for the use and benefit of the plaintiff," and not as gifts to the defendant; that "the plaintiff permitted said defendant to make investments of said sums in his own name, but always upon the distinct agreement * * * that said moneys and all increments and transmutations thereof should be and remain the property of the plaintiff; * * * that said moneys and the increment thereof has been from time to time invested by the defendant for the use and benefit of the plaintiff herein; and that a large portion of said sum and said increment are now invested" in certain properties, describing them. The prayer is that the defendant be adjudged to hold such properties in trust for the plaintiff and that he be required to convey them to the plaintiff; that he be compelled to account to the plaintiff; that she be given judgment for the balance due her on such accounting; and that she have "such other and further relief as shall be meet in the premises."

The defendant's version of the transactions between the parties may be stated in the language of his opening brief as follows:

> "At the time of their marriage each party had some property, and the property of both was placed in a general fund, and from time to time thereafter defendant's earnings, all profits from investments, all income, and all advancements by plaintiff were placed in this general fund. Out of this general fund all expenses of the parties and of their family and of their properties and the purchase price of other properties as acquired were paid. * * * The answer alleges * * * that said properties are community property, except as to those held in joint tenancy, and as to those that they are and should be declared to be held in joint tenancy."

The court found:

> That the "plaintiff turned over to defendant for the purpose of investment by defendant various sums; * * * that said sums * * * were not intended to be, and were not, gifts to defendant; that plaintiff permitted said defendant to make investments of said sums in his own name for the community and mutual benefit of plaintiff and defendant, but without any distinct agreement between plaintiff and defendant as to equitable ownership of the properties acquired therewith, or of the increment and transmutations thereof; that said moneys, and the increment thereof, have been from time to time invested by defendant as the husband and business head of the family for the mutual benefit and use of defendant and plaintiff as husband and wife; * * * that the defendant and plaintiff from time to time discussed generally the various purchases of property before the purchasing thereof, and that plaintiff has at all times had a general knowledge of the investments made by defendant, but that defendant has never rendered to plaintiff a complete accounting for funds received by him from her; * * * that in the year 1902 defendant purchased as his separate property certain real estate in Galesburg, Ill.; * * * that after marriage of the parties hereto defendant sold said property for $2,500 net to him, and the said $2,500 went into what is hereinafter designated as 'general fund,' the same being a fund in the possession and under the control of defendant at all times during the married life of plaintiff and defendant, and into which general fund all receipts and proceeds from plaintiff's (apparently should be defendant's) earnings, sales of property, proceeds from properties, and advancements by plaintiff to defendant, went, from time to time, and out of which fund defendant from time to time paid usual and necessary expenses, and personal expenses of plaintiff and defendant and their family, various business expenses of defendant, and the purchase price of various properties, both real and personal, as hereinafter more fully stated."

Then follows a detailed statement of moneys paid into the general fund from various sources, including the moneys delivered by plaintiff to defendant, and of payments made out of that fund in the purchase of properties, both real and personal. The twelfth finding enumerates the different sums of money delivered by the plaintiff to defendant, and then continues as follows:

> "All of which sums in this paragraph mentioned * * * were, at the times herein respectively mentioned after the several items, delivered by plaintiff to defendant for such expenditures as he might from time to time see fit to make, including payment of family expenses; that said deliveries of funds were not, and were not intended by plaintiff as, a gift to defendant, but were for necessary use by him in connection with family matters as occasion required, and for investment for family benefit."

The court further found, in response to an allegation of the answer, that it is not true that in 1902, or at any other time—

> "plaintiff and defendant agreed that in consideration of the promise of the defendant to contribute his time, energies, and talent, or any of them, to making investments in a home, and in other property, or otherwise thereafter to be acquired * * * or in consideration of defendant investing his property and money, or either of them, then owned, and all properties or money thereafter to be received by him from any source, or otherwise, plaintiff promised to deliver to defendant her said securities of the value of $4,000 or any securities, for the purpose of aiding the defendant to purchase * * * properties as defendant might determine advantageous to both parties, * * * and for the purpose of paying any expenses

necessarily to be incurred for the mutual benefit of both parties or otherwise, except as herein otherwise found. And the court further finds that no partnership agreement of any kind or nature was ever entered into between plaintiff and defendant concerning their property or properties, or the property of either party."

The decree adjudges that certain real property, standing of record in the names of the plaintiff and the defendant as joint tenants, is the separate property of the plaintiff, subject, however, to a charge of $3,000, with interest thereon, in favor of the community property of the parties. This is in accordance with the prayer of the answer and it does not appear that the appellant objects thereto. It is adjudged that a certain parcel of land and an automobile belong to the plaintiff as her separate property. The plaintiff's separate funds were used directly to pay for such property and there can be no question as to the correctness of the judgment relative thereto. Certain other property is adjudged to be the separate property of the defendant, and, of course, he makes no complaint in that respect. Of the other properties in controversy, it is adjudged that one parcel of land, standing in the names of the parties as joint tenants, is owned by them in joint tenancy, and that the remainder thereof is community property. This provision of the judgment is in accordance with the rights of the parties as contended for by the defendant. No reason appears for disturbing the judgment in so far as the terms thereof have been set forth. But the court further gave the plaintiff a personal judgment against the defendant for all sums of money delivered by her to him that were not traced into specific property which was purchased therewith, with interest at 6 per cent. per annum on each of said sums from the date of the delivery thereof to the entry of the judgment, regardless of the purposes for which the money was used.

[1, 2] Much of appellant's argument is based upon the contention that the court did not find that the plaintiff delivered the moneys in question to the defendant as her agent and in trust to be invested for her benefit. It must be conceded that the findings are uncertain in this respect. Probative facts are found from which it may be inferred that the moneys were so delivered. The rule is well settled, though sometimes lost sight of, that it is not sufficient to find merely the probative facts unless the ultimate facts are necessary inferences therefrom. Ellis v. Bonebreak, 180 Cal. 168, 170, 179 P. 893; Potts v. Paxton, 171 Cal. 493, 498, 153 P. 957; McCray v. Burr, 125 Cal. 636, 638, 58 P. 203. If different inferences may be drawn from probative facts found to exist, the inference to be drawn therefrom is a finding of fact to be made by the trial court. Estate of Berry, 195 Cal. 354, 361, 233 P. 330. Whether or not the defendant was the agent and trustee of the plaintiff and whether or not the findings in that respect are sufficient need not be decided, because, conceding that the findings are sufficient to show such agency and trusteeship, the personal judgment against the defendant must be reversed on other grounds.

[3] The court found that all sums of money in controversy "were * * * delivered by plaintiff to defendant for such expenditures as he might from time to time see fit to make, including payment of family expenses." In respondent's opening brief it is said:

> "The living expenses of the parties during the two years defendant was in law school were paid partially from the small income from the properties owned in Illinois at that time, and partially from the sums turned over to defendant by plaintiff which were not used by him in investments in properties."

The judgment requires the defendant to repay the full amount so turned over to him, including the part thereof used for family living expenses, with interest. Plaintiff testified that her mother gave her $250 to defray the expenses of a trip and that the money was so used; that at another time her mother gave her $500 which was used in paying household expenses; and that $605 out of a gift of $2,100 from her mother was "used up in expenses." The judgment requires the defendant to repay to plaintiff all of these sums, with interest thereon from the time they were received. It seems clear that when a wife uses her separate funds in payment of family expenses or voluntarily permits her husband to so use them, without any agreement or understanding as to repayment, she cannot require her husband to reimburse her. In Third National Bank v. Guenther, 123 N. Y. 568, 25 N. E. 986, 20 Am. St. Rep. 780, where a wife had agreed to support the family and had permitted her husband to pay the family expenses out of her funds, it is said:

> That so long as her agreement "remained executory it could not be enforced against her, but * * * she had the right to perform it, and having done so could not undo what had been done by recalling what she had paid or requiring the husband to reimburse her for the outlay."

[4-6] The evidence is amply sufficient to sustain a finding that the moneys in question were turned over to the defendant in trust as the agent of the plaintiff, to be invested by him for her benefit, except such moneys as she voluntarily permitted him to use and which he did in fact use for family and other expenses. The fact that some of the trust moneys were by the defendant commingled with his own and with community funds under his control, and that it is impossible to trace the same into any specific community property, does not in any manner destroy the trust, which may still be enforced by a personal judgment against the defendant for

the amount of money not so traceable. Under such circumstances, the defendant never having repudiated the trust until the present controversy arose, plaintiff's cause of action is not barred by the statute of limitations. England v. Winslow, 196 Cal. 260, 271, 237 P. 542. Plaintiff does not charge fraud or mismanagement of the moneys and properties intrusted to the defendant. The rate of interest, therefore, to be allowed plaintiff on moneys not traceable into specific property, should be in proportion to the profits actually realized, if the amount thereof can be shown. The case of Title Insurance & Trust Co. v. Ingersoll, 158 Cal. 474, 111 P. 360, furnishes a guide for the determination of the questions under discussion relating to the plaintiff's right to a personal judgment against the defendant. The requirement that the community property of the parties be applied towards the satisfaction of the personal judgment before resorting to defendant's separate property is favorable to him and gives him no cause for complaint.

Those parts of the judgment constituting paragraph XVII thereof, being a personal judgment in favor of plaintiff against the defendant for the recovery of $62,436.20, and interest thereon, is reversed, with direction to the trial court to retry the issues upon which such personal judgment is based. In all other respects the judgment is affirmed, the appellant to recover his costs of appeal.

We concur: PLUMMER, J.; BUCK, Justice pro tem.

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81 Cal. App. 639

NAPOLITANO v. SUPERIOR COURT WITHIN AND FOR LOS ANGELES COUNTY et al. (Civ. 5554.) ★

(District Court of Appeal, Second District, Division 2, California. March 7, 1927. As Modified April 22, 1927. Hearing Denied by Supreme Court May 5, 1927.)

1. Justices of the peace 🔑166(2)—Where appeal was not brought to trial within year, dismissal for want of prosecution was proper even after trial under one stipulation (Code Civ. Proc. §§ 581a, 581b, 981a).

Where case on appeal from judgment of a justice of the peace was not brought to trial until after expiration of one year, trial court in view of Code Civ. Proc. §§ 581a, 581b, 981a, on plaintiff's motion properly dismissed it for want of prosecution, although trial had been had by oral stipulation of parties after one year and judgment had been rendered for defendant.

2. Justices of the peace 🔑166(2)—Parties by written stipulation may preserve jurisdiction of superior court on appeal after time limited therefor by statute (Code Civ. Proc. § 981a).

On appeal from judgment of a justice of the peace, parties may preserve jurisdiction of the superior court to try appeal after time limited therefor by Code Civ. Proc. § 981a, by written stipulation.

3. Justices of the peace 🔑166(3)—Plaintiff held not estopped by oral agreement for continuance beyond time authorized, to move to dismiss case for want of prosecution (Code Civ. Proc. § 981a).

On appeal of case from judgment of a justice of the peace, plaintiff, although having orally agreed to continuance beyond time which superior court under Code Civ. Proc. § 981a, had jurisdiction, *held* not estopped from moving to dismiss case for want of prosecution even after trial and judgment thereon for defendant.

Original certiorari by J. Napolitano against the Superior Court of the State of California within and for Los Angeles County and another. Writ denied.

Andreani & Haines, of Los Angeles, for petitioner.

E. M. Torchia, of Los Angeles, for respondents.

CRAIG, J. We are asked to vacate an order of the superior court of Los Angeles county dismissing an appeal from a judgment of the justice's court, rendered in an action of Agustino Riggio against J. Napolitano, petitioner herein.

[1] It appears without conflict that the case on appeal was not brought to trial until after the expiration of one year from the date of its filing in the superior court. It was set for trial therein on the 6th day of December, 1926. At the time of being set down for trial, counsel for both sides were present in court, and orally stipulated to the date which was fixed; on December 6, 1926, both sides were present, and the case was tried. The petition alleges that judgment was then rendered in favor of the defendant, petitioner. No return was made by respondents, and so this statement must be accepted as true, although the clerk's transcript contains no copy of the judgment. Thereafter counsel for Riggio moved the court to set aside the judgment and to dismiss the appeal. No stipulation in writing extending the time for trial was filed as permitted by section 981a of the Code of Civil Procedure. Nevertheless, the court proceeded to trial without objection from either side, and rendered judgment before its attention was called to the fact that the trial had not taken place within the time allowed. The motion was then made and was granted. In this the superior court only performed its duty.

[2] Decisions dealing with the various statutes of limitation which merely provide for the time within which actions may be begun are not in point, for such provisions may be waived otherwise than by written stipulation filed in court. Neither are cases construing

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★Hearing denied by Supreme Court.

section 583 of the Code of Civil Procedure to be regarded, because the last-named section merely directs the dismissal of an action not brought to trial until after the limited time has elapsed. See Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 219 P. 1006, and Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 P. 616. These statements apply equally to such cases as Price v. Smith Mfg Co., 53 Cal. App. 303, 200 P. 53, cited by petitioner, holding that notwithstanding the statute of frauds, under certain circumstances an oral agreement will be upheld on the principle of estoppel. But section 981a prohibits further prosecution of an appeal when the appellant shall not have brought it to trial within one year from the time of its filing in the superior court. This prohibition is substantially the same as that established in sections 581a and 581b of the Code of Civil Procedure, and their language has been construed adversely to petitioner's contention. The question is one of jurisdiction. The prohibition against further action is one which deprives the court of the authority to take any action except to dismiss the appeal. Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470; White v. Superior Court, 126 Cal. 245, 58 P. 450; Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 60 P. 848; Beal v. Superior Court (Cal. App.) 247 P. 922. The fact that the trial took place and that judgment was rendered does not alter the situation. These steps were in excess of the court's jurisdiction, and void, and this is true because section 981a does not direct that the appeal be dismissed upon motion or when the situation is called to the attention of the court, but it prohibits any further proceedings after the time within which the appeal may be brought to trial shall have expired. Under this enactment but one method is provided through which jurisdiction may be preserved in the superior court to try an appeal from the justice's court after the time limited shall have passed, and that is "by written stipulation of the parties to the action, filed with the clerk of the superior court to which the appeal is taken." There can be no mistake as to the intention of the Legislature. Any other means of expressing consent than that provided in the statute is necessarily ineffective.

[3] The principles of estoppel have no application here, for it is not pretended that the conduct of Riggio in participating in the trial in any way induced Napolitano to neglect to bring the appeal to trial as required by law, and it is obvious that this cannot have been the case; and the mere fact of having agreed orally to a continuance beyond that time does not constitute either an estoppel or a waiver. Sauer v. Superior Court (Cal. App.) 241 P. 570, and cases to which reference is therein made. The opinion in Nolan v. Hentig, 138 Cal. 281, 71 P. 440, cited by petitioner, plainly declares that the objection goes to the manner in which jurisdiction is obtained, rather than to the jurisdiction of the court. Hence that decision is not in point.

The writ is denied.

We concur: WORKS, P. J.; THOMPSON, J.

81 Cal. App. 590

SLOANE v. HAMMOND, County Auditor.
(Civ. 5512.)

(District Court of Appeal, Second District, Division 2, California. March 4, 1927.)

1. Counties 🔑139—Special counsel, appointed to criminally prosecute county district attorney, may resort to fund provided for use of district attorneys (Pol. Code, § 472 and § 4307, subd. 3, and § 4308, as amended by St. 1925, p. 999, § 2).

Special counsel, appointed by Attorney General under Pol. Code, § 472, to criminally prosecute county district attorney, has right to resort to fund contemplated by section 4308, as amended by St. 1925, p. 999, § 2, for use of district attorneys, and is not limited to provisions of Pol. Code, § 4307, subd. 3, making necessary expenses in criminal proceedings county charges.

2. Statutes 🔑89—Law authorizing special counsel, where district attorney is disqualified, held not to violate Constitution, requiring uniformity in county governments (Pol. Code, § 472; Const. art. 11, § 4).

Pol. Code, § 472, authorizing Attorney General to employ special counsel to conduct prosecution in county, where district attorney is disqualified, *held* not in violation of Const. art. 11, § 4, requiring uniformity in county governments, since such section is uniform in its application to every county in state.

3. Criminal law 🔑639(2)—Law authorizing special counsel when district attorney is disqualified held consistent with laws relative to county powers (Pol. Code, §§ 472, 4000, 4001, 4003, 4005).

Pol. Code, § 472, authorizing Attorney General to employ special counsel to conduct criminal prosecution wherein district attorney is disqualified, *held* consistent with sections 4000, 4001, 4003, 4005, relative to powers of counties.

4. Criminal law 🔑639(2)—Special counsel, apppointed to prosecute county district attorney, is engaged in exercise of state, and not county, powers (Pol. Code, § 472, and § 470, subd. 5, and § 4153, subd. 1; Pen. Code, § 684).

Special counsel, appointed by Attorney General under Pol. Code, § 472, to prosecute a criminal offense against county district attorney, is engaged in all that he may do under his appointment in the exercise of state, and not county, powers, in view of section 470, subd. 5, requiring Attorney General to exercise supervisory powers over district attorneys, and section 4153, subd. 1, and Pen. Code, § 684, to the effect that criminal actions are prosecuted by the state.

5. Criminal law 🔑639(2)—Law authorizing special counsel when district attorney is disqualified held not in violation of Constitution as emasculating office of district attorney (Pol. Code, § 472; Const. art. 11, § 5).

Pol. Code, § 472, authorizing Attorney General to employ special counsel to conduct criminal prosecution, wherein district attorney is disqualified, *held* not in violation of Const. art. 11, § 5, as emasculating office required by Constitution to be appointed or elected under system of county governments, since the appointment confers authority only to function as to matters concerning which attorney is disqualified, and does not emasculate office of district attorney.

6. Criminal law 🔑639(2)—Special counsel, employed to prosecute criminal offense, where district attorney is disqualified, held not "county officer," required to give official bond (Pol. Code, §§ 472, 4022; Const. art. 11, § 5).

Special counsel, employed by Attorney General to conduct criminal prosecution, where district attorney is disqualified, in accordance with Pol. Code, § 472, is not a "county officer" within section 4022, enacted pursuant to Const. art. 11, § 5, requiring official bonds by county officers, including district attorneys.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County Officer.]

7. Constitutional law 🔑62—Special counsel, employed on disqualification of district attorney, held not within constitutional provision forbidding delegating power to control or interfere with county (Pol. Code, § 472; Const. art. 11, § 13).

Special counsel, employed by Attorney General under Pol. Code, § 472, to prosecute criminal offense wherein district attorney was disqualified, *held* not within the strict letter of Const. art. 11, § 13, forbidding delegation to any individual power to control or in any way interfere with county.

8. Action 🔑6—Right of special counsel prosecuting district attorney to special fund held not moot because of subsequent conviction, where appeal is pending therefrom (Pol. Code, § 472, and § 4308, as amended by St. 1925, p. 999, § 2).

Question of right of special counsel, employed in accordance with Pol. Code, § 472, to criminally prosecute county district attorney, to use special funds contemplated by section 4308, as amended by St. 1925, p. 999, § 2, for use of district attorney, *held* not moot because of subsequent conviction of district attorney, when appeal is pending therefrom, since appeal may result in reversal, and require another trial, creating necessity for use of fund.

Original application for writ of mandate by W. A. Sloane, directed to C. R. Hammond, County Auditor of San Diego County, to require him to issue a certain warrant. Writ granted.

W. A. Sloane, of San Diego, in pro per.

Albert J. Lee, Deputy Dist. Atty., of San Diego, for respondent.

WORKS, P. J. A criminal offense, claimed to have been committed by the district attorney of the county of San Diego, was under investigation by the grand jury of the county, whereupon the Attorney General "appointed and employed" the petitioner in this proceeding "to represent the people and the prosecution as special counsel * * * in all * * * matters pending in the courts of San Diego county in which the present district attorney of San Diego county is disqualified." The proceedings before the grand jury terminated in the indictment of the district attorney. Under a recital that "it is necessary, in order to provide funds for the further necessary investigation and procuring evidence for the trial" of the charges against the district attorney, "to make use of a portion of the special fund provided and set apart by the board of supervisors" of the county "by section 4308 of Political Code for the use of the district attorney in prosecuting such investigations," petitioner then made requisition upon the county auditor "to draw a warrant in my favor upon said fund for such use in the sum of $1,000." The county auditor declined to honor the requisition, whereupon petitioner presented to this court his petition for the writ of mandate requiring that official, respondent in the proceeding, to issue the warrant demanded by the requisition. Upon stipulation the issuance of an alternative writ, or of an order to show cause, was waived, and the petition was set down for hearing as an application for a peremptory writ. All of the questions presented for our consideration arise upon the face of the petition.

The designation of petitioner as special counsel was made pursuant to the terms of section 472 of the Political Code, which provides, in part:

> "That whenever a district attorney in any county of this state shall, for any reason, become disqualified from conducting any criminal prosecution within such county, the Attorney General may employ special counsel to conduct such prosecution."

The fund to which petitioner referred in his requisition upon respondent is provided for by section 4308 of the Political Code, as amended by St. 1925, p. 999, § 2, in the following language:

> "There is hereby created in each county a fund to be known as the district attorney's special fund. It shall be the duty of the board of supervisors, within thirty days after this act takes effect, and annually thereafter, at the beginning of the fiscal year, to transfer from

the general fund to the district attorney's special fund, such sum or sums as may be necessary from time to time so that there shall be in such fund at the beginning of each fiscal year available for use by the district attorney, the following amounts: In counties or cities and counties having a population of ninety thousand or more the sum of five thousand dollars ($5,000); in all other counties such sums as the board of supervisors shall set aside, not to exceed two thousand five hundred dollars ($2,500)."

[1] Speaking now in very general terms, it is contended by petitioner that the expression "to conduct such prosecution," found in section 472, imports the right to assemble and employ the resources whereby to conduct a prosecution, and, therefore, the right to resort to the fund contemplated by section 4308. Respondent, however, by an argument later to be examined, insists that in his preparation for the prosecution of the district attorney petitioner may look forward only to the provisions of subdivision 3 of section 4307 of the Political Code to the effect that "expenses necessarily incurred * * * for * * * services in relation to criminal proceedings for which no specific compensation is prescribed by law" are county charges. If respondent is correct in this attitude, an alarming prospect is opened to view. Under such circumstances petitioner may fail utterly in the performance of the duty for which the Attorney General has drafted him. The action of the Legislature in providing for the fund contemplated by section 4308 presupposes a necessity for money actually in the hands of a district attorney wherewith to prepare for the conduct of criminal litigation. It is also presupposed, necessarily, that the efficiency of a district attorney's office, as an effective agency in the punishment of crime, may be impaired but for the existence of the fund in question. A district attorney is secured against such dangers in the conduct generally of the criminal litigation which it is his duty to prosecute, while petitioner, if the contention of respondent is well founded, faces an impairment, and therefore a possible failure, of his duty to prosecute the district attorney of San Diego county for the commission of the crime with which he stands charged. It is impossible to contemplate with equanimity the existence of such a state of affairs. Moreover, the arguments whereby respondent seeks to deny to petitioner the right to resort to the special fund provided for in section 4308 have as ready an application to his right to incur expenses which may become a county charge under section 4307. This seems obvious. There can be no possible difference, in legal effect, between a power to spend money of the county himself and a power to incur liabilities which will force the board of supervisors and other county officers to spend it. The contention of respondent then, if upheld, practically nullifies the appointment of special counsel by the Attorney General under the provisions of section 472. The exercise of the authority conferred by the section becomes empty and barren, and, in consequence, no less than farcical. The special counsel cannot proceed without funds, and the punishment of the district attorney of San Diego county, if he be guilty of crime, becomes, in theory, impossible. It is to be observed here that there is no room under respondent's contention for the view that the Attorney General himself may assemble or command the funds necessary to the prosecution and himself conduct it. The contention, as will hereafter appear, places that officer and the special counsel appointed by him in the same category and under the same disabilities.

Respondent insists that under the Constitution the Legislature is without authority to empower the Attorney General himself, or a special counsel appointed by him under section 472 of the Political Code, to exercise that control over county funds which was implied by petitioner's requisition on respondent. In truth, it is said that such authority is precluded by sections 4, 5, and 13 of article 11 of the organic law. Section 4 provides in part:

> "The Legislature shall establish a system of county governments, which shall be uniform throughout the state."

This is a portion of section 5:

> "The Legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors,"

—of various other officers, including "district attorneys, * * * and shall prescribe their duties and fix their term of office. * * * It shall provide for the strict accountability of county * * * officers * * * for all public * * * moneys which may be paid to them, or officially come into their possession." A part of section 13 follows:

> "The Legislature shall not delegate to any special commission, private corporation, company, association or individual any power to make, control, appropriate, supervise or in any way interfere with any county, * * * money, property or effects, whether held in trust or otherwise, * * * or perform any municipal function whatever."

[2, 3] Counsel for respondent presents various points under these sections of article 11 of the Constitution. So far as section 4 is concerned, we can see nothing in section 472 of the Political Code that impinges upon the uniformity which is required in county governments. The section of the Code, whether it be viewed merely as granting an authority to appoint special counsel or in addition as also entitling a special counsel to resort to the fund provided for in section 4308 of the same Code, applies to every county in the state. It is therefore as uniform in its application as any of the enactments of the Legislature relating to county government. Respondent, however, points to several sections of the Political Code which the lawmaking body has enacted pursuant to the mandate of the constitutional provision, and contends that section 472 interferes, or is inconsistent, with them. The sections cited are: 4,000, to the effect that every county "is a body corporate and politic, and as such has the powers specified in this title, and such other powers as are necessarily implied from those expressed"; 4001, designating the agencies by which the powers of counties may be exercised; 4003, enumerating the powers of counties; and 4005, providing that "contracts, authorizations, allowances, payments, and liabilities to pay, made or attempted to be made in violation of law," are void, and cannot form the basis of a claim against a county. When counsel invokes the provisions of these sections, he is entirely beside the mark at which he aims. They are of no greater sanctity than section 472. It is obvious that resort cannot be had to them for the purpose of determining whether section 472 is violative of the Constitution. If, however, we meet counsel upon his own ground, we can see no scheme, under the enactments to which he directs our attention, into which the provisions of section 472 do not fit. The latter section is perfectly consistent with section 4000, especially as the powers "specified in this title," to employ the language of section 4000, and contained in section 4003, do not include any functions whatever incident to the detection or punishment of crime. We shall take further notice of this important omission in the next succeeding paragraph of this opinion. Section 472 does no violence to section 4001, for, according to the latter, powers of a county may be exercised "by agents * * * acting under * * * authority of law"; but let us observe here that we are far from deciding that petitioner, in anything that he may lawfully do under his appointment by the Attorney General, will exercise any of the powers of the county of San Diego. It is manifest from the provisions of section 4003, which in the interest of brevity we do not set out, that section 472 is not inharmonious with it, this especially because of the fact, to which we have already referred, that section 4003 gives to counties no control over the detection or punishment of crime. Section 472 is not out of step with section 4005, for the reason that the contracts, etc., denounced by the latter section are, naturally, only those which are "in violation of law." The question here is, entirely aside from the provisions of section 4005, whether the powers and authority sought to be exercised by petitioner as special counsel are in violation of law. So much for the sections of the Political Code to which our attention is drawn by respondent.

[4] While we have already observed that the sections of the Code to which counsel for respondent refers can furnish no guide toward a solution of the constitutional questions presented to us in this proceeding, it is well thus early to expose a fallacy in the arguments that are submitted in connection with them, particularly for the reason that the same fallacy pervades the entire brief of respondent. We are met with it at every turn. Counsel erroneously supposes, and continually takes for granted, that a district attorney, in his efforts to bring about the punishment of those who are charged with crime, and that petitioner, in all that he may do to procure a conviction of the district attorney of San Diego county, engage in the exercise of the powers of a county. We have already pointed out that section 4003 gives to a county no such powers. Section 472, if we concede for the moment its validity and constitutionality even to a limited extent, was enacted upon the theory that the power in question resides in the state, for special counsel designated under it are to be appointed by a state officer, the Attorney General. Section 470 of the Political Code, prescribing the duties of the Attorney General, was doubtless framed upon the same theory. Subdivision 5 of the enactment provides that the officer named shall "exercise supervisory powers over district attorneys in all matters pertaining to the duties of their offices," and perform any of such duties when, in his judgment, such action is advisable, "and from time to time require of them reports as to the condition of public business intrusted to their charge." In truth, this language is so broad, when taken alone, as to indicate that a district attorney exercises no county functions whatever, not even in advising county officers, although it is necessary to say no more here than that the enactment is at least broad enough to comport with the idea that the prosecution of criminal charges is a state affair. By subdivision 1 of section 4153 of the Political Code it is provided that a district attorney shall "conduct, on behalf of the people, all prosecutions for public offenses." This language also indicates that the conduct of criminal litigation is a state affair, when it is remembered that section 684 of the Penal Code reads in part:

> "A criminal action is prosecuted in the name of the people of the state of California, as a party."

When we turn from these statutory provisions and resort to the law of judicial decision, it becomes evident that matters which require governmental attention, and which are of general concern to the people of the state, must be handled, regulated, and controlled by the state, and not by any agency operating merely within a part or subdivision of the state. This question has frequently arisen over various matters sought to be controlled by charter cities under the "municipal affairs" clause of the Constitution. See, for instance, Pixley v. Saunders, 168 Cal. 152, 141 P. 815; Gadd v. McGuire, 69 Cal. App. 347, 231 P. 754. There are, specifically, several cases based upon the general principle that the punishment of crime is a matter for the state, and not for a city, within the meaning of the phrase "municipal affairs," as employed in the Constitution. See Farmer v. Behmer, 9 Cal. App. 773, 100 P. 901; Nicholl v. Koster, 157 Cal. 416, 108 P. 302. We do not mean to say that any of these cases presents the exact question which is now before us, but they all do illustrate the principle that matters which require an exercise of the activities of government and which are of more than local concern, are to be dealt with by the state, and not by local authorities. Nor do we say that the detection and punishment of crime may not sometimes be a matter of strictly local concern. Thus, the enforcement of penal ordinances passed by city councils and boards of supervisors may involve action which is for a city or for a county and not strictly for the state. It was said in a concurring opinion in Robert v. Police Court, 148 Cal. 131, 136, 82 P. 838, 840:

> "The trial and punishment of offenses defined by the laws of the state is not a municipal affair."

This opinion was signed by two justices only, it is true, but the quoted statement taken from it gives expression to a principle that is behind each of the other cases which we have cited. And it would seem, logically, that the "trial and punishment of offenses defined by the laws of the state" is no more a matter of county concern, or a matter calling for the exercise of the powers of a county, than it is a "municipal affair." Surely, the trial and punishment of crimes, generally, is an activity in which the people of the entire state are interested, and which they may conduct through their own officers. It may be conceded that for some purposes a district attorney is a county officer, and as such exercises some of the "powers" of a county. When, however, he conducts prosecutions for the punishment of crimes denounced by act of the Legislature, he certainly discharges functions which pertain to the state and not to the county, whether or not, technically, he is to be deemed a state officer when he is engaged in the discharge of such functions. Under such circumstances he surely acts as an agent of the state. The reason is therefore apparent why sections 470, 472, 4003, and 4153 of the Political Code and section 684 of the Penal Code are in the form in which we find them. The petitioner in the present proceeding, also, in all that he may do under his appointment as special counsel, will engage in the exercise of state, and not of county, powers. It has already been remarked that the district attorney of San Diego county is to be tried under indictment by the grand jury. The crime with which he is charged is bribery, an offense denounced by the Penal Code. The status of petitioner as special counsel is therefore plain.

[5] We return to a more specific discussion of the constitutional questions presented on behalf of respondent. It is contended that the Legislature has not "the power to emasculate the office of any of the officers required by the Constitution to be appointed or elected under the system of county governments to be established" by that body. It is to be observed that this point strikes at the very authority of the Attorney General to appoint special counsel under the terms of section 472 of the Political Code; that is, the point involves the idea that the portion of the section providing for such appointments is unconstitutional, for respondent cites in support of it a case (Massenburg v. Board of Commissioners, 96 Ga. 614, 23 S. E. 998) which decides that the Legislature is without power to abolish an office recognized by the Constitution. This question runs through the brief of respondent, and the right of petitioner to resort, as special counsel, to the fund contemplated by the provisions of section 4308 of the Political Code is sought to be denied upon the ground that his appointment was void as being in defiance of the Constitution. Laying aside the truth, to which we have already referred, that section 472 is of equal dignity with other sections of the Political Code enacted for the purpose of providing a system of county government, it is to be remarked that the section does not "emasculate" the office of district attorney, nor does an appointment made pursuant to its terms. Such an appointment is intended to confer an authority to function only as to matters concerning which a district attorney is disqualified, and in which, in all conscience, he ought not to act. Section 472 merely transmutes this matter of conscience—this affair of pure morals—into legislation. An appointment made under the section results from a laudable attempt of the Legislature to prevent the perpetration of great wrongs, and it neither affects the "office" of district attorney nor relieves an incumbent of the office from the discharge of its general duties. The enactment is one of a highly remedial character, and its validity cannot be affected by the specific point now under consideration. We shall say more, later, concerning the lengths to which the Legislature may go in preventing the horrible solecism involved in the prosecution by a district attorney of a criminal charge against himself and in providing means for an adequate prosecution of the charge by some other person or officer.

[6] It has been observed that section 5 of article 11 of the Constitution requires that the Legislature "shall provide for the strict accountability of county * * * officers

* * * for all public * * * moneys which may be paid to them, or officially come into their possession." Pursuant to this mandate the lawmaking body has provided for the giving of official bonds by county officers, including district attorneys. Pol. Code, § 4022. It is said that petitioner may not make use of the special fund mentioned in section 4308 of the Political Code, for the reason that he is not required by section 472 to give bond. But the constitutional provision requires the Legislature to "provide for the strict accountability" of "county officers" for public moneys to be handled by them, and petitioner, under his appointment as special counsel, is not a county officer. It is unnecessary to decide whether petitioner is an "officer" at all. The authorities are divided on this question. If, however, he were an officer, it is plain from what we have said above that he is not a "county" officer. We know of no rule requiring the Legislature to provide for the giving of bond by one exercising such an office or employment as that provided for by section 472, even if it be conceded that the appointee is to handle county moneys. Such a course might be proper under the dictates of prudence, but it is not required by the Constitution. In later paragraphs of this opinion, devoted to a consideration of the effect of the Constitution, generally, upon the right of petitioner to have access to the special district attorney's fund, we shall say something more upon the point treated in the present paragraph.

[7] It is provided by section 13 of article 11 of the Constitution that the Legislature "shall not delegate to any special * * * individual any power to * * * control, * * * or in any way interfere with any county, * * * money, property, or effects." If it be conceded for the sake of argument, without deciding, that petitioner is within the strict letter of this inhibition, we are satisfied that he is not within the spirit of it, as measured under the general principles of government which it is the purpose of all Constitutions to foster and to protect. We shall now proceed to cover this view by a line of argument which applies as well to inhibitions which respondent sees in each of the sections of the Constitution upon which he relies.

Restrictive provisions of Constitutions, however positive and drastic, cut very little figure in the settlement of such questions as those here presented. If the Constitution of California should be so amended as to contain a provision that the courts of the state should have no further jurisdiction to punish those guilty of crime, or that particular crimes, malum in se, should not be the subject of punishment, or that particular persons should not be punished for the commission of crimes malum in se, and that no part of the public funds should be employed for the purpose of detecting or punishing any of the crimes coming within any inhibition so declared, those provisions could not stand. They would be null, and the courts not only would disregard them, but would resort to their undoubted inherent powers to prevent the evils attempted to be wrought by them. Not only so, but it doubtless would be the duty of the Legislature to pass laws in defiance of them. "Police power is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society. As applied to the powers of the states of the American Union, the term is also used to denote those inherent governmental powers which, under the federal system established by the Constitution of the United States, are reserved to the several states." 12 C. J. 904. "No Legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them." Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079. "It is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects. * * *" Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 32 L. Ed. 253. The sound and essential principle stated in these cases has been enunciated in many later decisions of the United States courts. From among these we cite only Butchers' Union Co. v. Crescent City, 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; Logan & Bryan v. Postal Tel. & Cable Co. (C. C.) 157 F. 570; Pennsylvania Hospital v. Philadelphia, 245 U. S. 20, 38 S. Ct. 35, 62 L. Ed. 124; Silvey v. Commissioners (D. C.) 273 F. 202. The same salutary rule has been announced several times by the courts of this state, although the utterances of our own tribunals have not related expressly to the inability of the people themselves to abdicate the solemn duty incident to the exercise of the police power. "This power cannot be bargained or contracted away, and all rights and property are held subject to it." Laurel Hill Cemetery v. San Francisco, 152 Cal. 464, 93 P. 70, 27 L. R. A. (N. S.) 260, 14 Ann. Cas. 1080. In a later case the Supreme Court quoted thus from Mugler v. Kansas, supra:

> "Indeed, as was said in Stone v. Mississippi, 101 U. S. 814 [25 L. Ed. 1079], the supervision of the public health and the public morals is a governmental power, continuing in its nature, and 'to be dealt with as the special exigencies of the moment may require,' and that 'for this

purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.'" Ex parte Young, 154 Cal. 317, 97 P. 822, 22 L. R. A. (N. S.) 330.

And, again, the court has referred to "the general rule to the effect that the police power 'is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law.'" Ex parte Beck, 162 Cal. 713, 124 P. 548. One of the District Courts of Appeal has remarked that "the police power cannot be bartered away even by express contract." Maguire v. Reardon, 41 Cal. App. 596, 183 P. 303.

All these cases have an especial application to the duty inherent in government to be active and vigilant in the detection and punishment of crime. If the security of the citizen and the stability of government may be said to depend more upon any one element of governmental power than upon another, that one is the power, nay, the duty, to see to it, if it be humanly possible, that there be a speedy and never failing imposition of the sanctions annexed to the violation of penal laws. To come to the facts of the present case, it would be an execrable thing if a state of the law could be found that would admit of the failure, cessation, or suspension of the duty of the state to encompass the punishment of the crime with which the district attorney of San Diego county stands charged, if he be guilty, or of the slightest impairment of effort to ascertain whether he be guilty or innocent. No restrictive provisions of the Constitution, if any there be, can be permitted to stand in the way of the exercise of such a power. Similar situations to that with which we are here confronted have arisen in other states, and they have given rise to a line of decisions to which, with profit, we may now refer.

In one case, a district attorney having been disqualified to perform certain duties incident to his office, it appeared that a trial court, acting under statutory provision, had appointed an attorney to act in his stead. Question having been made as to the power of this individual to perform certain of the duties of the district attorney, a higher court said on appeal:

> "If the contention of defendant's counsel is to prevail, then, if a prosecuting attorney should be for any reason disqualified, all the wheels of criminal justice would be brought to a standstill for the reason that there would be no vacancy in the office that the governor could fill, and no power in the court to make a temporary appointee who could in all things discharge the duties pertaining to the office in question. The law does not intend any such absurdity, and will not permit such a failure of justice. And aside from statutory provisions, such as those quoted, the power thus to appoint a temporary representative of the state, one armed with full authority to discharge in full the office he temporarily fills, is of necessity an inherent power in courts of justice." State v. Moxley, 102 Mo. 374, 14 S. W. 969.

A case presenting a somewhat similar question arose in another jurisdiction. It there appeared that a statute of the state provided for the appointment by "the district court" of special counsel to act in the place of disqualified county attorneys. An appointment of such counsel was made by a judge of the district court while sitting in a county other than that of the county attorney who was alleged to be disqualified. It was contended that the appointment was not within the statute, and in disposing of the question raised the higher court said:

> "The * * * statute was intended to give the district court the power and authority to appoint temporarily a county attorney to act in the place and stead of the regular county attorney under the circumstances enumerated in the statute. * * * Independent of the statute, however, the court would have the inherent power to appoint a special county attorney under any of the circumstances therein enumerated. It is essential to the very life of the court that the proper officers be in attendance upon it. The power to appoint such officers is necessary for the protection and existence of the court and absolutely essential to the administration of justice and the enforcement of all our laws. It would be an indefensible reproach upon our institutions if crimes should go unpunished and the public business remained unattended to for want of power in a court of general jurisdiction to appoint some one to supply the place of the regular elected officer when absent from court or disqualified to act. The courts of this state are not powerless to this extent. They have the right and power to preserve their life, and the machinery of the court cannot be kept in motion without its proper officers. It is therefore an inherent power of the presiding judge of the court to supply these officers when there is a temporary vacancy or a disqualification in any particular case. We conceive it our duty therefore to give the foregoing statute a broad, practical, and common-sense construction in order to carry into effect the purposes for which it was enacted, and to give expression to this inherent power of courts of general jurisdiction in this state. We admit that it was intended that the special county attorney should be appointed by the court; but should an irregularity in the appointment destroy its effect and render void all the acts of this special officer where it appears conclusively from the record that with the knowledge and consent of the court the officer proceeded to his duty? In this case, while the original appointment was made by the judge in vacation, yet when the case was called for trial, and objection made to that appointment, the judge in open court before proceeding to the trial of this case announced that the appointment had been made by him, and permitted the special county attorney thus appointed to proceed as the representative of the state in this action. It is admitted also by counsel for the defendant that the regular county attorney was disqualified in this case; that the special county attorney who represented the state was qualified to act, and the very judge

who made the appointment in vacation presided at the trial. It is our opinion, therefore, that the action of the trial judge in permitting the special county attorney to act under these circumstances amounted in itself to an appointment made by the court, and was a specific ratification by the court of everything that the presiding judge had done in vacation and at his chambers." Hisaw v. State, 13 Okl. Cr. 484, 165 P. 636.

Extracts from the opinion in this case were quoted, with evident approval, by the Supreme Court of the state in Board v. Fain, 66 Okl. 13, 166 P. 896. Upon the same question see, also, State v. Ellis, 184 Ind. 307, 112 N. E. 98, where many other cases are cited.

The decisions in the four or five adjudications last cited rest naturally upon the principle enunciated by the cases to which we have above referred, and which deal with the duty of government to engage in the uninterrupted exercise of the police power. While the reasoning of them rests, undoubtedly, upon that ground, the occasion for the decisions arose from an equally well-established principle of English and American law, the essentially just principle which early ripened into the maxim that no man shall be a judge in his own case. It is abhorrent to all ideas of natural justice that chancellor or judge shall sit in a cause in which he is interested. The same feeling arises in the mind at the mere suggestion that a prosecutor, or his deputies—for in law the deputies are the arms of their superior, and in fact they are usually the servants of his will—may conduct a criminal cause in which the prosecutor is a defendant. The Legislatures of the various states—our own by section 472 of the Political Code—have taken care that no such anomaly shall exist. The law carefully provides security also against the possibility that another kind of officer may act in matters in which he has an interest. From time immemorial it has been customary to make provision for the appointment of elisors to perform the functions of the shrievalty whenever sheriffs are disqualified to act in the discharge of their duties. 3 Bl. Comm. 355; 20 C. J. 402; 35 Cyc. 1526; 35 C. J. 277; 15 Cal. Jur. 400; 23 Cal. Jur. 295. While section 226 of our Code of Civil Procedure, relating to elisors, does not in terms provide for their appointment upon the disqualification of sheriffs, the Supreme Court has determined that such is the meaning of the enactment (Bruner v. Superior Court, 92 Cal. 239, 28 P. 341; People v. Nakis, 184 Cal. 105, 193 P. 92), partially because of the language employed by the Legislature in section 4192, now section 4173, of the Political Code. Section 726 of the Code of Civil Procedure provides for the appointment of elisors upon the "disability or disqualification" of commissioners designated to conduct sales of real property under foreclosure. It is not strange that the Legislature, by section 472 of the Political Code, has made provision for the appointment of special counsel in case of the disqualification of district attorneys. Indeed, it were strange if no such provision were to be found in our statutory law.

The law is well settled, upon just considerations of public policy, as we have seen, that courts possess the inherent power to name special counsel to act in the place of disqualified public prosecutors. This state of the law is not inconsistent with a power in the Legislature, irrespective of constitutional authorization and apparently in defiance of attempted constitutional inhibition, to make it the duty of the Attorney General to appoint such counsel under proper circumstances. Several of the cases to which we have pointed above are to the effect that the inherent power of the courts to appoint exists irrespective or independent of statute. The cases tacitly concede an authority in the Legislature notwithstanding the inherent power in the courts. It would seem, in truth, that it is primarily the duty of the legislative department to provide for the appointment of special counsel to conduct criminal prosecutions against district attorneys who are charged with crime. It cannot be questioned that it is the duty of the Legislature to enact laws under which district attorneys shall be elected or appointed, and to make it the general duty of those officers to engage in the prosecution of alleged violators of the Criminal Code. It must follow that it is the duty of the lawmaking body to provide for an adequate prosecution of those cases in which district attorneys themselves are charged with crime, or in which those regular prosecutors are disqualified for some other reason. Doubtless, if section 472 of the Political Code had no existence, or if the Attorney General had neglected to discharge the duty thrust upon him by it, the superior court in and for the county of San Diego could have appointed petitioner to conduct the prosecution of the indicted district attorney. This power, resting in particular instances in the superior courts of the various counties, perhaps justly to be termed secondary in the face of legislation upon the subject, cannot interfere with the primary duty of the Legislature to provide for such appointments throughout the state.

We think the lodging of the power of appointment in the Attorney General shows a proper exercise of legislative discretion. The duties of that officer, as specified in section 470 of the Political Code, are such that he is kept in close touch with the conduct of criminal litigation in the various counties. His finger is on the pulse of the patient, and he is the natural physician to prescribe the remedy for such ills of the body politic as are in this proceeding brought to our attention. The functions which petitioner is to discharge under his appointment pertain to the state, and it is proper that the power to appoint him should have been reposed in a state officer. All considerations tend to the view that the Legislature exercised not only a proper but a wise discretion in vesting the appointing power where it did.

Nor do we think that the power and duty of the Legislature, exercised through section 472 of the Political Code, are affected by the fact that the lawmakers, by section 470 of the same Code, have provided that the Attorney General may "when, in his judgment, such action is advisable," perform any of the duties of a district attorney. Section 472 provides, among many things, for the corps of deputies the Attorney General may appoint. The Legislature doubtless considered, and justly so, that it would be impossible to determine what number of deputies must be provided to care for the ordinary duties of the office and conduct criminal prosecutions in the several counties of the state, if the latter duty were expected always to be performed from Sacramento. The legislators doubtless also considered that it would be difficult to foresee the extent to which the discharge of the ordinary duties of the office would be impaired, whatever the number of deputies decided upon, by a conduct of criminal cases throughout the state in which district attorneys might be disqualified. It could easily happen that at one and the same period several of the county prosecutors might be disqualified to conduct particular cases because they had been counsel for the defendants before their election, because they were related by blood or affinity to defendants, or because they themselves were charged with crime. There is another prime consideration which the Legislature must have considered. A district attorney is usually a prominent figure in his county. When he is charged with crime, a certain degree of sympathy among those who are to act as his judges upon the facts will be enlisted in his behalf by the very fact that the charge has been made. If the Attorney General or his deputies shall appear to conduct the prosecution of the case, the friends, neighbors, and adherents of the defendant will regard the intrusion as a species of carpetbagging against him, and the prosecution will have burdens to overcome which are entirely divorced from considerations relating to the evidence to be presented to the jury. The Legislature has acted wisely in the exercise of a discretion which, under all the circumstances of such a situation, rests with its members alone, in so framing the law that a district attorney may be prosecuted by a citizen of his own community, one who is of influence and good repute among the people of the county, and who may enter into a prosecution of the defendant in some degree freed from the burdens to which we have alluded.

The foregoing considerations have advanced us far toward a conclusion that petitioner, in the discharge of his duty as special counsel, may resort to the fund provided for by section 4308 of the Political Code. Counsel have referred us to no adjudication which touches this specific point, and we think no court has decided it, or any question that closely similar to it. We say we have advanced far toward a determination of the question favorable to appellant's claim, because, if the thought is abhorrent that a district attorney charged with crime may prosecute himself, or that he may go unprosecuted, and therefore unpunished, if guilty, it is as well shocking to the senses that he may be inefficiently or inadequately prosecuted, because of lack of funds to conduct a proper prosecution, by one appointed to press a charge against him. A lack of funds might well result in a travesty as disgusting to the citizen or as damaging to the public welfare as if the defendant were not prosecuted at all or as if he were sought to be whipped of justice by the feeble taps of a lash wielded by himself. The broad considerations which justify the appointment of petitioner as special counsel cry out that his attempt to encompass a conviction of the alleged malefactor cannot be stifled for the want of the funds necessary to render the attempt successful if the defendant under charge be in truth guilty. We have already referred to the fact that the Legislature has provided for the fund mentioned in section 4308 in order to insure a proper discharge of duty by district attorneys. The enactment of the section amounts to a legislative finding that the labors of the special counsel who is now a petitioner before us may fail if he is denied access to the same fund. We do not take leave of this question here, for there is some authority which bears more or less directly upon it. In one of the cases we have already cited the court said: "The attorney appointed by the court to prosecute in the place of an absent, sick or disqualified officer has the same power to draw and to sign bills of indictment as the regular official. If this be not true then it must be confessed that there is a very lame place in our criminal practice" (State v. Moxley, supra); and it will be remembered that in the portion of the same opinion which we have quoted on an earlier page the court said that such a special prosecutor is "one armed with full authority to discharge in full the office he temporarily fills. * * *" It was remarked in another case:

> "Such an appointee should be of the court's own selection, and as to the matters for which he is appointed, he becomes vested with all the powers of the district attorney, but independent of that official." People v. District Court, 29 Colo. 5, 66 P. 896.

In yet another case decided in the same jurisdiction the Attorney General of the state, acting under statutory authority, took up the prosecution of a criminal case in the stead of the local prosecutor. The Supreme Court, said in deciding a question which was presented to it:

> "When the act prescribing the duties of the Attorney General became effective, the method for prosecuting felonies was by means of an indictment returned by a grand jury. The law, however, required the indictment to be signed by the district attorney and the latter to appear in the courts of his district and prosecute in behalf of the people. Such being the state of the law, it is clear that when the Legislature empowered the Attorney General to prosecute under certain conditions, that official, when the required conditions existed, could do each and everything the district attorney might have done in the premises. Though the letter of the law required one official alone to do certain things, its spirit permitted another to do and perform the same or similar acts under certain conditions." People v. Gibson, 53 Colo. 231, 125 P. 531, Ann. Cas. 1914B, 138.

We turn again to the law concerning elisors:

> "An elisor appointed to execute process and orders of the court is invested with the powers, duties and responsibilities of the sheriff in the performance of those duties. * * *" Griffith v. Montandon, 4 Idaho, 75, 35 P. 704.

A special feature of the law relating to elisors may be mentioned here, in view of the contention of respondent that the Constitution would be violated if petitioner were allowed access to the fund provided for in section 4308 of the Political Code, for the reason that under the organic law, as executed by the statute, county officers are required to give bond, no such requirement existing as to special counsel appointed under section 472 of the Political Code. It has been decided in at least one state that an elisor may levy an attachment (McFarland v. Tunnel, 51 Mo. 334), and section 4173 of our Political Code seems to import that this substitute for sheriff and coroner may levy both attachments and executions. But there is nothing in our statutes which requires the giving of bond by an elisor, and yet in the taking and retention of personal property under either attachment or execution he may demean himself toward it in a manner which, if it were in the case of the sheriff himself, would create a liability upon that officer's official bond. Does such a circumstance nullify the statute providing for the appointment of elisors to levy attachments and executions? If it does, one who institutes suit against both the sheriff and the coroner of a county is denied the right in its courts to secure by attachment the payment of any judgment he may procure, and the right to enforce payment of the judgment by execution, except through the exercise of a power inherent in the courts. Doubtless, an elisor is liable, both civilly and criminally, for a willful misappropriation of funds or property seized by him under process. The same rule will apply to petitioner here in the matter of his use of the special district attorneys' fund, or any part of it.

We conclude that the petition in this proceeding must be granted because, if for no other reason, it is the irrefragable and inalienable duty of the people to enforce their penal laws. In the case of the charge pending against the district attorney of San Diego county the performance of that duty has been lodged, by competent authority, in petitioner. There is no way known to the law, as it is presented to us by respondent here, by which he can be impeded in a vigorous and adequate attempt to discharge the duty reposed in him by his appointment.

[8] We think it proper to say a few words upon the question whether this proceeding has become moot, although the point has not been suggested to us. In all things relating to the prosecution of the indicted district attorney we have spoken prospectively, and yet we know that a trial under the indictment has been had since the argument in this proceeding, and that a conviction has resulted, and that the cause is now on appeal to this court. Laying aside the question whether we may take judicial notice of these things actually known to us, and, as well, the question whether a cause is moot can be determined only under the law of judicial notice when no formal showing of the facts is made, we think the proceeding is not moot. The appeal may result in a reversal, and the convicted officer may be tried again. The cause against him is still pending, and petitioner may yet require the use of the fund to which he demands access. Nor does the fact that he has secured a conviction without the employment of the fund affect the question here presented. Whether public-spirited citizens have advanced money for the purpose of prosecuting the charge—a thing which sometimes occurs, as we are bound to know—or whether petitioner has been thus far successful in the prosecution despite the handicap caused by an inability to procure funds, is no concern of ours. It is to be observed that no question is here made that petitioner has made requisition upon respondent for an excessive allowance from the special district attorneys' fund, if, indeed, that point could be urged against a discretion apparently exercisable by him alone.

A peremptory writ of mandate will issue as prayed.

CRAIG, J. I concur in the conclusion announced in the foregoing opinion. As to whether or not a restrictive provision contained in a Constitution is void and to be disregarded by the courts if it would divest the government of one of its inherent powers I express no opinion, for, to my mind, that question is not one whose disposition is necessary to a decision of the instant case.

The status of the special prosecutor appointed by the Attorney General is, I think, that of an assistant to the last-named officer.

The mere fact that a special prosecutor appointed under section 472 of the Political Code is not enumerated among those members of the Attorney General's office who are designated as "officers" does not preclude this conclusion, as suggested by counsel for the respondent, under the rule expressio unius est exclusio alterius, since the special prosecutor is in certain respects in an entirely different class from those enumerated on account of his temporary tenure and the exceptional occasion for the use of his services. The conduct of the prosecution of the district attorney of San Diego county in this instance constitutes the exercise of a state function and the discharge of a duty of the state government. It is one which is particularly committed to the Attorney General. Subdivision 5, § 470, Pol. Code. Also, it must be conceded that in this prosecution the petitioner was engaged in the performance of duties and functions and the exercise of powers of a public officer, which in itself strongly indicates that he occupied the same status. Coulter v. Pool, 187 Cal. 181, 201 P. 120. That the Attorney General might personally have taken charge of this prosecution, I have no doubt. Had he done so, no question could have been raised as to his acting in an official capacity, nor of his having all of the authority of the district attorney of San Diego county in the performance of the duties and the exercise of the powers of that office. While so conducting such prosecution to the exclusion of the incumbent, instead of doing this in person, the Attorney General saw fit to appoint the petitioner as his representative and assistant, and in doing so conferred upon the latter all of the jurisdiction of the office which he represented.

Further, I agree with the preceding opinion in holding that, even though it be conceded (which of course it is not) that the special prosecutor is to be so classed as to his status as to be within the letter of section 13, art. 11, of the Constitution, he is not within the spirit of that provision, and hence it cannot be used to bar the conclusion reached herein. It is contrary to the spirit of this section to apply it to one performing the official duties of a duly constituted office while so acting under legal authorization of the holder of such office.

THOMPSON, J. I concur in the opinion, except that I must withhold, at this time, assent to the language which declares that courts would disregard restrictive provisions of constitutions which to the courts might seem to be at variance with the purposes of government. Restrictive provisions of state Constitutions which in operation should fail to accord to citizens equal protection of the law, or to afford a republican form of government, or should be destructive of the purposes of a Republican form of government, would undoubtedly fail by reason of violating section 1 of Amendment 14 or section 4 of article 4 of the United States Constitution. But the courts of this country derive their authority and their being from Constitutions, which are expressions of the will of the people, in whom rests, ultimately, the entire power of government. And, as water can rise no higher than its source, so the courts cannot be superior to their creator.

The authorities cited in support of this enunciation in the main opinion involve legislative action. The Legislature owes its being to the Constitution in the same manner as do the courts. Legislative power is restrained by constitutional limitations. As was said in People v. Central Pacific Ry. Company, 43 Cal. 398–432:

> "The deference we owe to the legislative will is only second to that which we owe to the commands of the Constitution, which both the Legislature and the court are sworn to obey."

We also read in 12 C. J. 753:

> "Courts are never at liberty to question the wisdom or policy of an act of the Legislature, their duty being to enforce such acts as are passed to the extent to which they are found to be constitutional and no further."

As the power of the court to question the wisdom of legislative enactment is limited to whether it contravenes constitutional guaranties, certainly the power of the court to question the wisdom of constitutional restrictions is bounded by similar limits.

MARTELLO v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.★

(Civ. 5542.)

(District Court of Appeal, Second District, Division 2, California. March 7, 1927. Hearing Granted by Supreme Court May 5, 1927.)

1. Judges 🔑14—Under Constitution as amended, litigants cannot stipulate for judges pro tempore, nor can superior court approve such selections (Const. art. 6, §§ 6–8, as amended 1926).

Under Const. art. 6, §§ 6–8, as amended in 1926, litigants have not the right to stipulate for trial before judges pro tempore of the superior court, nor has the superior court any power to approve such selections.

2. Constitutional law 🔑145—Judges 🔑25 (1)—Constitutional amendment precluding stipulation for trial before judge pro tempore held not to impair power of judge pro tempore previously selected to render decision (Const. Cal. art. 6, §§ 6–8; Const. U. S. art. 1, § 10, cl. 1).

Where, after trial before a judge pro tempore pursuant to stipulation of the parties but before rendition of decision, Const. Cal. art. 6, §§ 6–8, under which such judge had been selected and approved, was amended to take

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★Superseded by opinion of Supreme Court 261 P. 476.

away the right to stipulate for trial before a judge pro tempore, *held*, power of judge pro tempore to render decision was not lost, since such construction of Constitutional amendment would have been violative of clause of Constitution of the United States (article 1, § 10, cl. 1), forbidding the passage of laws impairing the obligation of contracts.

3. **Constitutional law ⚷145—Stipulation for trial before judge pro tempore held contract obligation of which cannot be impaired (Const. Cal. art. 6, §§ 6–8; Const. U. S. art. I, § 10, cl. 1).**

Stipulation for trial before a judge pro tempore pursuant to Const. Cal. art. 6, §§ 6–8, as they existed before amendment in 1926, *held* a contract within the protection of clause of Constitution of the United States (article 1, § 10, cl. 1) forbidding passage of laws impairing the obligation of contracts.

4. **Arbitration and award ⚷80—Agreement to arbitrate, when executed, binds parties to obedience to award.**

Agreement to arbitrate, when fully executed by the rendition of award, binds the parties to obedience to the award, even when they have not expressly agreed to be so bound.

5. **Judges ⚷14—Constitutional provisions held part of stipulation for trial before judge pro tempore (Const. art. 6, §§ 6–8).**

Const. art. 6, §§ 6–8, before amendment 1926 *held* part of stipulation made thereunder for trial before a judge pro tempore.

6. **Constitutional law ⚷145—Legislature cannot prevent carrying out of contract to arbitrate made pursuant to previously existing law.**

Legislature may not prevent the carrying out of a contract to submit dispute to arbitration, the contract having been executed pursuant to authority granted by a previously existing law.

Application by Dave Martello for a writ of prohibition to be directed to the Superior Court in and for Los Angeles County, R. E. Abbott, formerly a Judge pro tempore thereof and another. Alternative writ vacated, and peremptory writ denied.

Faucett & Ring, of Los Angeles, for petitioner.

Overton, Lyman & Plumb, of Los Angeles, amici curiæ, for respondents.

Max Schleimer, of Los Angeles, for respondent Abbott and as amicus curiæ for other respondents.

WORKS, P. J. Petitioner was one of several defendants in an action pending in respondent court, in which action one Ranney was the plaintiff. On September 28, 1926, under proper title of court and cause, the defendants and Ranney stipulated:

> "That the said cause may be tried before Robert E. Abbott, a member of the bar, admitted to practice before the Supreme Court of the State of California, and that his action in the trial of said cause shall have the same effect as if he were a judge of this court."

The stipulation also provided: "Fees of judge pro tem. to be taxed as costs." Appended to the stipulation was an order, signed by one of the judges of respondent court, approving "the selection of Robert E. Abbott to try the above entitled cause." Acting pursuant to the stipulation and to the order approving it, respondent Abbott began a trial of the cause, heard all the evidence, took the cause under submission, and on October 19, 1926, directed judgment for the plaintiff. On November 2, 1926, the people of the state adopted certain amendments to the Constitution, and these changes took effect on the same day. Thereafter respondent Abbott was about to sign and to file with respondent Lampton his findings and judgment in the cause which had been submitted to him as a judge pro tempore, when petitioner, believing that the powers of the judge pro tempore had been terminated by the recently adopted constitutional amendments, applied to this court for the writ of prohibition, to prevent further action by respondent Abbott in the cause, and an alternative writ issued. We are now to determine whether petitioner shall have a peremptory writ. All questions in the proceeding arise upon the face of the petition for the writ.

Before the adoption of the amendments of 1926, section 6 of article 6 of the Constitution contained this provision:

> "There may be as many sessions of [the superior] court, at the same time, as there are judges thereof."

This language applied only to the superior court in and for the city and county of San Francisco. Prior to the amendments of 1926 section 7 of the same article read, in part:

> "In any county, or city and county, other than the city and county of San Francisco, in which there shall be more than one judge of the superior court, the judges of such court may hold as many sessions of said court at the same time as there are judges thereof. * * *

Before the amendments mentioned section 8 of the article stood as follows:

> "A judge of any superior court may hold a superior court in any county, at the request of a judge of the superior court thereof, and upon the request of the governor it shall be his duty so to do. But a cause in the superior court may be tried by a judge pro tempore, who must be a member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the cause, and the person so selected shall be empowered to act in such capacity in all further proceedings in any suit or proceedings tried before him until the final determination thereof. There may be as many sessions of a su-

> perior court at the same time as there are judges thereof, including any judge or judges acting upon request, or any judge or judges pro tempore. The judgments, orders, acts and proceedings of any session of any superior court held by one or more judges acting upon request, or judge or judges pro tempore, shall be equally effective as if the judge or all of the judges of such court presided at such session."

Before the amendments of 1926 sections 6 and 7 had never been altered. Until 1926 they both stood as they were when the Constitution was originally adopted. The text of section 8, as above set forth, represents an amendment adopted by the people at the general election of 1922, although the section had been cast in much the same form by an amendment adopted in 1910.

By the amendments of 1926 the language of section 6 providing for the number of sessions of the superior court was changed to read thus:

> "There may be as many sessions of a superior court, at the same time, as there are judges elected, appointed or assigned thereto."

This language was not applied alone to the superior court in and for the city and county of San Francisco, but to the superior court generally. At the same time section 7 was so amended as to strike out all reference to the number of sessions which may be held by the superior court, and section 8 was so altered as to eliminate all provision for the number of sessions of the court, and, as well, all reference to judges pro tempore. These three amendments were adopted by the people in a group; that is, they were incorporated in one so-called "constitutional amendment" which was voted upon by the electorate as a whole. By the same "constitutional amendment," that is, in the same group of amendments, and voted upon at the same time and in the same manner, the people added a new section to article 6, to be known as section 1a. This section provides for a judicial council, and it directs the chief justice of the Supreme Court, as chairman of the council, which office is declared by the amendment to rest in him, to "provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred."

[1] Considering together the various amendments embodied in the single "constitutional amendment" adopted at the election in November, 1926, it is manifest to us that the sentence by one of them incorporated in section 6, and above quoted, must be construed as if it read: "There may be as many sessions of a superior court, at the same time, as there are judges elected [by the people], appointed [by the governor] or assigned [by the chairman of the judicial council] thereto." It is further manifest to us, upon the face of the amendments when considered together, that since November 2, 1926, litigants have not possessed the right to stipulate for judges pro tempore of the superior court to try their actions, nor has the superior court had the power to approve such selections. This result appears from the joint operation of the amendment of section 8, striking out all reference to judges pro tempore, and of the amendment of section 6, in effect providing that no sessions of the superior court may be held by judges pro tempore, but only by judges elected, appointed and assigned in the modes already pointed out. This view disposes of the contention of respondents that section 72 of the Code of Civil Procedure, relating to judges pro tempore of the superior court, is still in operative effect.

[2] We have seen that by the constitutional amendments of 1926 the people wiped out the pre-existing right to select judges pro tempore. The question yet remaining to be determined in the present proceeding is this: Did the amendments operate to terminate the powers of judges pro tempore who had been selected and who had entered upon the discharge of their duties before November 2, 1926, the date upon which the amendments were incorporated in the organic law? Respondents, in addition to the point they make, based upon the assumed continued existence of section 72 of the Code of Civil Procedure, present several contentions upon the question just stated. We think, however, that none of them, except one, presents matter which we need pause to consider. Therefore, without further reference to the others, we shall now address ourselves to that one. It is insisted that the amendments of 1926, if they so operate as to terminate the powers of a judge pro tempore who had been selected and who had entered upon the discharge of his duties before the amendments were adopted, are unconstitutional to that extent, as an infringement of the clause of the Constitution of the United States (article 1, § 10, cl. 1) which forbids the passage of laws impairing the obligation of contracts.

[3, 4] In considering this question it becomes necessary, first, to determine whether the stipulation selecting respondent Abbott as a judge pro tempore is a contract within the meaning of that clause of the national organic law which is above mentioned. The right of parties litigant to "agree" upon a judge pro tempore to try their cases, under section 8 of article 6 of the Constitution as it stood when respondent Abbott was selected to act in that capacity by petitioner and Ranney, was somewhat akin to the right, often conferred by statute, to submit disputed matters to arbitration. The Supreme Court has said:

> "The trial of a cause before a person selected by the parties to act as judge may be lik-

ened to an arbitration, in which issues of law and fact are determined by 'one or more persons' designated by the parties in interest." Graziani v. Denny, 174 Cal. 178, 162 P. 397.

If such a trial is like an arbitration it seems not too much to say that a stipulation for the trial is like an agreement for arbitration. It is well settled that such an agreement, when fully executed by the rendition of award, binds the parties to an obedience to the award, even when they have not agreed expressly so to be bound. The mere agreement to submit to arbitration is enough impliedly to obligate the parties to observe the terms of the award. Robinson v. Templar Lodge, 97 Cal. 62, 31 P. 609. And it would seem to follow logically that if two parties agree to submit a dispute to arbitration and enter upon a trial of the controversy before duly selected arbitrators, each of them is bound to go forward with the hearing to the end, or to suffer the consequences of a failure to participate in it. It further follows that petitioner and Ranney were obligated, under the stipulation entered into by them, to proceed to a conclusion of the trial commenced before respondent Abbott.

[5] The view just expressed is based upon the law of arbitration and upon the analogy therewith which springs from the facts of the present case. The view may be reinforced by a consideration of those facts themselves, in the light of the provisions of the Constitution under which the stipulation between the parties was made. Section 8 of article 6, as it stood at the time the stipulation was made and at the time when respondent Abbott had heard the evidence in the cause intrusted to him and had ordered judgment upon it, provided that "a cause * * * may be tried by a judge pro tempore, * * * agreed upon in writing by the parties litigant. * * *" Not only so, but the section provided that "the person so selected shall be empowered to act in such capacity in all further proceedings in any suit or proceedings tried before him until the final determination thereof." Under familiar rules of law these provisions became a part of the stipulation selecting respondent Abbott and must be read with its express language in order to admeasure its legal effect. If the contention of petitioner is to prevail, respondent Abbott is robbed of authority to act as judge pro tempore in the cause confided to his judgment "until the final determination thereof," despite the agreement of the parties to that effect which was impliedly imported into the stipulation from the Constitution. Ranney, then, will be deprived of the fruits of the stipulation—of the judgment which was about to ripen from the exercise of jurisdiction by the judge pro tempore up to the point at which it is sought to halt it. The stipulation provided that the fees of the judge pro tempore were to be taxed as costs. This was doubtless a proper clause in the concord of the parties, but if it was not, we must presume that the charges of the stipulated official must be met by someone, for it cannot be assumed that his services were to be rendered gratuitously. Again, ordinary costs must have been incurred in the hearing before him, or certainly, they may have been incurred, and so far as the question here presented is concerned the result is the same. Yet again, each of the parties, we must assume, become liable for the payment of counsel fees arising from the hearing before the judge pro tempore. If petitioner's contention is to be upheld, all these costs and expenses have been incurred for naught, and the money to meet them has been or will be thrown away, and all because of the exercise by the people of the right to amend the Constitution.

It would seem that the liabilities just mentioned have been incurred because of the stipulation into which Ranney and petitioner entered. When parties commence a trial before an elected or an appointed judge, it is true that they are bound by the law to conclude it. Neither can escape the grind of the wheels of justice. It is true, also, that a judge pro tempore has all the powers, in a cause before him, of the ordinary judge, and that the parties who selected him, because of that fact, are forced by the law to conclude the trial of the cause. Nevertheless, they need not originally have gone before him except upon a meeting of their minds under a free exercise of volition. It is for that reason, doubtless, that the Supreme Court has likened a trial before a judge pro tempore to a trial before an arbitrator. It is not the compulsion of the law, originally, which takes parties before a judge pro tempore, but the compulsion of the stipulation of which he is the creature. A denial of the right to conclude a trial before him is therefore the denial of a right to carry out their stipulation—their contract.

Petitioner says that the stipulation here in question is not a contract because under the Constitution the selection of the judge pro tempore must have been approved by the court in which he was to sit. This requirement, however, affected in no degree the right of the parties to contract. As a judge pro tempore, selected by agreement to sit in a particular case, is nevertheless to engage in the administration of a public trust, government is interested in the selection of a proper person to discharge the trust, and the approval of the court was intended as a safeguard against the selection of improper persons. Such approval affected not the mutual obligations of the parties to the contract here involved, but those obligations became effective and binding only upon the approval. Surely, the stipulation is no less a contract, when it does become effective, even if that state of affairs eventuates only after an approval by the court. The parties have agreed to do a particular thing and by the agreement they have finally become obligated to do it. Petitioner inveighs against the sanctity of the stipulation upon the ground stated in the following quotation:

> "Contracts which have a tendency to obstruct or interfere with the administration of justice are clearly against public policy." 6 Cal. Jur. 130.

This language has no application here. The stipulation did not interfere with the administration of justice, but was in furtherance of it. The question is whether the amendments to the Constitution interfere with the contract, impair its obligation. Petitioner makes other points under his contention that the stipulation was not a contract, but we think they are not of sufficient merit to require a specific consideration.

It would seem that the paper which the parties signed, in the light of the conditions under which it was executed, possessed all the elements of a contract. There were competent parties, of course. There was a subject-matter to be dealt with, in an action to be tried. Consideration was present in the advantage to be derived from an early trial of the cause, and also in a burden contemplated by the parties—the payment of the fees of the judge pro tempore by the defeated party.

[6] The stipulation was a contract, and there is no doubt, coming to the final question, that its obligation is impaired by the amendments to the Constitution, if they be construed as contended by petitioner. A Legislature may not prevent the carrying out of a contract to submit a dispute to arbitration, the contract having been executed pursuant to authority granted by a pre-existing law. State v. McPeak, 31 Neb. 139, 47 N. W. 691; State v. Thayer, 46 Neb. 137, 64 N. W. 700. The Supreme Court has made the following quotation from an opinion of the Supreme Court of the United States:

> "The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment; the largest and the least are alike forbidden." Bates v. Gregory, 89 Cal. 387, 26 P. 891.

The same authority has again been quoted thus:

> "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract, as such, in the view of the law, ceases to be, and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest." Welsh v. Cross, 146 Cal. 621, 81 P. 229, 106 Am. St. Rep. 63, 2 Ann. Cas. 905.

The alternative writ of prohibition is vacated and a peremptory writ is denied.

We concur: CRAIG, J.; THOMPSON, J.

81 Cal. App. 763

HILLWIG v. BOYER. (Civ. 5315.) ★

(District Court of Appeal, First District, Division 1, California. March 18, 1927. Hearing Denied by Supreme Court May 16, 1927.)

1. Mortgages 🔑38(1)—Evidence held to support finding that deed was intended merely as additional security.

Evidence *held* sufficient to support finding that deed absolute on face was not delivered to or received by creditor for purpose of passing absolute title, but was intended merely as additional security.

2. Mortgages 🔑32(3)—Deed given as security is "mortgage" as matter of law, and court's reference to it as "additional security" is not error.

Deed given as security for debt, and not intended to pass title, is as matter of law a mortgage with incidents that attach to mortgages, and court's reference to it as "additional security" is not error.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Mortgage.]

3. Mortgages 🔑38(2)—Proof of parties' intention that deed should be mortgage must be clear.

Where evidence is offered to convert deed absolute in form into mortgage, it ought to be so clear as to leave no doubt that real intention of parties was to execute mortgage.

4. Appeal and error 🔑1011(1)—Clarity of proof of intention of parties that deed should be mortgage is for trial court on conflicting evidence.

Where evidence is conflicting, clarity of proof on issue whether parties to deed absolute on face intended that it should be mortgage is largely matter for trial court to determine.

5. Reference 🔑7(3)—In action for money had and received, brought to have deed absolute on face declared mortgage, reference to referee for accounting held not error.

In action for money had and received, brought to have deed absolute on face declared mortgage, reference to referee for accounting *held* not error, where judgment could not be accurately figured because itemized statement was not furnished by defendant, since equity acquired jurisdiction for purpose of decreeing deed to have been intended as mortgage.

6. Action 🔑32—Action does not fail because plaintiff mistakes his remedy.

Party cannot be sent out of court unless on his facts he is entitled to no relief either at law or in equity, mistake in remedy being insufficient, since legal and equitable relief are administered in same form and according to same general plan.

★Hearing denied by Supreme Court.

7. Money received 🔑1—Action for money had and received lies where person possesses money which he ought to pay over to another.

Generally speaking, action for money had and received lies in all cases where one person has in his possession money which in equity and good conscience he ought to pay over to another.

Appeal from Superior Court, Los Angeles County; Edward F. Hahn, Judge.

Action by George N. Hillwig against J. F. Boyer. Judgment for plaintiff, and defendant appeals. Affirmed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Hyman Schwartz, E. M. Swartz, and Samuel W. Newman, all of Los Angeles, for respondent.

CAMPBELL, Justice pro tem. In this action judgment was entered in favor of plaintiff and against defendant for $3,864.92, and from this judgment defendant has appealed. He urges two points:

(1) "The evidence does not establish that the deed was intended to be anything other than what on its face it purports to be."

(2) "The ex parte order made by the court sending the case to a referee for hearing was void, and the judgment predicated upon the report of the referee is without support."

The complaint stated an action for money had and received, and the answer controverted the complaint. Without objection, however, the cause was tried by the plaintiff on the theory that he was indebted to the defendant on numerous notes secured by mortgages on his real estate to the amount of $15,000 and accrued interest; that the indebtedness was past due, and that defendant was demanding additional security; that the only additional security he could give the defendant was to deed him all of the mortgaged property to hold until a sale or disposition of the property could be made and the defendant paid; and that plaintiff on December 6, 1918, executed and delivered to defendant a deed, which in effect was nothing more than security to defendant and the control of the properties. The case was tried by defendant on the theory that the deed constituted an absolute sale and conveyance and a full settlement of all indebtedness.

[1] As to the first point urged by appellant, the court found that on December 6, 1918, plaintiff owed defendant $15,000 principal and accumulated interest; that on said date the deed was made and delivered to defendant as security; that no consideration passed for said deed; that under the agreement upon which the transfer was made the defendant was to hold the property and sell the same; that defendant was to collect rents and apply the proceeds on the indebtedness of plaintiff, less the expenses of managing the property and the payment of taxes, water bills, interest, and repairs; that on December 24, 1920, the defendant had realized from the sale of said property $19,500 cash and $2,314.67 in rent, and that the interest on the rent money to that date amounted to $114.99, making the total sum on said date of $21,929.66; that on said date the plaintiff owed the defendant the total sum of $18,438.14, being the principal and accumulated interest on the notes, according to their tenor.

Striking a balance, the court found defendant indebted to plaintiff in the sum of $3,491.52, but further found that defendant was entitled to compensation for his services in collecting some of the rents, and fixed such compensation at $75, and rendered judgment for plaintiff for $3,416.52, with interest at 7 per cent. from December 24, 1920, to date of judgment amounting to $448.40, making the total judgment $3,864.92.

Appellant finds no fault with the amount of the judgment, nor does he find any fault with the correctness of the account returned by the referee, but contents himself with the two points—the sufficiency of the evidence to overcome the deed absolute on its face, and that the court was without jurisdiction to appoint a referee to take an accounting after the court had found the issues in favor of plaintiff.

In support of his contention that the deed was not an absolute transfer of the property described therein, but was given merely as additional security, the plaintiff testified that in December, 1918, he said to defendant: "Mr. Boyer, if you are not satisfied with the security you hold, I will be willing to grant deed you that property and additional property to further secure your claim;" that he afterwards got a blank grant deed and read the description of the property to him and he put it down on the typewriter; Mr. Boyer filled out the grant deed; "I took the deed that evening; the next morning my wife and I appeared before a notary public, signed it; I put the revenue stamps on it, took it to the courthouse and recorded it; I paid for the recording fees and for the revenue stamps; that was all the conversation on December 6, 1918; I was to allow Mr. Boyer to collect the rents; Mr. Boyer said 'If I acquire a deed to the property, allow me to collect the rent, I will audit them to your credit, give you credit for everything above interest, taxes.'" Plaintiff testified that he collected some of the rents and after collecting the same he would either mail Mr. Boyer a check or take the money to him and submitted numerous canceled checks which were introduced in evidence. Plaintiff further testified that he handled the transaction with Brown Bros.; that he prepared the lease, took it to Mr. Boyer, who signed it, and that he delivered it to the Browns, collected the

$330 check, and delivered it to the defendant; that he made repairs on the premises and received no compensation therefor, and that he talked to defendant about making certain repairs and defendant told him to have it done and adjust the amount to the rent; that there were continuous attempts made by him to sell the properties and numerous conferences held in regard thereto between himself and the defendant, and that about October, 1920, he had a conversation with Mr. Boyer at the Citizens' Trust & Savings Bank, and that those present were Mr. Waldenfels, Mr. Boyer, the escrow clerk, and himself; that when he showed Mr. Boyer the escrow instructions of the proposed sale to Mr. Waldenfels, Mr. Boyer said: "You have only allowed me $17,000. I will ask now $17,500 to release," and plaintiff said: "Mr. Boyer, you have told me that it was originally $16,500, and you told me a few days ago it was $17,000; now you have raised it to $17,500." That defendant said: "I have changed my mind. I have raised it to $17,500," and he further said: "You can't eat your cake and have it too." Plaintiff further testified that under the agreement with Mr. Boyer at the time the property was sold he was to have all over $17,500 that was realized; that defendant stated in the presence of Mr. Waldenfels and himself:

> "Well, gentlemen, I want to see Hillwig get his equity out of this property. I know he had worked hard for his equity, and all I want is my money. When I get that the balance of it goes back to Hillwig."

W. D. Merickel testified that defendant Boyer stated to him in November, 1920, that Hillwig was owing him $17,000, and when asked "What shape is that in? Is it in a mortgage or what?" that Boyer replied: "He was holding a deed to the property as security."

J. F. Reynolds testified that he met Boyer in company with plaintiff and others about December, 1920, and that Boyer stated that all the interest he had in the property was $17,000, and George C. Fetterman testified that near the end of 1920 he had a conversation with Mr. Boyer in which Boyer said—quoting from Mr. Fetterman's testimony:

> "Mr. Hillwig owed him a lot of money and that if he would pay him back some money that he could have his property, something to that effect—that Mr. Hillwig owed him a lot of money and that he was holding his property as security, something like that."

The defendant testified that he told plaintiff he would have to have additional security, or a settlement, or he would foreclose; that he received the deed on the 6th day of December, 1918, and filed it for record the next day; that no consideration passed; that none of the notes or mortgages were marked paid or satisfied of record until December, 1920, when the sale of the property was made; that he received $19,600 for the property; that he never paid the taxes on lots 111 and 112; that he did not on December 6, 1918, mark the notes covered, mortgage or trust deeds paid, nor give any evidence of payment at any time until the property covered by the mortgage and trust deeds was transferred by him; that he placed them in escrow.

The foregoing evidence in our opinion is ample to support the finding of the trial court that the deed in question was not delivered or received for the purpose of passing absolute title, but was intended merely as "additional security."

[2] Criticism is made by appellant of the term "additional security" used by the court in designating the nature or character of the conveyance made by respondent to appellant, and cites us to Renton v. Gibson, 148 Cal. 650, 84 P 186. That is a case where property was conveyed to the grantee for the purpose of bringing a suit to quiet title. In one complaint it was alleged that the property was conveyed "in trust," and in a subsequent complaint this averment was stricken out and it was alleged that the property was conveyed as "security." There the court says:

> "If the finding of the court, following in this regard as it does the allegation of the complaint, is to be taken as a declaration that the deed from plaintiff to defendant was security in the sense that it was a mortgage merely, then this finding is not only not clearly and convincingly supported by the evidence, as all the authorities require shall be done before a written instrument of such dignity as a deed shall be proved other than what on its face it purports to be."

In that case the complaint also alleges that "up to" a certain date (the date of the deed) plaintiff had title, from which assumption arises that after that date he parted with title, and of course if plaintiff parted with the title on delivery of the deed, such deed could not be construed to be a mortgage.

Further on in the opinion the court in enunciating the law applicable to the situation here presented says:

> "Whatever be the form of an instrument other than a deed of trust, it is of course well settled that if it be intended as security merely, it is a mortgage, title does not pass, and only a lien results in favor of the named grantee, who in law is but the mortgagee," and cites section 2924 of the Civil Code to the same effect.

Much discussion is indulged in by counsel for appellant for the purpose of emphasizing the fact that both counsel for respondent and the court were at a loss to properly characterize the deed given. On examination of the authorities cited, as well as numerous authorities dealing with the question of the effect of deeds absolute on their face but intended as mortgages, there seems to be a lack of uniformity in the mode of expression by our appellate tribunals in the characterization of such instruments. The consideration to be indulged in is not what shall we call a deed absolute on its face but intended as a mortgage, but, rather, is the deed absolute on its face intended as a mortgage or additional security? If either, the characterization given to the instrument is unimportant, the sole question being: Did the parties intend by the instrument granting the properties to absolutely vest title in the grantee, or did the grantor reserve unto himself the right to redeem from the deed absolute on its face, by paying the indebtedness, to secure which the deed was given? The law is clear and well settled and needs no elaboration to the effect that if it were the intention of the parties that the deed should simply be security for a present, antecedent, or future indebtedness, then the deed is nothing more than a mortgage with the incidents that attach to mortgages. It therefore matters not that the trial court found the instrument to be one of "security," for as a matter of law a deed given to secure an indebtedness and not intended to pass title is a mortgage.

[3, 4] Appellant has cited us to many cases holding that when evidence is offered to convert a deed absolute in form into a mortgage the evidence ought to be so clear as to leave no doubt that the real intention of the parties was to execute a mortgage, otherwise the intention appearing on the face of the deed ought to prevail. We recognize this to be the rule, yet the clarity of the proof is largely a matter for the trial court to determine. As was stated in Couts v. Winston, 153 Cal. 686, 96 P. 357:

> "But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court. * * * In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court. * * * If therefore the evidence offered by plaintiff, taken by itself, was sufficiently 'clear, satisfactory and convincing' to satisfy the trial court that the deed was in fact a mortgage, the finding made cannot be overthrown merely because numerous witnesses, whose character is not impeached, gave positive testimony to the contrary effect."

[5] It is urged under appellant's second assignment of error that this being an action at law, no reference for the purpose of an accounting could be made. Numerous authorities are cited, several of them decided before the adoption of the Codes, and all involving cases where the reference was for the determination of the entire issues involved. In the instant case all questions of fact had been determined by the court prior to the reference, the court withholding the entry of its findings and final judgment pending the furnishing of an itemized statement by appellant of the net receipts from the rentals, the court making the following minute order:

> "Upon examination of the testimony for the purpose of determining the proper amount of credits and debits to be allowed and charged defendant, it appears that an itemized statement of debits and credits which was to be furnished by defendant during the trial was not put in evidence; hence it is impossible to accurately figure the amount of the judgment. The order of submission of the cause will be set aside and Willard Goodwin appointed as referee for the purpose of an accounting," etc.

Upon the reference being made appellant appeared with his counsel and offered his books in evidence for the purpose of determining the rentals received by him.

[6] While the action is one for money had and received, the cause was tried for the purpose of having a deed absolute on its face decreed a mortgage, which is a proceeding in equity, and equity having acquired jurisdiction for the purpose of decreeing the deed to have been intended as a mortgage, even if the matter of accounting is not of itself a subject of concurrent equity, jurisdiction may with propriety be referred. Jones v. Gardner, 57 Cal. 641. Legal and equitable relief are administered in this state in the same form and according to the same general plan. A party cannot be sent out of court merely because his facts do not entitle him to relief at law, nor merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief either at law or in equity. Consequently, an action does not now, as formerly, fail because a plaintiff has made mistake as to the form of his remedy. Dean et al. v. Shingle et al., 198 Cal. 660, 246 P. 1049, 46 A. L. R. 1156.

[7] The basis for an action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff, and, generally speaking, the action lies in all cases where one person has in his possession money which in equity and good conscience he ought to pay over to another. Sacramento County v. Southern Pacific Co., 127 Cal. 221, 59 P. 568, 825. This action is in the nature of an equitable one. A debt sufficient for such a purpose may arise from the operation of purely equitable principles. Fontaine v. Lacassie, 36 Cal. App. 175, 171 P. 812; Spitzer v. City of Oakland, 32 Cal. App. 748, 136 P. 1044.

This disposes of the errors urged by appellant. From what we have said it follows that there is no merit in the appeal.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

81 Cal. App. 752

PEOPLE v. SHAFFER. (Cr. 1449.)

(District Court of Appeal, Second District, Division 1, California. March 17, 1927.)

1. Criminal law ⚷878(1), 984—Where defendant held up occupants of store with revolver, obtaining check, separate verdicts and judgments under counts charging robbery and burglary held not error.

Where defendant held up occupants of store with revolver, obtaining check for $56.88, separate verdicts and judgments under counts charging robbery and burglary *held* not error, since he committed burglary when he entered with intent to commit crime of larceny, and committed robbery when he took check by force and fear from person of owner.

2. Burglary ⚷41(1)—Robbery ⚷24(1)—Evidence of identity held to sustain conviction for robbery and burglary.

Evidence *held* sufficient to identify defendant as one who held up occupants of store with revolver obtaining checks and money, in view of partial identification by two witnesses and defendant's confession, and hence sufficient to sustain conviction for robbery and burglary.

3. Robbery ⚷11—Unloaded revolver is "dangerous weapon," within meaning of robbery statute (Pen. Code, § 211a).

Unloaded revolver is "dangerous weapon," within meaning of Pen. Code, § 211a, providing that robbery by person armed with dangerous or deadly weapon is of first degree.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dangerous Weapon.]

4. Criminal law ⚷517(4)—Admission of confession held not error, in view of testimony that it was given freely and voluntarily.

In prosecution for robbery and burglary, admission of defendant's confession *held* not error, where witnesses for people testified that it was given freely and voluntarily and was not obtained by use of force, threats, fear, or hope of reward or immunity.

5. Criminal law ⚷531(½)—Refusal to allow accused to retestify as to voluntary character of confession except as part of his own case, after confession was read to jury, held not error.

Refusal to allow defendant to testify as to voluntary character of confession except as part of his own case, after confession had been read to jury and state's witness had been recalled and testified, *held* not error, where defendant had previously testified that confession was obtained by threats and promise of probation.

6. Criminal law ⚷1170(4)—Refusal to allow accused to retestify as to voluntary character of confession except as part of his own case, after confession was read to jury, if error, held harmless, where defendant's testimony was then given.

Refusal to allow defendant to retestify as to voluntary character of confession except as part of his own case, after confession had been read to jury and state's witness had been recalled, if error, *held* not prejudicial, where prosecution closed case immediately and defendant's testimony was then given.

7. Criminal law ⚷1144(12)—Testimony concerning confession must be assumed to have been properly admitted on appeal, where evidence was conflicting as to its voluntary character.

Where evidence was conflicting as to voluntary character of confession, it must be assumed, on appeal, that testimony concerning it was properly admitted, since reviewing court cannot say that its admission was error unless such error appears, as matter of law, from record.

8. Larceny ⚷77(4)—Instruction that defendant's unexplained possession of stolen property will not alone justify conviction for larceny, but is circumstance to be considered, held proper.

In prosecution for robbery and burglary, instruction that defendant's mere unexplained possession of stolen property will not justify conviction for larceny, but is circumstance to be considered in determining guilt and must be accompanied by corroborating circumstance, *held* proper.

9. Criminal law ⚷829(12)—Instruction that possession of stolen property alone would not support conviction for larceny held properly refused, in view of instruction given.

In prosecution for robbery and burglary, refusal of instruction that possession of stolen property alone would not support conviction for larceny *held* not error, in view of instruction given that unexplained possession would not justify conviction but was circumstance to be considered.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

William E. Shaffer was convicted of robbery and burglary, and he appeals. Affirmed.

Marshall A. Stutsman, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

McLUCAS, Justice pro tem. The defendant was convicted under two counts of the information charging robbery and burglary. Judgment was rendered on each of said counts. Defendant appeals from the judgments and from the order denying defendant's motion for a new trial.

On July 10, 1926, about the hour of 9:30 p. m., a man wearing a burnt cork mask entered the store of R. C. Welliver, in Los Angeles, drew and cocked a revolver, held up the occupants of the store, thereby obtaining a check for $56.88, together with other checks and money. On July 12th the defendant, having indorsed the above-mentioned check, deposited the same in an account which he opened with the Citizens' Trust & Savings Bank. Welliver and Brownell, two of the occupants of the store, gave testimony tending to identify the defendant. The defendant's landlady testified that the defendant was absent from home between the hours of 7:30 and 10:30 p. m., on July 10th, and that upon his return he washed his face and hands. The officer who searched the defendant's room testified that he found a Colt 45 revolver, loaded with 5 shells, a leather holster and belt with 13 cartridges, and a braided leather strap. The confession of the defendant was admitted in evidence, in which the defendant confessed to the robbery and stated that he used the gun offered in evidence at the time of the commission of the crime, but denied that it was loaded. The only evidence offered by the defendant was his testimony that the confession was obtained from him through a promise by the officers to help the defendant obtain probation and through certain other promises and threats.

[1] Defendant's first point is that the trial court erred in permitting the jury to bring in two verdicts, one under each count, and in pronouncing judgment on each of said verdicts. Defendant is mistaken in his contention. Defendant committed the crime of burglary when he entered the store of R. C. Welliver with the intent to commit the crime of grand larceny. Had defendant taken no further action, he could not have been charged with a further offense, but, when defendant by force and fear took from the possession of R. C. Welliver one check of the value of $56.88, defendant committed the separate crime of robbery. The numerous cases cited by defendant are beside the point. In reply thereto it is only necessary to cite two cases decided by this court. In People v. Sharp, 58 Cal. App. 637, 209 P. 266, where the facts were very similar to those in the instant case, it was held that the defendant was properly convicted of both burglary and robbery. In People v. Snyder (Cal. App.) 239 P. 705, it is said at page 706:

> "It is first contended by appellant that the two offenses charged, being based upon one single act or transaction, constitute only one offense, and although, under section 954 of the Penal Code, the two offenses might be charged in separate counts in the information, the defendant could be found guilty of and punished for but one offense. This question seems to have been definitely settled by the Supreme Court of this state adversely to appellant's contention." People v. Garnett, 29 Cal. 622, 628; People v. Curtis, 76 Cal. 57, 17 P. 941.

In People v. Devlin, 143 Cal. 128, 76 P. 900, the court said:

> "It is evident that one can commit burglary by entering a building with intent to commit any felony, such as rape, robbery, arson, or murder. It is also evident that the crime consists of the entry with the intent set forth in the statute. After one has entered a building with intent to commit any other felony than grand or petit larceny, he has committed burglary, but he may then find that it is impossible, for various reasons, to commit the felony which it was his intention to commit when he entered, and conclude to commit larceny by stealing some article of value in the building. He thus, in rapid succession, commits two crimes. Indeed, after he has committed burglary he might under favorable circumstances commit any felony named in the statute."

[2] Defendant next urges that the verdict is contrary to the evidence by reason of lack of identification of the defendant. We think the evidence as heretofore stated, taken with the partial identification of the defendant by two witnesses and defendant's confession, was sufficient to connect the defendant with the crime as charged.

[3] Appellant's next contention is that the accused was not armed with a deadly weapon because there was no direct proof that the revolver was loaded, and for that reason defendant could not be convicted of robbery in the first degree. We do not believe this point to be well taken. An unloaded revolver is a "dangerous" weapon, within the meaning of section 211a of the Penal Code. In People v. Egan (Cal. App.) 246 P. 337, it is said at page 338:

> "Appellant urges also that the evidence is insufficient to sustain a conviction of first degree robbery because it did not appear that the revolver used in the perpetration of the crime was loaded. In support of this point appellant cites the case of People v. Sylva, 143 Cal. 62, 76 P. 814. That case is not in point, however, because it involved the construction of the term 'deadly weapon' as used in the Code section defining the crime of assault with a deadly weapon (Pen. Code, § 245), which is a different term from the one employed in the Code section defining first degree robbery. The latter section declares that: 'All robbery * * * perpetrated * * * by a person being armed with a *dangerous* or deadly weapon is robbery in the first degree.' Pen. Code, § 211a. (Italics ours.) It is a matter of common knowledge, that in committing robbery pistols are frequently used as bludgeons rather than as firearms. The fact, therefore, that a person perpetrating such crime is armed with a pistol is enough to justify the conclusion that the pistol used by him is a 'dangerous' weapon within the meaning of said section 211a of the Penal Code, even though it be not loaded."

[4-6] The defendant further urges that defendant's confession should not have been received in evidence. We find no error in the admission of this confession. The witnesses for the people testified that the confession was given freely and voluntarily, and was not obtained by the use of force or threats or fear, or hope of reward or immunity. This testimony was not shaken by cross-examination on the voir dire. Defendant took the witness stand and testified by way of defense that the officers obtained the confession through a promise to help him obtain probation and other promises and threats. This was denied by the officers. Counsel for defendant concluded his cross-examination on

voir dire, and the confession was admitted in evidence over appellant's objection.

[7] After the confession was read to the jury, Officer Clark was recalled to the stand for further direct examination and testified that defendant had said the gun offered in evidence was the one he used in the robbery. At this stage, during further cross-examination of Officer Clark, counsel for defendant, after the confession had been received in evidence, offered to have the defendant take the stand and testify concerning the voluntary character of his confession. The trial court then ruled that defendant could not at that time take the stand and so testify, except as a part of his own case. We think the ruling proper, but if this be error the defendant was not prejudiced thereby inasmuch as the prosecution closed its case immediately upon the confession being received in evidence, and the testimony of the defendant was then given. At the most, the testimony of the witnesses for the people and that of the defendant were in conflict as to the voluntary character of the confession. Under such circumstances, it must be assumed that the testimony concerning defendant's confession was properly admitted. As stated in People v. Castello, 194 Cal. 595, 599, 229 P. 855, 856:

> "The rule is well settled that whether or not a confession is free and voluntary is a preliminary question addressed to the trial court. People v. Loper, 159 Cal. 6, 112 P. 720 (37 L. R. A. [N. S.] 934), Ann. Cas. 1912B (1193) 1933; People v. Siemsen, 153 Cal. 387 (95 P. 863); People v. Grafft, 61 Cal. App. 7 (214 P. 273); People v. Middleton, 65 Cal. App. 175 (223 P. 448). A reviewing court cannot say that the trial court committed error in admitting a confession of guilt unless such error appears, as a matter of law, from the record presented. The trial court is clothed with considerable discretion in determining whether or not the confession was free and voluntary. See authorities last above cited. Where the evidence is conflicting on the subject it must be assumed that the testimony concerning defendants' confessions was properly admitted. People v. Tugwell, 28 Cal. App. 348 (152 P. 740)."

[8, 9] Finally, defendant complains of instruction A, given by the court, upon the request of the jury for further instructions after several hours' deliberation, and also of the court's refusal to give defendant's instruction submitted at the same time. Instruction A reads as follows:

> "You are instructed that the mere possession of stolen property, unexplained by the defendant, however soon after taking, is not sufficient to justify a conviction of larceny; it is a circumstance, which taken in connection with other testimony, is to determine the question of guilt. Yet, if you believe from the evidence that the defendant was found in the possession of the property which you are satisfied was stolen from E. C. Welliver, or claiming to be the owner thereof, after the alleged taking, this is a circumstance tending in some degree to show guilt, but not sufficient, standing alone and unsupported by other evidence, to warrant you in finding him guilty. There must be, in addition to proof of possession of stolen property, proof of corroborating circumstances tending of themselves to establish guilt. These corroborating circumstances may consist of acts, or conduct or declarations of the defendant, or any other circumstances tending to show the guilt of the accused.
>
> "If the jury believe the property was stolen, and was seen in the possession of defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession, in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such."

Defendant's requested instruction is as follows:

> "The court instructs the jury that the possession of stolen property, standing alone, is not sufficient to support a conviction of larceny. And if you find from the evidence that the fact of possession, if you believe that fact, and it is not corroborated by other facts in evidence which you believe beyond a reasonable doubt, then you should acquit the defendant."

We see no error either in giving the requested instruction or in refusing defendant's instruction because included in instruction A.

The judgment and order denying motion for a new trial are affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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81 Cal. App. 643

DE WITT v. SIDES et al. (Civ. 5694.)

(District Court of Appeal, First District, Division 1, California. March 8, 1927.)

1. Mines and minerals 🔑20(1)—Boundaries of mining location must be marked within reasonable time after posting notice and before adverse rights attach (Civ. Code, §§ 1426, 1426a; U. S. Comp. St. § 4620).

To acquire valid title to mining claim, under Civ. Code, §§ 1426, 1426a, and Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620), boundaries of location must be marked or defined within reasonable time after posting notice and before adverse rights attach.

2. Mines and minerals 🔑38(16)—Right to possession of unpatented mining claim shown only by showing actual pedis possessio as against mere wrongdoer, or compliance with legal requirements (Civ. Code, §§ 1426, 1426a; U. S. Comp. St. § 4620).

Party can show right to possession of mining claim, when no patent has issued, only by showing actual pedis possessio as against mere wrongdoer, or by showing compliance with requirements of Civ. Code, §§ 1426, 1426a, and Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620).

3. Mines and minerals 🔑38(16)—Plaintiff in ejectment, not in possession of unpatented mining claim nor marking boundaries, held not to have established prima facie title (Civ. Code, §§ 1426, 1426a; U. S. Comp. St. § 4620).

Where neither plaintiff in ejectment nor his grantor were in possession of unpatented mining claim, and neither marked its boundaries in manner required by Civ. Code, §§ 1426, 1426a, and Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620) before defendants took possession and complied with all legal requirements as to location, plaintiff failed to establish prima facie title and was not entitled to judgment.

4. Mines and minerals 🔑38(25)—Plaintiff in ejectment held not entitled to judgment on ground that defendants, in entering on mining claim, violated quarantine, which prevented plaintiff from marking claim in compliance with law (Code Civ. Proc. § 1963, subd. 1).

Plaintiff in ejectment *held* not entitled to judgment on ground that defendants, in taking possession of mining claim, violated hoof and mouth disease quarantine, which prevented his compliance with law, in absence of findings that defendants were not in district when quarantine was proclaimed or did not afterward enter it lawfully or without knowledge of quarantine; presumption being that they were innocent of wrongdoing, under Code Civ. Proc. § 1963, subd. 1.

5. Mines and minerals 🔑38(24)—Findings implying wrongful entry on mining claim by defendants in ejectment cannot supply plaintiff's failure to mark boundaries (Civ. Code, §§ 1426, 1426a; U. S. Comp. St. § 4620).

Findings implying wrongful entry on mining claim by defendants in ejectment in violation of hoof and mouth disease quarantine cannot supply plaintiff's failure to mark boundaries of claim, which is essential element in plaintiff's title, under Civ. Code, §§ 1426, 1426a, and Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620).

6. Ejectment 🔑9(3)—Plaintiff in ejectment must stand on strength of his own title.

Plaintiff must stand on strength of his own title alone, to establish a prima facie case in ejectment.

7. Mines and minerals 🔑27(1)—Wrongful entry on mining claim in violation of quarantine would not invalidate title.

Wrongful entry on mining claim by defendants in ejectment in violation of hoof and mouth disease quarantine would not invalidate their title; existence of such quarantine having no effect on operation of mining laws.

8. Mines and minerals 🔑27(3)—Entry on quarantined mining claim held, at most, offense against health laws, invading no personal or property rights of claimants not complying with legal requirements (Civ. Code, §§ 1426, 1426a; U. S. Comp. St. § 4620).

Entry on mining claim in violation of hoof and mouth disease quarantine was offense against state health laws, if constituting a criminal offense punishable as misdemeanor, and did not amount to invasion of any personal or property right of prior claimant or his grantor, who had not taken possession or complied with requirements of Civ. Code, §§ 1426, 1426a, and Rev. St. U. S. § 2324 (U. S. Comp. St. § 4620), as to location of claim.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Ejectment by Aldo De Witt against W. I. Sides and others. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Hansen & Jertberg and Gallaher & Jertberg, all of Fresno, for appellants.

Burns & Watkins, of Fresno, for respondent.

KNIGHT, J. This is an action in ejectment, wherein plaintiff obtained judgment for the recovery of the possession of a mining claim. Defendants have appealed on the judgment roll alone, contending that the findings are insufficient to support the judgment.

The facts found were as follows: On March 31, 1924, Oscar De Witt, plaintiff's grantor, posted a notice of location on the mining claim in question, situate on government land in Fresno county, but did not distinctly mark the location on the ground so that its boundaries could be readily traced. On April 2, 1924, he caused said notice of location to be recorded in the county recorder's office in said county, and on April 26, 1924, which was within 30 days after posting the notice of location, accompanied by a man named King, undertook to again go upon said claim for the purpose of staking and monumenting the same, but, upon reaching a point about one-half mile therefrom, "they came to and saw a sign on a closed gate opening into the field embracing said mining claim, giving notice to all people not to enter into or on the territory within the gate" while a provisional quarantine was in effect, which the court found had been proclaimed on March 27, 1924, by the Governor of California on account of the hoof and mouth disease at that time prevalent among the cattle in that part of Fresno county. On the same day of the unsuccessful attempt to reach said claim, De Witt conveyed all of his interest therein by deed to plaintiff.

The day following, and on April 27, 1924, knowing that De Witt had so posted said notice on such claim, "the defendants, persons and citizens of the United States, entered into and upon said mining claim and have ever since remained in possession of the same, and on April 30, 1924, * * * while in possession of said described mining claim, posted on said mining claim a notice in writing whereby they located the said land as a mining claim," describing it, and on the same day "placed on said mining claim rock monuments sufficient to enable a person to readily trace the boundaries described in defendant's location notice." Thereafter they duly recorded said notice of location in the recorder's office of Fresno county. The conclusions of law were:

> "That said location notice so posted * * * by the said Oscar De Witt was and is good and valid; that by reason of the provisional quarantine * * * plaintiff could not lawfully enter into and upon said mining claim to properly monument the same prior to May 1, 1924; that plaintiff was entitled to the possession of said described mining claim. * * *"

Judgment in plaintiff's favor was entered accordingly.

[1] In order to acquire a valid title to a mining claim, under state and federal statutes, it is essential to post notice of location at the point of discovery, and also to distinctly mark and define the boundaries of the claim on the ground so that they may be readily traced. Civ. Code, §§ 1426, 1426a; and Rev. Stats. of U. S., § 2324 (U. S. Comp. St. § 4620). There appears to be no statutory time fixed within which the boundaries of the location shall be marked or defined, after posting notice (Newbill v. Thurston, 65 Cal. 420, 4 P. 409), provided it be done within a reasonable time (Union Mining & Milling Co. v. Leitch, 24 Wash. 585, 64 P. 829, 85 Am. St. Rep. 961; Patterson v. Hitchcock, 3 Colo. 533), and before adverse rights attach (Sharkey v. Candiani, 48 Or. 112, 85 P. 219, 7 L. R. A. (N. S.) 791; Lindley on Mines [2d Ed.] § 372); and accordingly it has been held that:

> "A subsequent locator cannot object that the first location was not marked in time, provided it was sufficiently marked before his location." Crown Point Gold Min. Co. v. Crismon et al., 39 Or. 364, 65 P. 87.

[2] The authorities further hold, however, as plaintiff concedes, that where notice is properly posted, but the locator does not remain in possession of said claim or distinctly mark the same on the ground so that its boundaries can be readily traced, the location is invalid as against a subsequent locator who complies with the requirements of the statute. Holland v. Mount Auburn G. & Q. Min. Co., 53 Cal. 149; Funk v. Sterrett, 59 Cal. 613; Donahue v. Meister, 88 Cal. 121, 25 P. 1096, 22 Am. St. Rep. 283; Eaton v. Norris, 131 Cal. 561, 63 P. 856; Newbill v. Thurston, supra. In other words, as said in Funk v. Sterrett, supra, a party can show a right to the possession of a mining claim (when no patent has issued) only by showing an actual pedis possessio as against a mere wrongdoer, or by showing a compliance with the requirements of law.

[3] Under the rule last stated, it would clearly appear that plaintiff failed to establish prima facie title to said claim because, as the findings affirmatively show, neither he nor his grantor were in possession of said claim, nor did they mark its boundaries in the manner required by law, prior to the time defendants took possession of the same and complied with all the legal requirements as to its location. Therefore plaintiff was not entitled to judgment.

[4-8] Plaintiff contends, however, that because of the conditions created by the existence of the provisional quarantine he and his grantor were prevented from completing their location, and that when defendants "went into possession of said mining claim * * * they did so in violation of the provisional quarantine then in force"; that consequently the determination of the case is not to be controlled by the general rule hereinabove stated. We are unable to sustain this contention, first, because the trial court did not find, as plaintiff claims, that defendants' entry upon said mining claim was violative of said provisional quarantine, nor in contravention of any law. For aught the findings show, defendants may have been within the restricted district embracing said claim when the quarantine was proclaimed, or may have afterwards entered upon said claim lawfully or by some other route than the one attempted to be taken by plaintiff's grantor, not knowing of the existence of said quarantine; and, in the absence of a finding to the contrary, the presumption is that they were innocent of any crime or wrongdoing. Subd. 1, § 1963, Code Civ. Proc.

Secondly, even though it be assumed that the findings fairly imply a wrongful entry, such fact cannot be made to supply the essential element lacking in plaintiff's title; namely, the failure to mark the boundaries of said claim, for upon the strength of such title alone he must stand in order to establish a prima facie case in ejectment. Neither can such wrongful entry be held to invalidate defendants' title, because the existence of said quarantine had no effect upon the operation of the mining laws under which defendants acquired their title; and, moreover, although such entry may have constituted a criminal offense for which defendants might have been subjected to punishment for misdemeanor, it was an offense against the health laws of the state and did not amount to an invasion of any personal or property right of plaintiff or his grantor in said mining claim, because they had acquired none.

For the reasons herein stated, the judgment is reversed with directions to re-enter the same in defendants' favor upon the facts found, and in accordance with the motion previously made by defendants, under section 663 of the Code of Civil Procedure.

We concur: TYLER, P. J.; CASHIN, J.

81 Cal. App. 690

WRIGHT v. SALZBERGER & SONS et al. (Civ. 5522.) ★

(District Court of Appeal, First District, Division 2, California. March 11, 1927. Hearing Denied by Supreme Court May 10, 1927.)

1. Evidence 🔑471(17)—Statement of defendant, sued for injuries, that automobile collision took place on right side of street held mere conclusion, where unsupported by other testimony.

In action for injuries to child operating coaster from collision with automobile, statement of defendant that collision took place on right side of street within two feet of center *held* mere conclusion, where middle of street was not marked and witness failed to give any testimony laying foundation for statement.

2. Appeal and error 🔑1046(4)—That infant's action for injuries was tried separately from father's after consolidation, if error, held not ground for reversal, in absence of showing of prejudice.

Where two actions, brought against defendant by minor child and father for injuries to child, were consolidated by stipulation, separate trial of child's suit, over defendant's objection, if error, *held* not ground for reversal, in absence of showing prejudice.

3. Appeal and error 🔑1066—Instruction in action for injuries that automobile driver was required to sound horn, if objectionable, held not ground for reversal, where irrelevant to evidence.

In action against driver of automobile for injuries, instruction regarding driver's duty to sound horn on entering dark zone on street, if objectionable, *held* not ground for reversal, where no evidence was introduced regarding sounding of horn.

4. Damages 🔑95—No definite measure of damages is prescribed by law for injuries resulting from negligence (Civ. Code, §§ 3281, 3282, 3333, 3359).

In action for injuries from negligence, no definite measure of damages is prescribed by law, though damages are recoverable, under Civ. Code, §§ 3281, 3282, 3333, 3359, amount being left to discretion of jury.

5. Appeal and error 🔑1064(1)—Instruction that negligence of defendant and plaintiff's want of contributory negligence must appear to jury's satisfaction, though error, held not prejudicial.

In action for injuries, instruction that before plaintiff could recover it must first appear defendant was guilty of negligence contributing to accident, and that it must appear plaintiff was without fault which may in any wise have contributed to accident, though improperly worded, *held* not ground for reversal, in absence of showing of prejudice.

6. Appeal and error 🔑1066—Instruction as to motorist's liability if he failed to keep lookout held not prejudicial as ignoring defense of contributory negligence.

In action for injuries, instruction that defendant driving automobile was under duty to keep lookout, and that failure to do so causing injury would warrant recovery, though containing no reservation regarding defense of contributory negligence, *held* not ground for reversal, where not relevant to evidence introduced at trial.

7. Trial 🔑253(4)—Instruction that injured child could recover if jury found negligence caused injury held not objectionable as ignoring contributory negligence.

Instruction in action for injuries that, if jury found negligence was proximate cause of injury, plaintiff could recover and that negligence was not to be imputed to infant, to deprive him of verdict, *held* not objectionable as directing verdict in favor of plaintiff without submitting or ignoring defense of contributory negligence.

8. Municipal corporations 🔑705(4)—Driving automobile over 20 miles an hour in closely built up neighborhood held negligence, regardless of whether speed limit signs were posted (Motor Vehicle Act, § 22a).

In action for injuries sustained in automobile collision with coaster, defendant who failed to limit speed of his car to 20 miles an hour in closely built up territory, as required by Motor Vehicle Act (St. 1917, p. 404) § 22a, *held* negligent, though sign posting of speed limit signs, required by statute in closely built up territory, was not shown.

9. Municipal corporations 🔑706(8)—Refusal to charge automobile driver could drive 30 miles an hour in closely built up neighborhood held not error (Motor Vehicle Act, § 22a).

In action for injuries resulting from automobile accident, refusal to charge that at time and place of accident defendant was allowed to drive 30 miles an hour *held* not error, where territory was closely built up neighborhood in which speed was limited to 20 miles, under Motor Vehicle Act (St. 1917, p. 404) § 22a.

10. Appeal and error 🔑1064(1)—Instruction that contributory negligence presupposes defendant's negligence held not objectionable as misleading.

In action for injuries, instruction that contributory negligence presupposes existence of negligence on part of defendant himself *held* not ground for reversal as misleading jury.

11. Trial 🔑241—Refusal of court to segregate from mass presented and read to jury part of ordinances held not error, in action for injuries from automobile.

In action for injuries, refusal of court to read as part of its instructions certain ordinances and parts of ordinances *held* not error, where parts had been already read and where reading of ordinances was requested, without segregating from mass of material presented.

12. Municipal corporations 🔑705(1)—Ordinance requiring motorcycle or "vehicle" to have lights held not to include child's coaster.

Ordinance requiring every motorcycle or "vehicle," while on public highway, to have lights *held* not to apply to child's coaster, in view of rule of construction that general words following enumeration of particular class are applica-

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★Hearing denied by Supreme Court.

ble only to things of same general nature, and in view of subsequent language of ordinance exempting vehicles which may be propelled by pedestrian from provisions relating to motorcycles.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vehicle.]

Appeal from Superior Court, Alameda County; F. M. Jamison, Judge.

Action by Thomas Osborne Wright, a minor, by Joseph S. Wright, his guardian ad litem, against Salzberger & Sons, etc., and Robert Salzberger. Judgment for plaintiff, and defendant last named appeals. Affirmed.

Wm. M. Abbott, K. W. Cannon, and J. E. Reardon, all of San Francisco, for appellant.

Ostrander & Carey, and Philip M. Carey, all of Oakland (Chas. D. Woehr, of Oakland, of counsel), for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover damages for injuries sustained in a collision between a Ford truck operated by the defendant and a coaster operated by the plaintiff and his brother. A trial was had in the lower court, the jury brought in a verdict in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed, under section 953a of the Code of Civil Procedure.

In his complaint the plaintiff pleaded negligence in general terms, following the form of the complaint in Stein v. United Railroads, 159 Cal. 368, 113 P. 663. The defendant answered, setting up several defenses. By denials he put in issue all of the allegations contained in the plaintiff's complaint, and then he pleaded the contributory negligence of the plaintiff.

The accident occurred on the 19th day of October, 1921, at about 6 o'clock in the evening. It occurred on Milvia street, about 70 or 75 feet north from the intersection of that street with Bancroft way, in the city of Berkeley. That street has a grade of 1.4 per cent. Robert Salzberger was driving a Ford truck, and there was no one riding with him. The plaintiff, Thomas Osborne Wright, a lad 12 years of age, was on the front end of a coaster, and his younger brother, Ronald Wright, 10 years of age, was seated on the rear end of the coaster with his back turned to Thomas. Thomas was pushing with his left foot and Ronald was pushing with both feet. So far as the record discloses, no other person either saw or heard the collision. Robert Salzberger testified that he did not see the Wright boys until he saw them 2 feet in front of his left-hand fender and 6 inches to the left. He testified that he next saw them after the accident, and at that time they were 15 feet to the rear. The plaintiff and his brother testified that, when they were in Milvia street at a point near the "Turner house," they saw the lights of an automobile near an electric pole located on the south side of Bancroft way. The distance between those points does not appear. Except as above stated, neither party saw the other before the accident. Each of the Wright boys testified that they were proceeding on their right-hand side of Milvia street. Robert Salzberger testified on the subject of the position of the Wright boys in the street, of the location of the blood spot, and of the exact place where the impact took place. On the first trial he testified:

> "At the time of the accident I was 4 feet from the right-hand curb."

At the time of the second trial he testified that at the time of the accident he was 10 feet from the curb. Asked why he changed his testimony, he stated:

> "The only reason, the figures must come out right. As I said, figuring it over, if I was 2 feet from the center, if my machine was 6 feet wide, that would make 8 feet, that would leave remaining 10 feet from the curb. * * * I was coming north from Bancroft on the right-hand side there. I could feel something thud on my left wheel; as I felt that I put on my footbrake, and then I automatically turned. I had one foot on the emergency. I turned to see what it was and saw the outline of the children. * * * I generally go straight on the road.
>
> "Q. If you were over here on the right-hand side, why didn't you stop at the right-hand curb, stop and run back? A. I don't know why I didn't. * * * I should judge about 65 feet north of the intersection, that I judge, I saw this coaster with two boys on it and they were about 2 feet over my left front fender, that is to my left and in front also. They were about a foot and a half in front and, well, about 2 feet in front, a little over on the side about 6 inches over my fender to the left of my machine. I didn't see these boys or that object any time before they were 2 feet in front of me. As I drove along there from Bancroft on Milvia up to the point within 2 feet of these boys, they were not in the rays of my light at all. * * * The blood spot was six inches over on their side to the center of the street. * * * They were tipped from their side of the street, or tipped west. The blood spot was 6 inches over on their side of the center of the street. * * * I would say the actual contact or collision took place on my side of the street within 2 feet of my center of the street."

[1] The photographs show that the middle of the street is not marked on the surface of the ground. Although Robert Salzberger was examined and cross-examined extensively, at no time did he testify that he saw the curb on either side nor did he give any testimony on which the last statement was predicated. It was solely the conclusion of the witness. In the absence of the last sentence quoted, there is not a particle of evidence in the record sustaining the claim of the appellant that the Wright boys were on the wrong side of the street. On the contrary, all of the

evidence, direct and indirect, and the conclusions to be drawn therefrom are against the appellant.

On the trial of the case the evidence was conflicting as to the exact time the accident occurred. Robert Salzberger claimed that the accident occurred at 6:10 or 6:12 p. m. The Wright boys claimed that the accident occurred a few minutes before 6. Robert Salzberger claimed that at the point where the accident occurred, in the absence of the lights on his truck, it was pitch dark. The plaintiff claimed that it was not pitch dark, and that it was between daylight and dark. All of the evidence regarding the speed at which Robert Salzberger was driving is contained in his testimony. He testified that he was driving 18 or 20 miles per hour. There was evidence that he stated to others that he was driving 20 to 22 miles per hour. Neither party printed the testimony, and neither states the fact, whether Robert Salzberger did or did not not sound a horn or gong or otherwise give notice of his approach. There was evidence that his machine was equipped with lights and that his lights were burning. There was evidence that the coaster had no lights and that it did not have a horn or gong. In presenting the case for the plaintiff, and in presenting the case for the defense, the witnesses were examined and cross-examined extensively regarding the position in Milvia street of a spot of blood, which indicated where the respondent's head lay after he was knocked over by the truck. Numerous photographs were introduced on the trial for the purpose, as stated by counsel, of showing the location of that spot of blood with reference to the middle line of Milvia street. There was no evidence that it was on the left side of the middle of the street. All of the evidence was to the effect that, before the collision, the coaster was on the right of the blood spot. There was evidence that at the time of the collision the plaintiff fell forward and towards the middle of the street. There was no evidence to the contrary. There was evidence that Milvia street was closely built up, but the record does not show that any signs had been erected bearing thereon the words and figures "20 miles speed limit." See Deering's General Laws [1917-1921] p. 1645, to which all references will be made in citing the statute. Several ordinances of the Berkeley council regarding the operation of motor vehicles and coasters were introduced in evidence. From what we have said, it will be seen that in the trial court the theory on which the respondent presented his case was that Robert Salzberger, at the time of the accident, was driving his truck at an unlawful speed and on the wrong side of the street. It will also be seen it was the theory of the appellant that he controverted both contentions made by the respondent, and that it was his claim that the respondent was at the time of the accident guilty of contributory negligence, and that such contributory negligence consisted in violating the provisions of the said ordinances of the city of Berkeley and provisions of the statute.

The appellant claims that the trial court erred (1) in refusing to give certain instructions which the appellant had requested, and (2) that the trial court gave certain instructions which should not have been given.

[2] Before the first trial was had, the parties entered into a stipulation that this action be consolidated and tried with an action that had been brought by the father. Nevertheless, over the objection of the appellant, the trial court proceeded to try this action separately. Conceding for the purposes of this decision, and for such purposes solely, that in so doing the trial court erred, there is no showing that the error was prejudicial.

[3] The appellant earnestly objects to an instruction which the trial court gave regarding the duty resting on Robert Salzberger to sound his horn as he proceeded to enter the dark zone on Milvia street. For the purpose of this decision, it will be conceded that the instruction was not free from the objections which the appellant urges, but a search of the record discloses that no evidence whatever was introduced by either party as to whether Robert Salzberger did or did not sound his horn. In other words, the instruction was utterly irrelevant to any evidence introduced. It appears to be the settled law in the American jurisdictions that:

> "If an instruction not warranted by the evidence is calculated to mislead the jury and prejudice the objecting party, it is ground for reversal. But an instruction stating a correct proposition of law is not necessarily misleading, or prejudicial, merely because it is inapplicable to the facts in evidence, and where it is not so, there is no ground for reversal." 38 Cyc. 1621, 1622; Thomas v. Northwestern, etc., Ins. Co., 142 Cal. 79, 84, 85, 75 P. 665; Renfro v. Fresno City R. Co., 2 Cal. App. 317, 325, 84 P. 357; Hammond v. Pacific Electric R. Co., 32 Cal. App. 756, 763, 164 P. 50; City of Los Angeles v. Pomeroy, 124 Cal. 597, 644, 57 P. 585.

The instruction complained of in the case last cited dealt with the defendant's right surreptitiously to take certain waters. As there was no evidence whatever of theft, the court held that the instruction was harmless. In People v. Cochran, 61 Cal. 548, the appeal involved a conviction of murder. The instruction complained of was an incorrect statement of law. It did not apply to any facts to be found in the record. The court said:

> "Presumptively, however, an erroneous proposition of law, referring in no way to the evidence in the case submitted to the jury, has not prejudiced the defendant."

In Bosqui v. Sutro R. Co., 131 Cal. 390, 63 P. 682, the plaintiff was injured when one of the defendant's cars left the track and collided with another one of defendant's cars. The defendant claimed that the car was forced off the track by an obstruction. There was evidence of the presence of an obstruction, but not a particle of evidence that the defendant had put the obstruction on the track. The trial court gave an instruction regarding the defendant's liability, which contained the statement:

> "Unless on the whole case, it has been shown by competent evidence that defendant, or its servants, placed the obstruction on the rails. * * *"

The court cited and followed the rule in the Cochran Case. See, also, cases cited Marston v. Pickwick Stages (Cal. App.) 248 P. 930. The instruction complained of in the instant case was far less harmful, if it was harmful at all, than the instructions considered in the cases cited.

[4] The trial court instructed the jury on the subject of damages, among other things, as follows:

> "Of course the law prescribes no definite measure of damages in cases of this kind, but the law leaves the amount of such damages to be fixed by the jury as their discretion and judgment dictates, and as under all the circumstances may be just and proper."

The appellant objects to the instruction and quotes Civil Code sections 3281, 3282, 3333, and 3359. Having done so, he does not make it clear that our law does prescribe a definite measure of damages. Rystinki v. Central California Traction Co., 175 Cal. 336, 345, 165 P. 952.

[5] The trial court instructed the jury:

> "Before the plaintiff can recover in this action, it must first appear to your satisfaction that the defendant was guilty of some act of negligence which directly contributed to the accident. It must also appear to your satisfaction that the plaintiff was without fault or negligence on his part which may in any wise have contributed to the accident."

The instruction was improperly worded. Hutson v. Southern California R. Co., 150 Cal. 701, 705, 89 P. 1093. However, there is nothing in the record to show that the error was prejudicial.

[6] The trial court gave an instruction as follows:

> "I instruct you it was the duty of the defendant, while operating his automobile on Milvia street at and before the happening of the accident herein complained of, to keep such a lookout ahead for other traffic on the street and for pedestrians and for other persons using the street as an ordinarily careful and prudent person would have done, and if the defendant failed to perform his duty and you find that such failure on his part was the proximate cause of the injury herein complained of, then, and in that event, your verdict must be in favor of the plaintiff."

The appellant contends that, because it contains no reservation regarding his defense (plaintiff was guilty of contributory negligence), and that the instruction was, in effect, a directed verdict against the appellant. Starr v. Los Angeles Ry. Corp., 187 Cal. 270, 201 P. 599. The negligence mentioned in the instruction objected to in the instant case was not specifically alleged in plaintiff's complaint, was not mentioned by him in his opening statement, nor was it suggested in any question propounded by him to any witness. The record does not disclose whether the instruction was given at the request of the plaintiff or was given by the court of its own motion. As to whether Robert Salzberger was keeping a lookout ahead as he drove north on Milvia street, no witness testified on the subject except Robert Salzberger. In reply to a question propounded by his own counsel, he testified that he was looking straight ahead of him. In view of the distinct issues which were presented during the trial and which were wholly unrelated to the subject-matter of the instruction quoted, it is impossible to say that the jury was confused by any portion of the instruction. To sustain the appellant's position, we must assume that the jury found against the statement of Robert Salzberger and found that he was not keeping "such a lookout ahead for other traffic on the street and for other pedestrians * * *"; and that thereupon the jury took up the second proposition contained in the instruction and proceded to bring in a verdict in favor of the plaintiff without giving any consideration whatever to the question of contributory negligence. There is nothing in the record that justifies us in doing so. Under circumstances not wholly dissimilar, where the same contention was made the Supreme Court ruled that the instruction was harmless. Idemoto v. Scheidecker, 193 Cal. 653, 662, 663, 226 P. 922. As the matter of keeping a lookout ahead was not an issue, no instruction should have been given on the subject. The rights of the litigants are not altered because the instruction complained of was also improperly worded. We think that the instant case, in so far as this point is concerned, is not ruled by the Starr Case, but is ruled by what was said in People v. Cochran, supra.

[7] The trial court instructed the jury regarding the maximum speed permissible. The instruction closed with the words:

> "And if the jury finds that such negligence, if they find that any occurred, is the proximate cause of the injury complained of, then the injured person may recover."

It also instructed the jury regarding imputed negligence and closed with the words:

> "Such negligence is not to be imputed to the child or deprive him of a verdict."

The appellant claims that both of those instructions were subject to the same criticism—directed a verdict in favor of the plaintiff without taking into consideration the defense of the defendant. A most cursory reading of the instructions discloses that neither one purported to direct a verdict. For that reason the attack may not be sustained.

[8] The trial court instructed the jury as follows:

> "Section 22a of the Motor Vehicle Act of this state, at the time of this accident, provided as follows: 'Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property.' [St. 1917, p. 404.] And, further, it is provided that in any event no person shall operate or drive a motor vehicle or other vehicle on any public highway where the territory contiguous thereto is closely built up at a greater rate of speed than 20 miles an hour. And I further instruct you that, if you find from the evidence in this case that the defendant Robert Salzberger violated this provision of the Motor Vehicle Act, then such violation is negligence in itself, and if you further find that such negligence is the proximate cause of the injuries herein complained of by plaintiff and that the plaintiff himself was in the exercise of ordinary care, your verdict must be in favor of the plaintiff."

The appellant quotes from the statute:

> "'Closely built up' shall mean the territory of any * * * city * * * contiguous to a public highway, which is on the line of said highway not mainly devoted to business, where for not less than a quarter of a mile the dwelling houses and business structures on such highway average less than 100 feet apart; provided, that the local authorities having charge of such highway shall have placed conspicuously thereon at the boundary lines of such district, signs of sufficient size to be easily readable by a person using the highway, bearing the words and figures '20 miles speed limit,' which words shall be printed in white letters on a red background. * * *"

Having quoted the above passage, the appellant contends that evidence of "sign posting" is in the nature of indispensable evidence. The question is not new. It has been ruled to the contrary in several cases. Varcoe v. Lee, 180 Cal. 338, 347, 181 P. 223; Sinclair v. Pioneer Truck Co., 51 Cal. App. 174, 178, 196 P. 281; Collom v. Bloch, 70 Cal. App. 33, 38, 232 P. 486; Dewhirst v. Leopold, 194 Cal. 424, 432, 229 P. 30. There is an abundance of evidence in the record showing that in fact the accident occurred in a "closely built up" neighborhood. The trial court committed no error in giving the instruction complained of.

[9] If we are correct in what we have just said regarding the foregoing instruction, it follows that it would not have been proper for the trial court to instruct the jury that, at the time and place of the accident, Robert Salzberger was entitled to drive 30 miles an hour. The trial court did not err in refusing to give the defendant's requested instruction to the effect that 30 miles per hour was the maximum legal speed at said time and place.

Complaint is made regarding an instruction which stated the duty of the driver to keep his motor vehicle under control. The appellant says it was a charge on a question of fact, argumentative, misleading, and unfair. It purports to be based on the instruction approved in Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471. A careful examination does not disclose any feature wherein it differs materially from the instruction approved in that case.

[10] The trial court gave an instruction to the effect that the defense of contributory negligence presupposes the existence of negligence upon the part of the defendant himself. The appellant admits that it states a legal truism, but that it was misleading. However, the appellant cites no part of the record showing that the jury was misled to any extent whatsoever. As addressed to the record in the instant case, we find no error in the instruction.

[11] Appellant earnestly complains because the trial court did not read to the jury, as part of its instructions, certain ordinances and parts of ordinances of the Berkeley Council. Those ordinances and parts of ordinances had been received in evidence and had already been read to the jury. Thereafter, and immediately before respondent's counsel commenced his closing argument, appellant's counsel made the above-mentioned request of the trial court. Apparently the request was made by handing to the trial court copies of ordinance 227 (N. S.), ordinance 232 (N. S.), and sections 1, 2, 4, 10, 34, 41, 42, 44, and 47 of ordinance No. 448 (N. S.) It was one request. No part of the request should have been granted for the reasons which will hereinafter appear. Be that as it may, it cannot be seriously contended that the request should have been granted as made. The trial court did not commit a reversible error by failing to segregate from the mass of material requested any particular part and give that portion. Williamson v. Tobey, 86 Cal. 497, 25 P. 65; Dover v. Archambeault, 57 Cal. App. 659, 664, 208 P. 178.

No part of ordinance 227, or ordinance 232, or of sections 2, 41, and 42 of ordinance 448, deals with a subject-matter which was pertinent to any fact or set of facts introduced in evidence.

As to the application of the provisions of section 44 to the facts of this case, that matter was fully treated in Wright v. Salzberger & Son, 63 Cal. App. 450, 218 P. 785. On the second trial the appellant made no effort to develop the foundation there delineated.

In so far as any portion of section 4, section 10, or section 47 of ordinance 448 was pertinent to any facts introduced in evidence, the subject-matter was fully covered by cognate sections of the Motor Vehicle Act, which were duly read to the jury as part of the instructions of the court.

[12] The appellant calls attention to the last sentence of section 34 of ordinance 448, and then he calls attention to the definition of "vehicle" as contained in section 1, and he argues that, reading both passages together and substituting the definition of "vehicle" wherever that word occurs, then we have a legislative provision which is applicable regarding the duty of the respondent to have lights on his coaster. Making the substitution as requested, it will be seen at once that numerous inconsistencies and absurdities are created. However, the method suggested by the appellant is not the appropriate rule of statutory construction to be followed. It is not even contended that respondent's coaster comes within the provisions of the first sentence, or the second sentence of section 34. The third sentence is:

> "Every motorcycle or vehicle while on the public highway," etc.

That enumeration commences with the particular thing "motorcycle," and is followed by the general expression "vehicle." We think the rule applicable was stated by the court in Pasadena University v. Los Angeles Co., 190 Cal. 786, 790, 214 P. 868, 869, as follows:

> "It is the rule of construction that where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. 1119; 25 R. C. L. 996, 997; 2 Lewis' Sutherland's Statutory Construction, §§ 803, 804."

As so construed, the sentence may be said to be applicable to motorcycles (that is, bicycles having a motor), motortricycles, and perhaps to some other vehicles operated by motors. As so construed, force and effect is given to every part of the section and no absurdity whatever is created. This view is reinforced by the language used by the legislative body, "Every motorcycle or vehicle. * * *" The expression uses the disjunctive "or." If the class was to be broadened, as appellant contends, the council would have used the conjunctive "and." So construing the ordinance, the respondent's coaster did not come within the things enumerated in the third sentence. It was expressly excepted by the language used in the second sentence:

> "All other vehicles, except motorcycles, bicycles, and horses, and such vehicles that may be propelled by a pedestrian shall carry at the left side thereof a lighted lamp visible front and rear and from the left for a distance of not less than 200 feet."

As respondent's coaster was expressly excepted from the operation of the ordinance, the trial court did not err in refusing to read to the jury the provisions of the ordinance.

The judgment is affirmed.

We concur: KOFORD, P. J.; NOURSE, J.

81 Cal. App. 633

COLE et al. v. LOW. (Civ. 5497.)

(District Court of Appeal, First District, Division 1, California. March 7, 1927.)

1. Brokers ⟹43(1)—Written promise to pay broker for past services in sale of real estate is not within statute of frauds (Civ. Code, § 1624, subd. 6).

A written promise to pay a broker for past services in the sale of real estate is not within statute of frauds (Civ. Code, § 1624, subd. 6), requiring agreements employing an agent to sell real estate on commission to be in writing.

2. Contracts ⟹143—Construction of contract must give effect to every word, unless repugnant to intention of parties or leading to absurdity (Civ. Code, § 1641).

In view of Civ. Code, § 1641, a contract must be construed to give effect to every word in it, so that no clause or word may become redundant, unless such construction would be repugnant to the intention of the parties, or would lead to absurdity.

3. Contracts ⟹153, 154—Contract must receive interpretation making it lawful, reasonable, and effective, if possible, without violating intention of parties (Civ. Code, § 1643; Code Civ. Proc. § 1858).

By provision of Civ. Code, § 1643, and Code Civ. Proc. § 1858, a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties.

4. Brokers ⟹39—Words "commissions of $3,400 to (plaintiffs)" in contract for sale of realty held to imply promise to compensate broker for past services in procuring buyer.

The words "commissions of $3,400 to Cole Bros.," immediately above the signatures on a contract for sale and purchase of real estate, implied a promise to pay for the past services which resulted in bringing about the contract.

5. Brokers ⟹74—Promise in land contract to pay broker commission held enforceable against vendor alone, as joint and several obligation of vendor and purchaser (Civ. Code, § 1659).

The promise implied by the words "commission of $3,400 to Cole Bros.," above signa-

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes tures on a contract for sale of real estate, must be presumed to be the joint and several obligation of vendor and purchaser, enforceable against vendor alone at the promisee's option, in view of Civ. Code, § 1659.

6. Brokers ⟹82(2)—Vendor's failure to plead defense of joint liability, under statute, with purchaser for payment of commissions under land contract, held waiver thereof (Civ. Code, § 1659).

In a broker's suit for commissions due under an implied joint promise contained in a land contract, the vendor must be deemed to have waived defense of joint liability, under Civ. Code, § 1659, with the purchaser by his failure to plead it.

7. Evidence ⟹87—Presumption of joint liability of promisors under statute is not conclusive (Civ. Code, § 1659).

Presumption, under Civ. Code, § 1659, of joint liability of persons uniting in promise, is not conclusive.

8. Brokers ⟹39—Omission to fix time for payment of broker's commissions promised in land contract held not fatal to broker's right.

The promise implied by the words "commission of $3,400 to Cole Bros.," above signatures on a contract for sale and purchase of real estate, was not rendered unenforceable by failure to fix time of payment; the commission being due immediately on execution of the contract.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by Friend W. Cole, Jr., and another, copartners doing business under the name and style of Cole Bros., against Ollie I. Low, to recover commissions on the sale of real property. From a judgment of the superior court of Los Angeles county for plaintiffs, the defendant appeals. Affirmed.

Walter Gould Lincoln, of Los Angeles, for appellant.

John E. Biby, of Los Angeles, for respondents.

KNIGHT, J. This is defendant's appeal, taken on the judgment roll alone, in an action to recover a sum of money alleged to be due as real estate commissions under the terms of a written agreement entered into between appellant as seller and F. De La Guardia as buyer for the sale of appellant's apartment house in Los Angeles.

A copy of the entire agreement is annexed to the amended complaint, and is made a part of each of the two counts set forth therein, the particular provision of said agreement upon which respondents rely as the basis for the recovery of their commissions being inserted at the end of said agreement, immediately preceding the signatures thereto of the seller and the buyer, and reading as follows: "Commissions of $3.400 to Cole Bros."

[1] Appellant contends that the provision mentioned does not meet the requirements of the sixth subdivision of section 1624 of the Civil Code, which provides that an agreement authorizing or employing an agent or broker to purchase or sell real estate for a commission is invalid, unless the same or some note or memorandum thereof is in writing and subscribed by the party to be charged or by his agent; and that therefore neither count of said amended complaint states a cause of action.

The allegations of the two counts are identical in form with the one exception hereinafter noted, all of which allegations the trial court found to be true. Among the other facts alleged were the following: That appellant verbally employed respondents as a licensed firm of real estate brokers to negotiate the sale of said apartment house for $90,000, and agreed to pay them therefor a commission of 5 per cent. on the selling price; that thereafter respondents produced a purchaser in the person of De La Guardia, with whom appellant entered into said written agreement whereby she agreed to sell, and De La Guardia agreed to buy, said property, under the terms and conditions therein stated, for the sum of $85,000, part of which was to be paid in cash within a specified time, and the balance by the execution of certain incumbrances on the property, to be delivered in escrow; that subsequently appellant refused to consummate said sale or to pay respondents any part of said commission. As to the obligation to pay said commission it was alleged that in and by said written agreement "it was provided that said defendant did thereby promise and agree to pay Cole Bros., plaintiffs herein, a commission in the amount of thirty four hundred ($3,400) dollars for services rendered in her behalf in and about the securing of the execution of said agreement and negotiating for the sale of said property to said F. De La Guardia."

The second count differs from the first count only by the inclusion of the additional allegation that "said instrument in writing or agreement executed by and between Ollie I. Low and with F. De La Guardia, hereunto annexed and marked Exhibit A, was and is an agreement in writing made for the express benefit of plaintiffs herein, and said agreement has not been rescinded by the parties thereto."

The foregoing allegations clearly indicate that in neither count do respondents base their right of recovery upon the theory that the provision mentioned constituted an agreement in writing or any note or memorandum subscribed by appellant or her agent authorizing or employing them as agents or brokers to sell said property; nor was appellant held liable for the payment of said commissions on that ground. The first cause of action, as shown by its allegations, is founded upon the doctrine that, where services have been rendered with the intention that they shall be paid for, but payment therefor is unenforceable because there exists no written contract between the parties, and after rendition of said services the party receiving the benefit thereof promises, in writing, to pay therefor, his moral obligation to pay for what he has previously received furnishes a consideration to support the subsequent promise to pay (Crawford v. Kennedy, 64 Cal. App. 719, 222 P. 644; Carrington v. Smithers, 26 Cal. App. 460, 147 P. 225; Muir v. Kane, 55 Wash. 131, 104 P. 153, 26 L. R. A. [N. S.] 519, 19 Ann. Cas. 180; Mohr v. Rickgauer, 82 Neb. 398, 117 N. W. 950, 26 L. R. A. [N. S.] 533; Bagaeff v. Prokopik, 212 Mich. 265, 180 N. W. 427, 17 A. L. R. 1292); and the second cause of action is grounded upon the theory that the provision of said agreement relating to commissions was made expressly for respondents' benefit, and that, said agreement not having been rescinded, the provision mentioned may be enforced by respondents under section 1559 of the Civil Code, which declares that "a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Lundeen v. Nowlin, 20 Cal. App. 415, 129 P. 474; Stanton v. Carnahan, 15 Cal. App. 527, 115 P. 339; Washer v. Independent, etc., Co., 142 Cal. 702, 76 P. 654.

It will therefore be seen that in both counts respondents rely upon an alleged subsequent written promise to pay for past services, and, consequently, that portion of the statute of frauds invoked by appellant is not pertinent; the determinative question being whether said agreement as a whole fairly implies a promise to pay for said past services.

[2, 3] Among the rules given for the interpretation of contracts generally are the following: A contract shall be so construed as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the parties, to be collected from its terms, or would lead to some absurdity (6 Cal. Jur. p. 259; Civ. Code, § 1641; Code Civ. Proc. § 1858; Hyatt v. Allen, 54 Cal. 353), and, furthermore, "must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties" (Civ. Code, § 1643).

[4] Construing the provision of the agreement relating to said commissions in the light of the foregoing rules, we think the language used therein clearly implies a promise to pay the amount of commissions stated as compensation for past services, which resulted, as the findings show, in bringing about the consummation of a binding agreement for the purchase and sale of appellant's property. The parties to said agreement must have had in mind some useful purpose in inserting said provision in the agreement, and no other meaning than the one just stated can be fairly ascribed to it, if it be made operative and capable of being carried into effect; and obviously such construction is not repugnant to the intention of the parties as expressed by them in said agreement, nor does it lead to absurd results.

[5] The omission to specify therein whether the seller or the buyer or both should pay said commissions is not fatal to its validity. Section 1659 of the Civil Code provides:

> "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several."

[6, 7] Appellant and De La Guardia both signed the agreement in question, thereby uniting in the promise to pay said commissions, and, since respondents' services in negotiating the purchase and sale of said property and in obtaining the execution of a binding written agreement for that purpose were manifestly of "some benefit" to the buyer as well as to the seller, the obligation to pay said commissions must be presumed, in the absence of express or implied language to the contrary, to be a joint and several one, and, consequently, enforceable against the seller alone at the option of the promisee. Such presumption is doubtless a disputable one, but, appellant having failed to plead a joint liability must be deemed to have waived such defense (Russ v. Tuttle, 158 Cal. 226, 110 P. 813), and, the contract of purchase and sale not having been rescinded, as the findings show, a cause of action arose in respondents' favor, upon the default of appellant to carry out its terms (Lundeen v. Nowlin, supra).

[8] Neither does the failure of said provision to fix the time of payment of said commission render it unenforceable, for the reason that appellant accepted the purchaser procured by respondents by entering into a valid contract of sale with him, and, consequently, the commission became due immediately, whether or not the sale was finally consummated. Johnson v. Krier, 59 Cal. App. 330, 210 P. 966; Freeman v. Creelman, 60 Cal. App. 14, 212 P. 56.

The facts of the case of Irwin v. Klimper, 56 Cal. App. 434, 205 P. 714, cited by appellant are materially different from those of the instant case, for there the document considered did not purport to be a subsequent promise to pay commissions, being shown upon its face to be merely an order directed to an escrow holder, and therefore it could not be construed as being a promise to pay commissions without doing violence to the intention of the seller who alone signed the same. Nor does the instrument which was involved in the later case of Crawford v. Kennedy, supra, bear any analogy to the provision of the agreement here in question, because, as the court there remarked in holding said instrument to be fatally indefinite:

> "It does not mention any services nor the nature of any indebtedness; it does not state the amount of the indebtedness nor any method by which it could be computed."

The provision here under attack is not lacking in any of the elements mentioned.

For the reasons hereinabove assigned, we conclude that each count in the amended complaint states a cause of action, and therefore the judgment is affirmed.

We concur: TYLER P. J.; CASHIN, J.

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81 Cal. App. 747

KATZ v. T. I. BUTLER CO. (Civ. 5546.)★

(District Court of Appeal, First District, Division 2, California. March 17, 1927. Hearing Denied by Supreme Court May 16, 1927.)

1. Municipal corporations ⚷706(5)—Finding of negligence in operating unlighted truck striking pedestrian sustained.

In action for death of pedestrian crossing street intersection when struck by truck, evidence of defendant's operating truck on street about half hour after sunset without lights *held* sufficient to sustain jury's finding that defendant was negligent.

2. Municipal corporations ⚷705(10)—Pedestrian crossing street is required to act with ordinary care under circumstances.

Test of pedestrian's negligence in crossing street when struck by truck is, not whether he did all that it was possible for him to do, but whether he acted with ordinary care under all the circumstances.

3. Municipal corporations ⚷706(7)—Pedestrian held not negligent as matter of law in failing to see unlighted truck.

A pedestrian, acting with ordinary prudence in crossing street intersection, is not as matter of law guilty of negligence in not seeing an unlighted truck or failing to apprehend that it is a source of danger, at a time when lights are required by law or reasonably necessary.

4. Negligence ⚷136(9)—Contributory negligence is question for jury, where reasonable minds might differ.

Court cannot say as matter of law that contributory negligence is established, the question being for jury, except where no fact is left in doubt, and no deduction or inference other than negligence can be drawn from the evidence.

5. Municipal corporations ⚷706(7)—Contributory negligence of pedestrian injured by unlighted truck held for jury.

Whether pedestrian crossing street intersection when struck by truck without lights when they were reasonably necessary was contributorily negligent *held* for jury.

6. Evidence ⚷355(5)—Time card of workman held admissible to aid in establishing time of automobile accident.

Time card of workman *held* properly received in evidence when produced by him in connection with his statement, made without objection, that clock kept accurate time, the evidence being material in fixing time of automobile accident.

7. Negligence ⚷141(8)—Instruction referring to contributory negligence as proximate cause by definite article held not misleading.

An instruction that plaintiff's negligence must be "the" proximate cause of his injury, in order to defeat his claim, was not misleading, although plaintiff's negligence is better referred to with the indefinite article.

8. Municipal corporations ⚷706(8)—Instruction that automobile lights were required during half hour after sunset held not misleading.

Instruction that at "all times during half an hour after sunset to half an hour before sunrise every automobile" should carry lights was not misleading as requiring jury to believe lights must be on during period commencing at sunset.

9. Trial ⚷260(1)—Court properly refused instructions repeating those given.

Defendant's instructions, which constituted repetition of those given at his request, were properly refused.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Joseph T. Gaughran, for whom was substituted Phil. C. Katz, as administrator of the estate of Joseph T. Gaughran, deceased, against the T. I. Butler Company, a corporation, to recover damages for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

Cooley & Gallagher, of San Francisco, for appellant.

Spencer G. Prime, of San Francisco, for respondent.

KOFORD, P. J. [1] This is an appeal by the defendant from a judgment in favor of plaintiff for personal injuries. The trial was by jury. The evidence shows that plaintiff was struck and injured by a truck driven by defendant's driver while crossing Mission street at the intersection of Twelfth street in the city of San Francisco. The evidence would support a finding that the accident happened a few minutes after, or perhaps a few minutes before, one-half hour after sunset. The truck did not have its headlights burning, and entered Mission street driving southerly on Twelfth street, and turned westerly into Mission street. The plaintiff was struck by the truck after he had walked but a few feet out from the sidewalk into the street. At the trial witnesses testified to various degrees of darkness and visibility.

★Hearing denied by Supreme Court.

On the side of plaintiff such expressions as the following were used: About dusk, getting dark, hazy and dark, inclined toward darkness and foggy. One witness testified it was with difficulty that he could see to pick up plaintiff's silver scattered on the pavement.

[1] The evidence shown in the record is sufficient to support the finding of the jury that the defendant's truck driver was negligent in operating the truck without lights at the time and place and in the manner testified to by the witnesses.

[2-4] Plaintiff and another witness testified that he looked to his left before starting to cross the street, but saw no danger. Appellant contends that the plaintiff was guilty of contributory negligence as a matter of law. It contends that, if plaintiff looked and did not see, he looked negligently, for the truck was not invisible, and was seen by another witness. On the other hand, if the plaintiff did not look before leaving the sidewalk to cross the pavement, it is claimed he was negligent for not looking. Appellant has cited numerous authorities where this principle has been applied. The facts in the cases referred to, however, are either quite different from those in the case at bar, or are cases where the jury or trial court determined the question as a decision of fact. It is certainly not true that this principle can be applied to every case of a pedestrian struck by a vehicle while attempting to cross the street. The test is, not whether the plaintiff did all that was possible for him to do, such as seeing everything that was possible to see that could be a source of danger to him, but whether he acted with ordinary care and prudence under all the facts and circumstances. A pedestrian acting with ordinary prudence at a time when lights are reasonably necessary or required by law may look with due care, and still fail to see an unlighted truck, or fail to apprehend that it is a source of danger to him. Especially is this so where the truck makes a turn just before coming into the street and bearing upon the pedestrian. At least we cannot say that this is not true as a matter of law. The rule is well settled, as stated in Johnson v. Southern Pacific R. Co., 154 Cal. 295, 97 P. 520, and also in Zibbell v. Southern Pacific R. Co., 160 Cal. 237, 241, 116 P. 513, that it is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence that a court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one for the jury. Seller v. Market Street Ry. Co., 139 Cal. 268, 271, 72 P. 1006.

[5] Under the facts which the jury were entitled to believe from the record in this case, it was entitled to find that the plaintiff was free from contributory negligence, and this finding by the jury will not be disturbed by this court on appeal.

[6] We see no error in the court's rulings on evidence admitted over the objection of appellant. The injuries testified to by the doctor were embraced within the allegations of the complaint. The time card of a workingman was properly received in evidence when produced by him in connection with his statement made without objection that the time clock kept accurate time. This was material to help fix the time of the accident.

[7] Appellant criticizes instruction No. 7 given by the court, in which the following expression is used:

> "The plaintiff's negligence must be the direct or proximate cause of his injuries or it will not defeat his claim for damages in the event his injuries if any were caused by the negligence of the defendant."

Strictly speaking, contributory negligence is not *the* proximate, but is more properly referred to as *a* proximate, cause, because it co-operates with another proximate cause, to wit, the negligence of the defendant. But here the instruction as a whole is not even technically wrong, much less misleading. This instruction, in the part quoted, and also in its first part, makes plain that the injuries referred to must have been caused by the negligence of the defendant. It is not capable of a construction meaning that contributory negligence of plaintiff must be the only cause of the injuries in order to bar his recovery.

[8] Another instruction attacked by the appellant reads in part as follows:

> "I instruct you that the requirement of * * * the Motor Vehicle Act, 'that all times during half an hour after sunset to half an hour before sunrise every automobile while on the public highways shall carry at the front at least two lighted lamps,' and if you find from the evidence that the said Kleiber truck operated * * * at the time of the accident to the plaintiff herein was being so operated one-half hour after sunset, etc. * * *"

Appellant claims that the language used by the court in the foregoing quoted portion gave the jury to understand that the law required such headlights during the period of one-half hour commencing at sunset instead of during the period commencing at the expiration of one-half hour after sunset. The criticism is hypercritical, and without merit.

[9] Appellant complains of the court's refusal to give requested instructions 17 and 20, but it has suggested no reason why this refusal constituted error, and we can see no error in the ruling. The other instructions requested and refused were properly refused, either because they constituted a repetition of instructions given at the request of the appellant or because they were based upon

the theory that plaintiff in any event was guilty of contributory negligence in putting himself in a place of danger either without looking for or without seeing the approaching danger. We have treated this point above.

For the foregoing reasons, it is ordered that the judgment appealed from be, and the same is hereby, affirmed.

WE concur: STURTEVANT, J.; NOURSE, J.

81 Cal. App. 758

SCHURMAN v. LOS ANGELES CREAMERY CO. (Civ. 5289.)

(District Court of Appeal, First District, Division 1, California. March 17, 1927.)

1. Highways 🔑184(2)—Evidence held to sustain findings of negligence of driver of wagon colliding with plaintiff's automobile.

Evidence *held* sufficient to sustain findings for plaintiff on question of defendant's negligence, in action for damages resulting from collision between plaintiff's automobile and defendant's milk wagon when latter was on wrong side of road along which plaintiff was driving in opposite direction.

2. Appeal and error 🔑1010(1)—Findings supported by testimony not so inherently weak as to warrant conclusion that, as matter of law, they cannot be upheld, will not be disturbed.

Findings of fact, on which judgment appealed from was predicated, will not be disturbed, if supported by testimony not so inherently weak or wanting in probative force as to warrant conclusion that, as matter of law, they cannot be upheld.

3. Highways 🔑184(2)—Burden was on defendant to establish contributory negligence of automobile driver, unless apparent from plaintiff's case.

In action for damages from collision between plaintiff's automobile and defendant's milk wagon, burden was on defendant to establish defense that plaintiff proximately contributed to accident by his own negligence, unless it clearly appeared from plaintiff's case.

4. Highways 🔑184(3)—Automobile driver held not contributorily negligent as matter of law in not seeing wagon in time to avoid collision.

Automobilist, traveling at 12 to 15 miles per hour, with headlights on at night, *held* not contributorily negligent as matter of law in failing to see milk wagon moving toward him just over center of highway in time to stop before collision therewith.

5. Appeal and error 🔑1010(1)—Much more is required for appellate court to find respondent contributorily negligent as matter of law than to sustain such fact finding in trial court.

For appellate court to determine, as matter of law, that respondent was guilty of contributory negligence, much more is required than would be sufficient in trial court to sustain a fact finding to same effect.

6. Appeal and error 🔑1010(1)—Undisputed facts must show failure to exercise ordinary care for appellate court to find respondent contributorily negligent as matter of law.

For appellate court to determine, as matter of law, that respondent was guilty of contributory negligence, it must be clearly shown from undisputed facts, judged in light of common knowledge and experience, that he failed to exercise such care as men of common prudence usually exercise in positions of like exposure.

7. Appeal and error 🔑1010(1)—Evidence must leave no room for doubt to justify appellate court in determining as matter of law that respondent was contributorily negligent.

Evidence against plaintiff should be so clear as to leave no room for doubt, and facts such that inference is irresistible, to justify appellate court in determining, as matter of law, that he was guilty of contributory negligence against finding to contrary.

8. New trial 🔑104(1)—New trial for newly discovered cumulative evidence is properly denied.

Refusal of new trial for merely cumulative newly discovered evidence is not error.

9. New trial 🔑102(1)—New trial for newly discovered evidence, not shown to have been unprocurable at trial by reasonable diligence, is properly denied.

Refusal of new trial for newly discovered evidence is not error, in absence of showing that it could not have been secured at trial by exercise of reasonable diligence.

10. New trial 🔑99—New trial for newly discovered evidence, merely establishing conflict in testimony, and showing no probability of different result, is properly denied.

Refusal of new trial for newly discovered evidence, which could have had no greater effect than to establish a conflict in testimony, and does not show slightest probability of different result had it been available, is not error.

11. New trial 🔑100—New trial for newly discovered evidence of unemployment period and reading of X-ray plates held properly denied, where court based damages on pain, suffering, and impaired earning power.

Refusal of new trial of damage suit for newly discovered evidence of plaintiff's period of unemployment and reading of X-ray plates in evidence *held* not error, where court based damages on pain, suffering, and impaired earning power.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action by George Schurman against the Los Angeles Creamery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin E. Geibel, of Los Angeles, for appellant.

C. F. Holland, of Los Angeles, for respondent.

PARKER, Justice pro tem. This is an appeal from a judgment rendered in favor of plaintiff in an action for damages alleged to have been sustained as a result of a collision between an automobile driven by plaintiff and a milk wagon of defendant corporation. Plaintiff recovered judgment for the sum of $719.30, which included $50 as physician's fees and $69.30 for damages to his automobile.

Issue was joined on the question of defendant's negligence and on the amount of damage, and also defendant set up the contributory negligence of plaintiff as an affirmative defense. The case was tried before the court without a jury.

[1] The first contention of appellant is that the evidence is insufficient to sustain the findings of the court on the question of defendant's negligence.

Plaintiff testified as follows:

> "I was traveling in a westerly direction and on the north side of the highway. I was going about twelve or fifteen miles per hour when I struck something. I did not know what it was. I heard two horses jump, and then I saw the wagon. I hit the hind wheel of the wagon because the wagon was standing across the highway. I saw the driver of the wagon laying on the ground. He told me that he was passing a machine that was standing on the right-hand side of the road from him, and that he had passed that, and was going over to his side of the road. I was on the north side of the road going west. He, the driver of the wagon, was on the south side, but the hind part of his wagon was standing crosswise on the boulevard north of the middle of the road. My lights were lit, and it was about an hour and a quarter after sundown. The defendant's wagon had no light, and I was unable to see the wagon before I hit it. As the result of the injury, I suffered much pain, and sustained various injuries."

One Shipman, who was seated in the car of plaintiff, next him, at the time of the accident, testified substantially as did plaintiff. He saw a lantern, but knew it was not lit.

The driver of the wagon testified that it was loaded with full milk cans; about fifteen cans, each containing 200 pounds of milk. He testified that, if he had been on the right-hand side of the road, he would not have been hit, and that his being on the wrong side caused the collision.

[2] It is not necessary to present herein a statement of the testimony submitted by defendant, for, as far as this court is concerned, it is sufficient if there be found in the record—as we find herein—in support of the findings testimony characterized by no such inherent weakness, or upon its face so wanting in probative force, as to warrant the conclusion that as a matter of law it cannot uphold the conclusions of fact upon which the judgment is predicated. Stohlman v. Martin, 28 Cal. App. 339, 152 P. 319. Not only is the evidence adduced by plaintiff sufficient to sustain the findings, but the evidence of the defendant is not in direct conflict as to the facts. Defendant by its witnesses endeavors to demonstrate by argumentative process the fact that the accident could not have happened as plaintiff relates it.

It is always a difficult matter to try and explain an accident. Common experience indicates that many things actually happen that upset all prior ideas of relativity. In accidents the laws of nature seem to suspend themselves for the time, and peculiar and unexplainable results follow. In this case the theories of the defendant were not satisfactory or convincing to the learned trial judge; and there seems nothing so compelling about them to warrant this court in attempting to speculate upon the oddities of an accidental occurrence.

[3-7] Appellant next urges that, even if defendant was negligent, the plaintiff, by his own negligence, proximately contributed to the accident, and that the collision was the result of plaintiff's own carelessness and negligence.

Of course, defendant has the burden of establishing this defense, unless it clearly appears from the case of plaintiff. Appellant urges that respondent was guilty of contributory negligence as a matter of law from his own statement of the occurrence, and that such contributory negligence was the proximate cause of the injury. It is appellant's claim in this behalf that, if plaintiff was traveling at the rate of 12 to 15 miles per hour with his headlights on, he must have seen the wagon of appellant in ample time to stop before the collision, and that his failure so to do precludes his recovery. The admitted fact, incidentally, is that appellant's wagon was not directly in the course of respondent's lights, but just over the center of the highway, and moving toward respondent. Appellant asks the court to determine, as a matter of law, that a person traveling the highway at night must see every object on his half of the highway in face of the fact that automobile engineers and manufacturers are expending vast sums of money in extensive research to develop lights that will measure up to appellant's requirements, and have so far been but partly successful. In order that this court could determine, as a matter of law, that respondent was guilty of contributory negligence, much more is required than would be sufficient in the trial court to sustain a finding of fact to the same effect. It must be clearly shown from the undisputed facts, judged in the light of common knowledge and experience, that a party has not exercised such care as men of common prudence usually exercise in positions of like exposure. Nehrbas v. Central Pac. R. Co., 62 Cal. 320. The evidence against the plaintiff should be so clear as to leave no room for doubt, and the facts such that the inference is irresistible, to justify this court in determining, as a matter of law, plaintiff guilty of contributory negligence against the finding. Schneider v. Market St. R. Co., 134 Cal. 487, 66 P. 734. In the instant case we will not disturb the trial court's finding on that question.

[8-11] Appellant further claims that the court erred in denying his motion for a new trial. Aside from the sufficiency of the evidence, already passed on herein, appellant urged the ground of newly discovered evidence.

The evidence presented was to a great extent wholly cumulative, and there was absolutely no showing that the same could not have been secured at the trial by the exercise of reasonable diligence. The remaining evidence alleged to have been newly discovered could have had no greater effect than to establish a conflict in the testimony, and there appears therefrom not the slightest probability that, had it been available, the result would have been different. In passing, it might also be said that it is not apparent that the findings of the court were adverse to appellant on the issues to which this newly discovered evidence might be directed. Explanatory of this, the new evidence went mainly to plaintiff's period of unemployment and the reading of certain X-ray plates in evidence. The court in its finding based its damages upon pain and suffering and impaired earning power.

Finding no error, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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81 Cal. App. 793

ROSS v. ROSS. (Civ. 5468.)

(District Court of Appeal, First District, Division 1, California. March 19, 1927.)

1. Divorce 🔑303(2) — If divorced mother teaches child disrespect of father or shows herself unfit, custody may be changed to father.

If divorced mother were teaching child disrespect of father or conducting herself as unfit person to have care and custody of minor child, court could modify divorce decree by changing custody from mother to father.

2. Divorce 🔑296, 312—Custody and maintenance of children of divorced parents are within discretion of trial court, whose action will not be reversed in absence of clear abuse.

Trial court has extensive discretion in awarding custody of children of divorced parents and providing for their support and maintenance with view of best interests of minors, and its conclusion will not be set aside in absence of clear abuse of discretion.

3. Divorce 🔑298(1)—Court's discretion held not abused in awarding custody of minor child to divorced wife.

In action for divorce, trial court *held* not to have abused discretion in awarding custody of minor child to the wife.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by Mary Ellen Ross against George Henry Ross. From an order of the superior court denying motion to modify decree of divorce, defendant appeals. Affirmed.

Stanley F. Nolan, of San Francisco, for appellant.

Fabian H. Hillebrandt, of San Francisco, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from an order denying defendant's motion to modify a decree of divorce. The notice of motion, eliminating that part merely formal, is that defendant will move the court "to modify the decree and orders herein so that defendant shall pay the sum of $15 per month for the support of the minor child of plaintiff and defendant, instead of the sum of $25 per month as previously ordered herein; that said child of said parties shall be known as Aileen Ross; that said child shall be taught respect and love for her father," etc.

During the course of the argument in this court, counsel for appellant waived the question of a reduction of the monthly allowance for the support and maintenance of the minor child and conceded the amount of $25 per month to be a proper allowance, but insists that the trial court should have entered its order directing that the child be known by the name of "Ross" and not "Callahan"—the mother's name by reason of a subsequent marriage—and that the child be taught to respect and love her father.

[1] It is difficult to see how the court could enforce its order in this respect, if made. If the mother were teaching the child disrespect of her father or in any manner so conducting herself that she is not a fit and proper person to have the care and custody of the minor child, the court could modify its decree changing such custody from the mother to the father; but there is no claim that the mother is not a fit and proper person to have the care and custody of such minor.

The evidence contained in the record, however, strongly supports the conclusion that the mother, while not teaching the child to disrespect the father, has encouraged respect and has never denied the right of the father to see the child on all proper and convenient occasions. It is true that the child was registered at school under the name "Aileen Callahan," but the mother notified the school authorities that her name was "Aileen Ross," and the proper correction has been made.

[2, 3] The Code has not provided explicit rules in regard to the exercise of the trial court's discretion in awarding custody of children and providing for their support and maintenance. It is manifest that the Legislature intended to confide to trial courts a very extensive discretion in this respect with a view of the best interest of such minors, and its conclusion will not be set aside in the absence of a clear abuse of that discretion. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582. In the instant case the action of the trial court was not an abuse of discretion, but, on the contrary, as the record discloses, such discretion was properly exercised.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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81 Cal. App. 786

BURDICK v. KERKOVECZ et ux.

(Civ. 5331.)

(District Court of Appeal, First District, Division 1, California. March 18, 1927.)

1. Vendor and purchaser 🔑110, 334(1)—Vendor's failure to furnish abstract under contract entitles purchaser to disaffirm and recover payment.

Vendor's failure or refusal to furnish an abstract of title, required by the contract of sale, is such breach as entitles purchaser to disaffirm the contract and recover back purchase money paid.

2. Quieting title 🔑49—Court properly refused to quiet title of vendor's defaulting successor in interest except on condition of refunding purchase money.

Court properly imposed condition that vendor's successor in interest, who failed to furnish abstract, must refund purchase money as condition precedent to decree quieting title against purchaser.

3. Escrows 🔑8(2)—After vendor terminated, escrow vendees were not placed in default by refusing to sign additional escrow instructions.

Where vendees kept balance of purchase price in escrow until vendor's successor in interest withdrew deed, thereby terminating escrow, vendees were not thereafter placed in default by refusal to sign additional escrow instructions.

4. Descent and distribution 🔑129—Heir takes real estate, subject to equities of purchaser, under contract (Civ. Code, §§ 1589, 3521).

Heir inherits real estate, subject to the equities of purchaser, under contract with ancestor, under maxim, Civ. Code, § 3521, he who takes the benefit must bear the burden, and Civ. Code, § 1589, providing that voluntary acceptance of benefits of transaction is equivalent to consent to obligations arising from it.

5. Executors and administrators 🔑224—Vendees' claim for refund of purchase money was not barred by failure to file claim against estate of vendor whose heir defaulted.

Failure of vendees to present a claim against estate of deceased vendor did not bar their claim for refund of purchase money paid, upon default in contract by vendor's heir.

6. Vendor and purchaser 🔑337—Where vendor defaults in furnishing abstract, vendee has lien on property for return of purchase money paid, under statute (Civ. Code, § 3050).

Omission of vendor and his successor in interest to furnish abstract of title under contract providing therefor constitutes failure of consideration, entitling purchaser to lien on property for purchase money paid, under Civ. Code, § 3050, providing that purchaser under agreement for sale has special lien on property upon failure of consideration.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Suit by M. St. Keyna L. Burdick against Charles Kerkovecz and wife, to quiet title. From an interlocutory decree quieting plaintiff's title on condition, plaintiff and defendants appeal. Affirmed as corrected.

Scarborough & Bowen, of Los Angeles, for appellants Kerkovecz.

C. La V. Larzelere, of Long Beach, for respondent Burdick.

KNIGHT, J. Two appeals from a decree in a suit to quiet title are presented herein.

On December 16, 1919, the defendants entered into a written contract with Roland A. Wood-Seys, plaintiff's father, for the purchase and sale of a dwelling situate in the town of Avalon, Santa Catalina Island, for the sum of $3,000 cash, of which sum defendants paid $1,000 at the time the contract was executed, and agreed, as provided in the contract—

"to pay the balance of $2,000 not later than the 31st day of December, 1919. *Deed and abstract to be given on full payment.* Possession to be given not later than three days after full payment." (Italics ours.)

Five days subsequent to the execution of said contract the vendor died. Shortly afterwards plaintiff was appointed administratrix of his estate, and, being sole heir, succeeded to the property in question, subject to the interest acquired therein by defendants under said contract.

The sale to defendants was not consummated, and on January 14, 1921, plaintiff brought this suit to quiet title, the complaint being in the usual form, alleging ownership and possession of the property in plaintiff, and that defendants claimed an adverse title therein which was without right or foundation. Defendants, besides denying plaintiff's asserted absolute title, alleged in their answer that they acquired an interest in said property by reason of said contract and the payment thereunder of the sum of $1,000; that the sale was not consummated on account of the default of the vendor and his successor in interest in that they failed to furnish the abstract of title as in said contract provided; that after the death of her father, plaintiff took possession of said $1,000, has since retained the same for her own use and benefit, and has refused defendants' demand for the return thereof to them; defendants therefore prayed that plaintiff take nothing by her action, and that it be adjudged and decreed that defendants have a lien on said real property for the sum of $1,000 and interest from December 16, 1919, the date of payment.

The trial court's findings followed substantially the denials and allegations of the answer, and thereupon an interlocutory decree was entered, in accordance with the terms of its conclusions of law, to the effect that:

> "Upon the plaintiff depositing with the court within 90 days, * * * for payment to defendants, the sum of $1,000, together with interest at the rate of 7 per cent. per annum from January 1, 1921, a final decree shall be made and entered quieting plaintiff's title. * * *"

—but that upon the failure of plaintiff to so deposit said sum she should take nothing by said action.

Both parties to said decree, being dissatisfied therewith, have appealed, plaintiff contending, among other things, that the evidence is insufficient to support the finding that failure to consummate the sale was due to the default of the vendor and his successor in interest, and defendants claiming that the court should have given them judgment for the recovery of the money paid by them or impressed said property with a lien for the payment thereof.

The evidence upon which the trial court made its finding to the effect that an abstract of title was never furnished or tendered, as in said contract provided, was as follows: On July 6, 1920, which was prior to the distribution of the property to plaintiff, she placed in escrow with a Los Angeles bank a deed signed by her in her individual capacity, accompanied by instructions to continue the certificate of title to the property down to the date of the deed, and in compliance therewith the bank "ordered a search of the property." During the month following, August, 1920, defendants delivered to said bank a draft for the sum of $2,060, payable to the bank's order, with instructions to pay said sum—

> "upon delivery of grant deed in favor of (defendants) Charles Kerkovecz and Betty Kerkovecz, his wife, covering part of lot 38, block 33, city of Avalon (the property in question), together with certificate of title showing title clear, vested in the new owners."

But on November 26, 1920, without having obtained the continuation of the certificate of title, and consequently never having tendered the same, plaintiff terminated the escrow by withdrawing her deed; whereupon, two weeks later, defendants requested the return of their deposit, but the same was not actually refunded until April, 1921. Several weeks after the escrow had been terminated by both parties, plaintiff personally tendered a deed to defendants, but admittedly did not furnish or tender therewith an abstract or a certificate of title. Defendants refused to accept the deed and demanded the return of the initial payment made on the contract. From the foregoing it would appear without dispute that, although plaintiff requested the bank to obtain a continuation of the certificate of title, and that the bank "ordered a search" of the title to the property to be made, no abstract or completed certificate of title, was, in fact, ever obtained, furnished or tendered.

[1] It is well settled that the failure or refusal of a vendor to perform his part of the contract entitles the purchaser, if not in default, to treat the contract as at an end and to recover any money which he has paid thereunder (Chatfield v. Williams, 85 Cal. 518, 24 P. 839; Bertola v. Allred, 46 Cal. App. 593, 189 P. 489), the reason therefor being that it would be inequitable to permit a vendor to retain money paid him if he has failed to keep his contract or to furnish the consideration on his part (Carter v. Fox, 11 Cal. App. 67, 103 P. 910); and the authorities, without conflict, further hold that where an abstract of title is called for, it is incumbent upon the vendor to furnish the same before he can put the vendee in default; and if he fails to furnish the same, the purchaser has the legal right to disaffirm and insist upon a refund of the part purchase money paid (Carter v. Fox, supra; Robben v. Benson, 37 Cal. App. 227, 173 P. 766; Howe v. Hutchinson, 105 Ill. 501; Kane v. Rippey, 24 Or. 338, 33 P. 936; Horn v. Butler, 39 Minn. 515, 40 N. W. 833; Matheson v. C-B Live Stock Co. (Tex. Civ. App.) 176 S. W. 734; Maupin on Marketable Titles, p. 169.)

[2] Therefore, in the instant case, since the vendor and his successor in interest defaulted in the performance of the contract by failing to furnish said abstract, the trial court was justified, in the exercise of its equitable powers, in refusing to grant plaintiff a decree in the absolute form prayed for, quieting her title against the claim of defendants accruing under said contract, unless as such successor in interest plaintiff refunded the money previously paid on the purchase price. Chandler v. Chandler, 55 Cal. 267; Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681.

[3] Plaintiff contends, however, that de-

fendants were first in default because they declined to sign certain additional escrow instructions requested by the bank. The import of those additional instructions is not made clear by the record, but, regardless thereof, there can be no force in plaintiff's contention, for the reason that defendants fully complied with the terms of the contract and with all legal requirements as vendees when they deposited with the bank the full amount of the balance due on the purchase price, accompanied by the plain and definite instructions, hereinabove quoted, to pay over said deposit upon delivery of a grant deed in their favor conveying the property in question, together with a certificate of title; and when plaintiff thereafter failed to perform the contract and terminated the escrow, said contract was at an end, entitling defendants to the return of the purchase money paid. Glock v. Howard, etc., Co., 123 Cal. 10, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Robben v. Benson, supra.

[4] Further contention is made by plaintiff that, in no event, may she be held liable for the payment of said sum of $1,000 because she was not a party to the contract, and as an heir is not liable for the payment of the debts of her deceased father. The point is without merit, because the decree does not purport to be a money judgment against plaintiff personally. It merely makes the payment of said sum optional with her, depending upon her desire to obtain the equitable relief she is asking, and is founded upon the proposition that, having acquired a title through inheritance which was limited by the decree of distribution and made subject to certain equities created by the written obligation of the one from whom she inherited, she was not entitled to have such title quieted against those equities and thus be given greater rights in the property than were possessed by her predecessor at the time of his death, unless she extinguished said equities; in other words, that she was not allowed to accept and enjoy the full benefits of said inheritance without assuming its burdens. Civ. Code, §§ 3521, 1589; Mathews v. Wilson, 38 Cal. App. 148, 175 P. 647.

[5] Plaintiff contends, also, that defendants' right to the return of said money is barred because they failed to present a claim therefor against the estate of her deceased father. The default in the performance of the contract did not occur, however, until after her father's death, from which it follows that defendants had no valid claim against his estate. The other points urged in support of plaintiff's appeal either relate to immaterial matters or do not possess sufficient merit to require discussion.

[6] As to defendants' appeal, section 3050 of the Civil Code reads as follows:

> "One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration."

The omission of the vendor and his successor in interest to furnish an abstract of title doubtless constituted a failure of consideration (Benson v. Shotwell, supra), which entitled defendants to a return of the purchase money paid (Glock v. Howard, etc., Co., supra; Robben v. Benson, supra). We therefore believe that, under the Code section quoted, defendants were entitled to have a lien impressed upon the property for the repayment to them of said purchase money, in the event that plaintiff declined to exercise the option granted by the interlocutory decree to deposit said money in court, and that a provision to that effect should have been inserted in the interlocutory decree. In the absence of such provision, the form of final decree to be rendered upon plaintiff's declining to deposit said money in court will obviously afford defendants no relief whatever, for it will decree merely that plaintiff take nothing by her action, thereby leaving the parties where it found them at the commencement of the litigation, and effectually denying to defendants the right to the return of said purchase money.

It is therefore ordered that the decree appealed from be corrected so as to provide therein that, in the event of the failure of plaintiff to deposit said money in court, defendants have a lien upon said property therefor, in accordance with said Code section and the views herein expressed; and, as corrected, said decree will stand affirmed, defendants to recover their costs.

We concur: TYLER, P. J.; CASHIN, J.

81 Cal. App. 737

CITY OF LOS ANGELES v. VICKERS et al.
(Civ. 5301.)

(District Court of Appeal, Second District, Division 2, California. March 15, 1927.)

1. Eminent domain 🔑265(3)—Expert's fees not "costs," and their denial not unconstitutional taking of property (Const. art. 1, § 14).

Fees paid for expert testimony in defense of condemnation suit are not "costs" within the meaning of condemnation statute; consequently an order denying such costs is not a violation of Const. art. 1, § 14, prohibiting taking private property for public use without just compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Costs.]

2. Eminent domain 🔑265(3)—Under eminent domain statute, fees of experts held not properly chargeable as "costs" (Code Civ. Proc. § 1255).

Code Civ. Proc. § 1255, providing for allowance of costs in discretion of court in condemnation proceedings, *held* not to authorize payment of expert witness fees which are not ordinary costs attending trials allowed under statutory provisions.

3. Eminent domain 🔑265(1)—Costs chargeable are ordinary and usual costs attending trials and allowed under statutes (Code Civ. Proc. § 1255).

Costs allowable under Code Civ. Proc. § 1255, in condemnation proceedings, are the ordinary and usual costs attending trials and allowed under statutory provisions.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action in eminent domain by the City of Los Angeles against Anna C. Vickers and others. From an order denying its motion to tax costs, plaintiff appeals. Reversed, with directions.

Jess E. Stephens, City Atty., and Donald M. Keith, Deputy City Atty., both of Los Angeles, for appellant.

Youngworth, McClean & Hartman, of Los Angeles, for respondents.

WORKS, P. J. This action involves the exercise of the right of eminent domain. Decree of condemnation having gone for plaintiff, defendant Youngworth filed a memorandum of his costs and disbursements, whereupon plaintiff filed its notice of motion to tax the costs. Upon the motion coming on to be heard the trial court made its order denying it. From this order plaintiff appeals.

[1] The items of the cost bill to which exception was taken showed the payment of fees to certain experts upon the value of real property, in compensation for their time expended in testifying for respondent. These fees were in addition to and much in excess of amounts payable to witnesses under the law as "witness fees," strictly so-called, and for mileage. Respondent contends that the charges of the experts for testifying are collectible as "costs," for the reason that to deny to him a recovery of them would be to lessen the amount awarded to him for his lands by the condemnation decree. The result, so he says, will be a violation of the constitutional inhibition against the taking of private property for public use without just compensation. Appellant contends that the charges are not collectible as costs at all.

We must say at the outset that we cannot agree with the contention of respondent in its fullness. It is the rule as to litigation other than that involving the exercise of the right of eminent domain that the right to recover costs is purely statutory. People v. Feraud, 45 Cal. App. 765, 188 P. 843. And it has been said in a condemnation case:

> "The word 'costs,' when used in relation to the expenses of legal proceedings, means the sum prescribed by law as charges for the services enumerated in the fee-bill." City of St. Louis v. Meintz, 107 Mo. 611, 18 S. W. 30.

Another court has remarked in a proceeding of a similar nature:

> "This claim [for the fees of experts] was disallowed on the ground that the act of Assembly, in providing that in a proceeding such as this all costs shall be paid by the municipal corporation, had in contemplation only such costs as may be legally taxed in the ordinary action, and not those expenses which a party to the cause may have incurred. We entertain no doubt whatever as to the correctness of this conclusion. The word 'costs,' as used in this connection, has a fixed and definite meaning, viz. costs authorized by statutes." In re City of Pittsburgh, 243 Pa. 392, 90 A. 329, 52 L. R. A. (N. S.) 262.

In a condemnation case which came before our own courts a defendant included in his cost bill items of the counsel fees paid by him in conducting his defense. On a motion to tax the trial court struck out the items in question, and on appeal the very ground was taken which is urged by respondent here. The court, according to the syllabus in the report, which is a fair statement of the effect of a portion of the opinion, decided:

> "The 'just compensation' to which the owner of property is entitled under section 14 of article 1 of the Constitution, in proceedings in eminent domain, does not include reasonable disbursements made by him for attorneys at the trial; it has reference to the value of the property taken and the damage to property not taken, and nothing more."

The court said in the opinion, also:

> "It has frequently been held that costs are recoverable only by virtue of some statute." Pacific Gas & E. Co. v. Chubb, 24 Cal. App. 265, 141 P. 36.

This case appears to be exactly in point upon the question which respondent makes as to his rights under the Constitution. It is true that the decision relates to attorney's fees as costs, but expenditures made to lawyers for the defense of a condemnation suit and fees paid to experts for their testimony stand in the same category in so far as it may be contended that payment of the latter reduces, in effect, the amount to be paid to a defendant under decree of condemnation. We think the point made under the Constitution is without merit.

[2] It yet remains to decide whether, under the statutes of this state, respondent was entitled to judgment for the items of alleged costs which he claimed and which the trial court allowed him; and in determining this question it is to be observed that there is no contention that the experts who testified for respondent were appointed by the court. They were apparently of respondent's own selection.

Section 1022 of the Code of Civil Procedure provides that "costs are allowed of course, to the plaintiff, upon a judgment in his favor," in certain specified actions, among which are not included those commenced for the purpose of condemning real property under the exercise of the right of eminent domain. It is provided in section 1025 of the same Code that in actions other than those mentioned in section 1022 "costs may be allowed or not, * * * in the discretion of the court. * * *" These two sections are found in a chapter of the Code entitled "Costs." Section 1255 of the same Code, contained in a "title" which is headed "Eminent Domain," so far as its language is material here, is identical with section 1025.

There is no legislative declaration in this state as to the meaning of the word "costs" (7 Cal. Jur. 280), but that word has a generally accepted meaning throughout the country. The import of the word, we think, is not broad enough to include such items as the trial court here allowed to respondent. Our research has uncovered but one case (In re Commissioners of Palisades Park, 83 Misc. Rep. 186, 144 N. Y. S. 782) in which it has been decided that the fees of experts are properly chargeable as costs. The decision was rendered under a ruling of the trial court which had allowed them. The ruling was based, however, upon a special statute relating to proceedings in eminent domain, and which provided that the court should tax and allow as costs "such costs, fees and expenses to the commissioners of appraisal and other persons performing any legal duty in the premises" as the court "shall think equitable and right." It would appear that the appellate court's construction of the special statute, which was different from our legislative enactments in material particulars, was eminently proper. There are decisions from several states to the effect that fees paid to experts in condemnation cases are not included in the word "costs." Some of the cases from these states are City of St. Louis v. Meintz, supra; In re Grade Crossing Commissioners, 19 Misc. Rep. 230, 43 N. Y. S. 1073; In re Rapid Transit Commissioners, 103 App. Div. 530, 93 N. Y. S. 262; In re City of Pittsburgh, supra.

[3] It has been determined in Bathgate v. Irvine, 126 Cal. 135, 58 P. 442, 77 Am. St. Rep. 158, that in an action to quiet title fees paid to experts may not be allowed as costs. The taxation of costs in such actions is regulated by the provisions of section 1025 of the Code of Civil Procedure; but section 1255, relating to condemnation proceedings, is cast in the same language as section 1025. It would seem, therefore, that, as the fees of experts are not allowable under the latter section they cannot be allowable under section 1255. It is said in the opinion in Pacific Gas & E. Co. v. Chubb, supra, that the costs referred to in section 1255 "are the ordinary and usual costs attending trials and allowed under statutory provisions." Respondent insists that this remark was not necessary to a decision of the case. Whether this contention be tenable, we do not say. We think, at any rate, that the remark is a correct statement of the law.

In considering the questions presented by this appeal, we have examined San Diego Land & T. Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L. R. A. 604, San Francisco v. Collins, 98 Cal. 259, 33 P. 56, and City of Oakland v. Pacific Coast L. & M. Co., 172 Cal. 332, 156 P. 468, Ann. Cas. 1917E, 259.

Order reversed, with directions to the trial court to strike from the cost bill the following items: J. B. Vaille, $25; S. O. Walker, $34.25; R. H. Gast, $160; O. L. Sponsler, $150; W. J. Weir, $150; E. S. Butterworth, $100; W. G. Stewart, $100; G. G. Johnson, $125; Arthur R. Mass, $166.50; Thomson-Slavin Co., $9; Stagg Photo Co., $1.50; Langdon Photopress Co., $12.30.

We concur: CRAIG, J.; THOMPSON, J.

200 Cal. 718

FORBELL v. PACIFIC ELECTRIC RY. CO. et al. (L. A. 8242.)

(Supreme Court of California. March 28, 1927.)

Carriers 🔑320(21)—Issue of bus driver's negligence held for jury in action by passenger against electric railway and bus company for injuries.

In action by passenger in bus against electric railway company and bus company for injuries resulting from collision, issue of bus driver's negligence *held* for jury; instruction that driver was negligent being erroneous.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Robert E. Forbell against the Pacific Electric Railway Company, and A. B. Watson, doing business under the fictitious name and style of Crown Stages. Judgment for plaintiff, and the defendant last named appeals. Judgment reversed in so far as it affects the last-named defendant.

Sarau & Thompson, of Riverside, Clyde Bishop, of Santa Ana, and B. P. Gibbs, and E. E. Morris, both of Los Angeles, for appellant.

E. B. Drake, of Los Angeles, for respondent.

PER CURIAM. This appeal was placed upon a special calendar of this court upon an order to the respondent to show cause why the judgment herein should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. It appears that the respondent has sold and assigned the judgment recovered herein to the First National Bank of Santa Ana, Cal. Upon the calling of said calendar, neither the respondent nor his assignee appeared and the order to show cause was thereupon submitted. This is an appeal by the defendant Watson from a judgment entered by the superior court of the county of Los Angeles in favor of the plaintiff, Robert E. Forbell, in an action instituted to recover damages for personal injuries sustained in a collision between an electric car of the defendant Pacific Electric Railway Company and a bus operated by an employee and servant of said appellant Watson. At the time of the collision, which occurred at a point where the defendant electric company's line intersects a public road or highway, the injured person was a passenger in the bus of the appellant. After trial of the cause the lower court instructed the jury, as matter of law, that—

> The "defendant Watson is liable in the case, because the bus driver was guilty of negligence. * * * So that * * * regardless of whether the Pacific Electric is liable or not, the defendant Watson is."

The court then went on to instruct, however, that it was the province of the jury to determine whether the servants of the defendant electric railway company were also negligent in the operation of its car.

It is contended by the appellant that the trial court erred in giving an instruction that he was "absolutely liable" because of the asserted negligence of the bus driver. We are

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

of the opinion that this contention is meritorious. An examination of the record discloses that there is ample evidence therein tending to show that the driver of the bus stopped a short distance from the tracks of the railway and looked to the right and left before attempting to cross said tracks. The driver of the bus and a passenger sitting directly behind him both testified that they were unable after glancing to the right and left, to see the approaching car of the defendant electric railway company. In fact, the plaintiff himself testified that he was sitting on the second from the rear seat of the bus and that he did not see the approaching car until the position of the bus placed him practically on a direct line therewith, thus tending to indicate that the electric car was not discernible until the bus was well upon the tracks of the defendant railway company. In view of this evidence, we are of the opinion that the question of fact as to the bus driver's negligence should have been submitted to the jury and it was error for the trial court to instruct, as matter of law, that the bus driver was negligent. The instruction complained of finds no support in the case of Billig v. So. Pac. Co., 192 Cal. 357, 219 P. 992, apparently relied on by the trial court in giving the same for the circumstances in that case differed in that the automobile truck driver therein failed to "stop, look and listen" before venturing across the railroad tracks. We are not to be understood as holding, however, that the driver of the bus in the instant case was not negligent. Our conclusion is merely that this question should have been submitted to the jury.

The two other grounds urged by the appellant may not properly be considered on this appeal.

For the foregoing reasons the judgment appealed from in so far as it affects the appellant Watson is hereby reversed.

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200 Cal. 726

NEILSON v. HOULE. (L. A. 8062.)

(Supreme Court of California. March 29, 1927.)

1. Municipal corporations 🔑706(5)—Evidence held to sustain finding of negligence of driver of automobile colliding with motorcycle.

In action for injuries resulting from collision between automobile and motorcycle, evidence *held* to sustain finding of negligence of automobile driver.

2. Appeal and error 🔑1001(1)—Testimony in action for injuries resulting from collision held not so inherently improbable as to require reversal.

In action for injuries resulting from collision between automobile and motorcycle, plaintiff's testimony *held* not so inherently improbable or impossible as to require reversal.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by James K. Neilson against R. Houle. Judgment for plaintiff, and defendant appeals. Affirmed.

George C. Watson and E. B. Drake, both of Los Angeles, for appellant.

Bertrand J. Wellman and J. M. Fursee, both of Los Angeles, for respondent.

PRESTON, J. This appeal presents the single issue as to whether or not we will override the judgment of the court below on the verdict of a jury rendered on conflicting evidence in an action for personal injuries.

Plaintiff's testimony showed that at the time of the accident he was proceeding at a lawful speed on the proper or right-hand side of the street, while going south on Santa Fé avenue in Los Angeles; that there were machines parked along the right or west side of said street, which obstructed his view of vehicles entering the street from that side; that the defendant, who had been on the premises of the Good Roads Machinery Company, on the right or west side of said avenue, suddenly entered the street immediately in front of him and was traveling in a northeasterly direction across the 56-foot street at a reasonable rate of speed; that plaintiff, thinking to avoid a collision, swerved to the left about 10 feet, and the machine failing to slow down or stop a collision resulted at a point near the center of the street, leaving the automobile still pointing in a northeasterly direction and diagonally across the street.

[1, 2] The complaint alleged negligence on the part of defendant, and the answer set up negligence on the part of plaintiff, as the sole cause of the accident. The evidence was sufficient to warrant the jury in finding defendant guilty of negligence in entering the street from a private entrance thereon at a point where his presence would be obscured to oncoming traffic by parked machines without taking some precaution to avoid a collision and also in not stopping his car to prevent the collision. No authorities are cited nor is there any contention made of insufficiency of the evidence, but the appeal is prosecuted upon the sole ground of inherent improbability of plaintiff's testimony. In other words, appellant appears to desire to invoke the rule of incredible testimony, which is, as stated in section 381, page 1145, of volume 10, Cal. Jur.:

> "Where testimony, in the light of the undisputed facts, is so inherently improbable and impossible of belief as to, in effect, constitute no evidence at all, the rule that the amount of credit to be given to the positive testimony of any witness is solely a question for the trial tribunal, does not apply. Undoubtedly an ap-

pellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. * * * Even if there is a certain degree of improbability about much of the evidence that leaves it unsatisfactory to the mind of the appellate court, if it is not contradicted nor impeached except by its own weakness the decision of the lower court will not be disturbed."

See, also, De Arellanes v. Arellanes, 151 Cal. 443, 90 P. 1059, and Austin v. Newton, 46 Cal. App. 493, 189 P. 471.

The contention of defendant, in the language of his counsel, is as follows:

> "That he had been in a building and that he backed his automobile out on the west side of Santa Fé avenue about 100 feet from where the accident happened and then drove directly across the street and was headed practically due north and that his automobile was standing still on the right side of the center of the street, the way he was headed; that by reason of the roughness of the railroad track plaintiff was crossing, some 30 feet northerly from defendant's automobile and the point of collision, it caused his motorcycle to, and it did, swerve to its left and zigzagged so he struck the right front bumper of defendant's automobile headed northerly on Santa Fé avenue, to east of the center thereof, that is, on plaintiff's wrong side of the street."

There is thus present a direct and sharp conflict in the evidence. There is nothing at all inherently improbable in the story of plaintiff. One or the other party must be disbelieved in a situation of this kind. The jury believed the plaintiff and rendered a verdict accordingly. The court below, being dissatisfied with the amount thereof, caused it to be reduced from $20,000 to $12,000, but no dissatisfaction was expressed as to the proof of negligence; indeed, the conclusion is certain that the court below, after modification as to damages, directly approved the verdict.

This case is well summed up in the language of Austin v. Newton, supra, at pages 497-500 (189 P. 473), as follows:

> "As we understand counsel's argument, what appellant does contend for is that there are certain details of the accident, as described by plaintiff and his witnesses, that are irreconcilably in conflict with certain admitted physical facts. * * * Such inconsistencies, however, would not necessarily prevent a recovery by plaintiff. It is not to be supposed that witnesses to an accident that happens in the twinkling of an eye should accurately observe all the details. Much less is it probable that one who is injured in the accident, and rendered unconscious, should be able to give a correct account of all the quickly happening events. It cannot be laid down as a rule of law that a plaintiff in a personal injury case cannot recover unless the court can see that every detail of the accident, as testified to by the plaintiff and his witnesses, is consistent with admitted physical facts and the laws of science. Undoubtedly where some of the details of an accident, as described by a witness, conflict with admitted physical facts, the whole story of the accident, as given by that witness, may be entirely discredited; but, as an appellate court, we cannot reverse unless we can say that the admitted physical facts are wholly irreconcilable with the negligence alleged in the complaint. To entitle respondent to an affirmance, it is sufficient if it can be said that notwithstanding the admitted physical circumstances, the accident could have been caused by the negligence charged in the complaint. We hold that the reasonableness of plaintiff's version of the accident was a question of fact for the trial court, and that its finding thereon is conclusive here. * * *
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> "Undoubtedly an appellate court, in reviewing the evidence, is bound to exercise its intelligence, and in doing so must recognize that certain facts are controlled by immutable physical laws. It cannot permit the verdict of a jury to change such facts, because, as said in Quigley v. Naughton, 100 App. Div. 476 (91 N. Y. S. 491), to do so would, in effect, destroy the intelligence of the court. And when the undisputed circumstances show that the story told by litigant and his witnesses cannot by any possibility be true, or when their testimony is inherently impossible, the appellate court should not hesitate to reverse the judgment, to the end that the cause again may be submitted to the determination of a jury or trial judge.
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> "On the other hand, as an appellate court, it is our bounden duty to exercise great care and caution in applying the tests of common sense and common knowledge of physical laws to a given state of facts. Common experience and observation teach us that strange and astonishing things sometimes happen in the world of physical phenomena, and accidents sometimes appear to happen in manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal upon the ground that the verdict is contrary to the evidence. Stokes v. Metropolitan Street Ry. Co., 173 Mo. App. 676 (160 S. W. 46). Unless, therefore, we can say that, under the undisputed physical facts, the accident could not possibly have been due to defendant's negligence as alleged in the complaint, we must affirm the judgment. It is not sufficient that the story told by plaintiff and his witnesses may be improbable. It is for the jury or the trial judge to weigh and balance probabilities. We cannot reverse upon the ground that the finding of negligence is contrary to the evidence unless we can see that the fact as found contravenes recognized physical laws, and that therefore it is impossible that the accident could have been due to the negligence alleged in the complaint.
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> "Tested by the foregoing, we cannot say that the finding that defendant's negligence was the proximate cause of the accident is not supported by the evidence."

The judgment is affirmed.

We concur: CURTIS, J.; WASTE, C. J.; LANGDON, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

200 Cal. 730

PEOPLE v. SANDOVAL. (Cr. 2948.)★

(Supreme Court of California. March 29, 1927. Rehearing Denied April 28, 1927.)

1. Criminal law ⚷997—Motion after judgment to return case to status at arraignment was in effect application for writ of coram nobis.

A motion, subsequent to overruling motion for new trial, and final judgment to set aside judgment and return case to its status as of the time of arraignment, on ground that accused had desired to plead guilty, was in effect application for writ of coram nobis.

2. Criminal law ⚷997—Motion for writ of coram nobis to permit plea of guilty held properly denied after motion for new trial and sentence.

Where accused was not subject to duress and had fair trial, court properly denied application presented by amicus curiæ, after motion for new trial and sentence, where the application was in effect for writ of coram nobis on ground that accused had desired to plead guilty.

3. Criminal law ⚷997—Motion after sentence to reinstate case as of arraignment held properly denied, where facts were fully known on motion for new trial.

Motion of accused subsequent to sentence to set aside judgment and place case in same status as at arraignment was properly denied, even if not subject to limitations of writ of coram nobis, since facts were fully known and remedies were available upon motion for new trial.

4. Homicide ⚷238—Evidence held sufficient for conviction of murder in first degree, notwithstanding intoxication, under statute that voluntary intoxication shall not make act less criminal (Pen. Code, § 22).

Evidence *held* to justify conviction of murder in first degree, even though accused was intoxicated at moment of committing crime, under Pen. Code, § 22, providing that no act shall be less criminal by reason of the actor being in state of voluntary intoxication.

5. Criminal law ⚷1172(11)—Inadvertent signature of judge on two forms for lesser verdict held harmless after conviction for murder in first degree.

Accused was not prejudiced by inadvertent signature of judge on forms of verdict for murder in second degree and not guilty, among five forms of verdict submitted to jury, where use of forms was carefully explained and jury returned verdict of guilty of murder in first degree without recommendation.

In Bank.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Joseph Sandoval was convicted of murder in the first degree, and he appeals. Affirmed.

Rehearing denied; PRESTON and LANGDON, JJ., dissenting.

Pierce & Gould, of Ventura, for appellant.

Erle S. Gardner, of Ventura, amicus curiæ.

U. S. Webb, Atty. Gen., H. H. Linney, Deputy Atty. Gen., and Edward Henderson and James C. Hollingsworth, both of Ventura, for the People.

RICHARDS, J. There are in this cause two appeals which are presented upon separate transcripts, but to be considered together. One of these is an appeal from the judgment of conviction of the defendant of the crime of murder in the first degree without recommendation by the jury and from the order denying his motion for a new trial. This appeal was taken by the defendant's regular attorneys of record acting on his behalf. The other appeal is one taken and prosecuted from an order of the trial court, made and entered after final judgment, denying a motion made on behalf of said defendant by certain counsel, appearing in the capacity of amici curiæ for the purpose of presenting said motion on behalf of the defendant and of taking an appeal from the order of the court denying the same.

[1] We shall first in order consider the latter appeal. The facts out of which said appeal arose are these: During the trial of the cause before the superior court in and for the county of Ventura, Mr. E. S. Gardner, a member of the law firm of Drapeau, Orr & Gardner, was present in court and became apparently much moved with sympathy for the unfortunate plight in which the defendant appeared to be, and was impressed with the belief that on account of certain happenings prior to and during the course of said trial the defendant was not being accorded or receiving the full benefit of those rights and privileges to which those who are charged with and being tried for crimes are entitled. Accordingly, after the trial was over, and after the defendant had been convicted of the crime of murder in the first degree without recommendation, and after the motion for a new trial made by his regularly appointed counsel had been denied, and after the defendant had been sentenced to suffer the extreme penalty of the law, Mr. Gardner, acting for his said firm of attorneys, applied to the court for and was granted permission in the capacity of amici curiæ to present orally a motion which he denominated "a motion to set aside the judgment in this case and return the case to the time of arraignment as far as the legal status of the case is concerned." The motion, while thus denominated, was, in effect, an application for a writ coram nobis and was apparently treated as such in the argument and citation of authorities by counsel in presenting the same. It is true that counsel, in presenting his said motion, stated that the remedy which he was seeking thereby was so broad as would, if granted, have enabled the defendant to go back so far in the proceedings against him as to withdraw his original plea of "Not guilty," and to inter-

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★Rehearing denied.

pose a different plea; but this does not avail to change the essential nature of his motion as being in purpose and effect an application for a writ coram nobis. The trial court, while expressing itself in doubt as to its jurisdiction to entertain such an application, permitted said counsel to make the same and to support it with a full showing of the facts upon which it was asserted to be predicated. These facts were, briefly stated, as follows:

Shortly after the arrest of the defendant for the murder of the woman with whom he was then living as his common-law wife, he stated to the arresting officers that he was "going to plead guilty and take his medicine." On several other occasions between that time and the time of his arraignment he made similar statements as to his intention to plead guilty. At the time of his arraignment the defendant was asked by the court if he had an attorney; he replied that he had not and had no means to employ an attorney, and, if any attorney was to represent him, the court would have to appoint one. The court thereupon appointed the firm of Pierce & Gould to represent the defendant, and a continuance was had until the afternoon at the request of the defendant's said counsel. When the case was again called, both sides answering ready, Mr. Gould of said firm stated on behalf of the defendant that he would waive the reading of the information "and enter a plea of not guilty at this time." He further stated that "we will look into the matter very carefully, and, if it is advisable to change the plea at a later time, we will do so." The court thereupon directed the defendant to stand up and inquired directly of him whether he waived the formal reading of the information, to which the defendant replied in the affirmative; whereupon the court said: "You know, however, that you are charged in this information with the crime of murder, with having killed and murdered one Julia Lopez about the 27th day of June of this year; that is what is charged against you!" The defendant: "Yes sir." The court: "And to this information do you plead guilty or not guilty?" The defendant: "Not guilty for the present." The court thereupon directed the defendant's plea of "Not guilty" to be entered, and set the cause for trial for a date satisfactory to his counsel. At the time of the trial, the defendant and his counsel were in court and answered ready, without any attempt or suggestion of an intent to withdraw said plea. The cause proceeded to a trial before a jury extending over several days, during which the circumstances preceding and attending the homicide were fully gone over, the testimony of an eyewitness to the crime was given with the fully exercised right of cross-examination; the several confessions of the defendant were rehearsed. The defendant himself was sworn and testified on his own behalf. Certain other witnesses also testified for the defense.

The cause was argued by respective counsel, and was finally submitted to the jury for decision after a full set of instructions by the court had been given. In the course of giving said instructions, the court read and explained to the jury five several forms of verdict; that is to say, a verdict of murder in the first degree without recommendation, a verdict of murder in the first degree with recommendation fixing the punishment at life imprisonment, a verdict of murder in the second degree, a verdict of manslaughter, and a verdict of not guilty. These five several forms of verdict when thus read by the court were handed to the jury. In some way not fully explained the signature of the judge had been placed upon two of these forms of verdict on the line affixed for the signature of the foreman of the jury. These two forms of verdict were those relating to the verdict of murder in the second degree and the verdict of not guilty. There is no echo in this record from the jury room as to how that body regarded the matter of the evident misplacing of the name of the trial judge upon these two forms of verdict, but the fact is that the jury returned a verdict of guilty without recommendation and was duly discharged. Thereafter the court fixed the time for pronouncing judgment at several days later, at which time, the defendant and his regular counsel being present in court, the defendant's motion for a new trial was duly presented in writing, setting forth seven separate grounds why such motion should be granted, but setting forth no such ground as that herein urged, viz. that the defendant had mistakenly entered or had entered for him upon his arraignment a plea of not guilty. The motion for a new trial, after being argued by respective counsel, was denied by the court, whereupon the court proceeded to obtain such information as to the defendant's antecedents and his family as is required in certain cases under section 1192a of the Penal Code, and for that purpose placed the defendant upon the witness stand. From the examination which then ensued, it appeared that the defendant, while a Mexican as to his ancestry, was a native-born citizen of the United States of the age of 46 years, born and reared in the county of Ventura, speaking, reading, and writing both the English and Spanish languages, and having attended for a time at least, the public schools of his native place. After these facts had been elicited from the defendant, the court proceeded to pronounce sentence, in the course of which it inquired of the defendant whether he had any legal excuse to offer why the judgment of the court should not then be pronounced. The judge upon making this inquiry understood the defendant to state that he had not, and thereupon proceeded to pass judgment upon him affixing the penalty of death. Counsel of record for the defendant then gave notice of appeal, and the defendant was removed from the courtroom. Shortly thereafter, however, it was made known to the court that it had misunderstood the defendant and that he had something to say why judgment should not be pronounced. The defendant was thereupon returned to court, and, upon inquiry, stated that he had something to say why judgment should not be pronounced; and the court, stating that it had misunderstood him, proceeded to hear his statement. The defendant then made the following statement:

> "Well, when I first came in here before your honor I intended to plead guilty right here, but my attorney advised me not to, so that is the reason I did not, and I hadn't had no chance to explain myself, so that is the reason why I didn't spoke any more. I told Mr. Suytar when he took me up there that I wanted to plead guilty and save the expense of the county. * * * What I mean is that I just wanted to plead guilty as soon as I came before you, and I was advised not to, and that is how I stood trial."

The court upon hearing the foregoing statement replied that it furnished no legal excuse which would give the court authority or power to stay the imposition of the judgment, and that the judgment as pronounced would stand. It then repeated the substantial portion of its former judgment affixing the death penalty, and noted the defendant's appeal to the Supreme Court. At the afternoon session of the court, Mr. Gould, representing his firm, arose in court to ask the court to dismiss his firm from the case upon the ground that, the defendant having at the morning session of court made a statement indicating that he was dissatisfied with his attorneys, it might be possible that he would wish through other attorneys to urge executive clemency on account of their handling of his case. The court stated that he knew of no misconduct on the part of counsel and had no disposition to relieve them of their further duties in or connected with the case, but, on the other hand, suggested that they continue to take every legal step required to perfect an appeal and preserve to the defendant every right of appeal which he might have. Several days later Mr. E. S. Gardner appeared in court to state that, moved by his sympathy for the defendant and under the belief that he had not been accorded all of his rights in the premises, he would ask permission as amicus curiæ and on the defendant's behalf to move to set aside the judgment and restore the cause to the condition in which it stood when the defendant was arraigned, in order that the defendant might withdraw his plea of not guilty and present a plea of guilty as he had at first intended. The court permitted Mr. Gardner, or rather his firm, to act as such amici curiæ in the premises and to present such motion, though doubtful of its jurisdiction to hear and determine the same; whereupon all of the foregoing facts were fully presented to the court, and, the matter being then argued and submitted to the court for its decision, the court rendered its decision as follows:

> "So far as this matter is concerned, I do not see that it affects the defendant one way or the other; and, on the merits of the motion Mr. Gardner has made, I have given it a good deal of consideration, and while I have no doubt in my own mind that the statements of the witnesses as to the declarations made by the defendant with reference to his intention to plead guilty and his desire to plead guilty in this case are true, and that he said he was persuaded or prevented by his counsel from doing so, and that the defendant made those statements or declarations as and when testified to by the witnesses, as a legal proposition I cannot see that the court has any power to interfere with the situation, even if we were to reach the conclusion that the court should so interfere. The defendant was represented by counsel and a trial was had, I believe a fair and impartial trial, and the defendant submitted himself to this tribunal, and I know of no authority in the court at this time to set aside this judgment or to permit now a withdrawal of the plea of not guilty and the interposition of a plea of guilty, and the motion will have to be denied."

[2, 3] It is from the foregoing order that the second appeal herein has been taken. There is no merit either as a matter of law or as a matter of fact upon the record before us in the contentions of counsel acting as amici curiæ upon this second appeal. The case of People v. Perez, 9 Cal. App. 265, 98 P. 870, even if regarded as authority for such a proceeding in cases where no trial of the defendant had been had but a plea had been obtained by some character of duress or the trial was affected by some outside force, has no application to the facts of the instant case wherein no duress of any kind was exercised and where the defendant's trial had been regular in all respects. The very limited class of cases to which the writ of coram nobis would be applicable under our statutory forms of procedure, of which it has never been expressly made a part, was very fully considered by this court in the cases of People v. Mooney, 178 Cal. 525, 174 P. 325, and People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435, and it is clear that under these authorities the trial court properly denied this application, considered as an application for a writ coram nobis. And, if said application were to be considered as an application for any other or broader remedy than that strictly permissible under coram nobis, it would also have been properly denied upon the ground that the facts were fully known and the remedies fully

available to the defendant upon his motion for a new trial and upon his appeal from the order denying such motion. People v. McCoy, 71 Cal. 395, 398, 12 P. 272; Wood v. Moulton, 146 Cal. 317, 322, 80 P. 92. An examination of the record upon the first appeal discloses that the contention that the defendant was injuriously affected by the fact that the name of the trial judge was inadvertently affixed to certain of the forms of verdict above adverted to is fully presented and argued upon that appeal, and will be there given due consideration. For the foregoing reasons the second appeal herein is dismissed.

[4, 5] As to the first or main appeal of the defendant from the judgment of conviction and order denying a new trial herein, it requires but brief attention. There is no merit in the appellant's contention that the evidence in the case was insufficient to sustain the verdict. Aside from the fact that there was an eyewitness to the entire tragedy, whose testimony, notwithstanding certain inconsistencies, the jury was entitled to believe, there was also the confession several times repeated by the defendant that he had slain his common-law wife because of jealousy over her attentions to another man and of her threatened intent to leave him, which confessions were made under circumstances which left little doubt as to their truth. These fully justify the verdict of the jury, even conceding the state of intoxication in which the defendant may have been when he came to the actual moment for the commission of his crime, and which in itself furnishes no excuse for its perpetration. Section 22, Pen. Code; People v. Sainz, 162 Cal. 242, 245, 121 P. 922; People v. Yeager, 194 Cal. 452, 474, 229 P. 40; People v. Casade, 194 Cal. 679, 687, 230 P. 9. As to the final contention of the defendant that he sustained some prejudicial injury from the fact that the judge's signature had been inadvertently misplaced upon two of the forms of verdict furnished to the jury, we are unable to perceive enough of merit therein to justify a reversal of this cause. The jury had already had read and explained to it in the court's instructions the precise form of verdict which it was required to render in the five alternatives presented to it in arriving at its verdict. Having been so explicitly advised, its members as intelligent men could not well have been misled by the presence upon one or more of these forms of verdict of the name of the judge in a place thereon where it had no reasonable business to be. To strike out the misplaced name of the judge and insert the name of the foreman of the jury in case that body had agreed upon either of said forms of verdict would have been the altogether reasonable thing to do; while the substitution instead of the most drastic form of verdict submitted to it would be the altogether unreasonable thing for the jury to do, unless its members were agreed upon that extreme form of verdict, in which event it would be quite immaterial what the rejected forms of verdict contained.

We perceive no error in this record.

The judgment and order are affirmed.

We concur: WASTE, C. J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.

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200 Cal. 522

FAY v. DISTRICT COURT OF APPEAL, SECOND APPELLATE DIST., DIVISION 2, et al. (L. A. 9631.)

(Supreme Court of California. Feb. 28, 1927. Rehearing Denied March 28, 1927.)

1. Judges 🔑16(1)—Constitutional amendment, creating judicial council, held intended to apply to entire state judicial system to relieve congestion and expedite business (Judicial Council Amend., adding section 1a to Const. art. 6; section 1a, subds. (1–5).

"Judicial Council Amendment," adding section 1a, to Const. art. 6, creating a judicial council, and providing that chairman shall assign judge to assist a court whose calendar is congested, was intended to apply to entire judicial system of the state, including the Supreme Court and District Courts of Appeal, and to confer on council certain powers enumerated in subdivisions (1–5) thereof, and to confer on chairman certain powers having reference to whatever state of congestion exists in calendars, with a view to speedy relief of congestion and to expedite judicial business.

2. Judges 🔑25(1)—Constitutional amendment relating to judges assigned "to assist a court" whose calendar is congested held to empower such judges to exercise judicial functions (Judicial Council Amend., adding section 1a to Const. art. 6).

Judicial Council Amendment, adding section 1a to Const. art. 6, providing that the several judges assigned "to assist a court whose calendar is congested" are "to sit and hold court as assigned," *held* to create clear implication that judges thus assigned shall exercise judicial functions while operating under such assignment.

3. Courts 🔑51—Prior to amendment creating judicial council, constitutional provision relating to pro tempore judges did not authorize creation of court pro tempore (Judicial Council Amend., adding section 1a to Const. art. 6, Amendments of 1904 and 1918).

Prior to Judicial Council Amendment, adding section 1a to Const. art. 6, Amendments of 1904 and 1918, relating to pro tempore justices did not create a pro tempore court, so as to authorize members of Supreme Court or District Courts of Appeal to substitute for themselves, acting as a group in performing their judicial function, another body of men, composed of justices pro tempore, and, as such empowered to exercise functions of a Supreme Court or District Court of Appeal.

4. Judges 🔑16(1)—Statutory or constitutional provision transferring direct selection of appellate court membership from people should be plain and unambiguous.

It is right of the people of the state to have their essential rights, liberties, and interests in respect to person and property heard and determined by courts of last resort composed of members of their own selection, and though people may transfer direct exercise of this selection to those whom they have chosen to administer government, text of such transfer, whether embodied in Constitution or statute, should be plain and unambiguous.

5. Constitutional law 🔑16—Statutes 🔑181(1)—Though evil sought to be remedied, and propaganda preceding enactment may be considered, language of enactment controls construction.

Though courts may construe statutory or constitutional provisions in light of evils or defects in administration of justice which they were designed to remedy, and the propaganda accompanyng its proffer for adoption or rejection by the electorate, such aids to interpretation are not controlling, but intent of enactment must be derived from language thereof.

6. Constitutional law 🔑5—Statutes 🔑158—Repeals by implication are not favored.

Repeals of laws, statutory or constitutional, by implication, are not favored.

7. Statutes 🔑230, 232—Express modification or repeal of provisions in former enactment will be held to disclose full extent of intent to modify or repeal.

When an enactment expressly modifies or repeals provisions in a former enactment, such express modification or repeal will be held to disclose the full intent of framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal, in application of the principle "expressio unius, est exclusio alterius."

8. Judges 🔑25(1)—Constitutional amendment providing for assignment of justices to relieve congestion of calendars held not to authorize change in designated number of members of courts (Judicial Council Amend., adding section 1a to Const. art. 6; Const. art. 6, §§ 2, 4).

Judicial Council Amendment, adding section 1a to Const. art. 6, providing that judges assigned "to assist a court whose calendar is congested" are "to sit and hold court as assigned," must be construed in light of existing provisions of article 6, §§ 2, 4, which were not repealed by implication, and, as so construed, justices so assigned can "sit and hold court" only as members of courts to which assigned and can only exercise judicial functions in such relationship to such courts as will not change or increase the designated number of members thereof.

9. Judges 🔑16(1)—Justice, assigned to assist appellate tribunals, has same powers possessed by regularly constituted members (Judicial Council Amend., adding § 1a to Const. art. 6).

In making assignment of justices "to assist" appellate tribunals under "Judicial Council Amendment," adding section 1a to Const. art. 6, chairman of council is empowered to invest persons so assigned with no other or different official relation to such courts than that held by the regularly constituted members thereof, and a judge so assigned occupies substantially same relationship to other members as that occupied by justices pro tempore under article 6 prior to amendment.

10. Judges 🔑14—Assignment of justices pro tempore, though regularly constituted justices are not disqualified nor unable to act held authorized (Judicial Council Amend., adding § 1a to Const. art. 6).

Judicial Council Amendment, adding section 1a to Const. art. 6, authorizing chairman of council to assign a justice to act for a judge who is disqualified or unable to act, was not intended to repeal former provisions of article 6, relating to justices pro tempore, but was intended to broaden former provisions, so as to authorize selection of justices pro tempore to assist courts when their calendars are congested, though regularly constituted justices of said courts, thereby replaced, are neither disqualified nor unable to act.

11. Statutes 🔑206—That interpretation of statute, susceptible of two conflicting constructions, which will give effect to entire language thereof, is preferred (Civ. Code, § 3541).

In view of Civ. Code, § 3541, between two apparently conflicting interpretations of a law equally adaptable, that one is to be preferred which will give effect to the entire language thereof, rather than that which will destroy any portion of it and to that extent defeat legislative intent.

12. Courts 🔑42(1)—Order of division of District Court of Appeal that three superior judges assigned to assist court should sit and act as separate division held invalid (Const. art. 6, § 4, as amended in 1918; Judicial Council Amend., adding section 1a to Const. art. 6).

Const. art. 6, § 4, as amended in 1918, providing that there shall be but two divisions of the District Court of Appeal for the Second Appellate District, was not, by implication, repealed by Judicial Council Amendment, adding section 1a thereto, and an order of a division of said District Court of Appeal that three judges of superior court individually assigned to assist said division sit and act as a new group of justices sitting in effect as a separate division thereof was invalid.

In Bank.

Application by Hugh Fay for certiorari to review an order of the District Court of Appeal, Second Appellate District, Division 2, and others, designating judges of the superior court assigned to assist such court to sit as a separate division thereof. Order annulled, and writ of prohibition ordered.

Lyle Pendegast and W. J. Hunsaker, both of Los Angeles (Daniel M. Hunsaker, of Los Angeles, and F. M. Angellotti and Wm. B. Bosley, both of San Francisco, of counsel), for petitioner.

R. P. Henshall, of San Francisco, amicus curiæ.

U. S. Webb, Atty. Gen., R. W. Harrison and John W. Maltman, Deputy Attys. Gen., for respondents.

John Perry Wood and Thos. C. Ridgway, both of Los Angeles, and Warren Olney and Max Thelen, both of San Francisco, amici curiæ.

RICHARDS, J. The petitioner herein applies for a writ of review whereby he seeks to have reviewed a certain order made by the District Court of Appeal in and for the Second Appellate District, Division 2, purporting to direct that a certain cause pending upon appeal in said court, entitled "The People, etc., Plaintiff and Respondent, v. Fay et al., Defendants and Appellants," be placed upon a calendar of said division of said court for hearing and argument upon a certain date before Hon. Harry R. Archbald, Hon. Elliot Craig, and Hon. C. W. Guerin, judges of the superior court of the state of California in and for the county of Los Angeles, to whom the said cause was by the terms of said order assigned for hearing determination and judgment. The foregoing order of said court purports to be predicated upon another certain order made by Hon. William H. Waste, Chief Justice of the Supreme Court of California, but purporting to act in making said order as chairman of the judicial council of the state of California, and which order reads as follows:

> "In the Matter of the Assignment of Judges to Assist the District Court of Appeal, Second Appellate District, Division 2.
>
> "It having been made to appear to me by Hon. Lewis R. Works, Presiding Justice of the District Court of Appeal, Second Appellate District, Division 2, that the calendar of said court and division is congested: now, therefore, in order to expedite the judicial business of said court, and in accordance with the provisions of that certain amendment to the Constitution of the state (Senate Constitutional Amendment No. 15), ratified and approved by the people of the state at the general election held on November 2, 1926, providing for a judicial council, and authorizing the chairman thereof to assign judges to assist a court or judge whose calendar is congested, it is ordered that Hon. Harry R. Archbald, Hon. Elliot Craig, and Hon. C. W. Guerin, judges of the superior court of the state of California in and for the county of Los Angeles, are hereby assigned to sit and hold court as Justices of the said District Court of Appeal, Second Appellate District, Division 2, for the period of two weeks beginning Monday, December 20, 1926. Dated: San Francisco, California, December 14, 1926. William H. Waste, Chief Justice of the Supreme Court of California and Chairman of the Judicial Council."

The petitioner herein also seeks for a writ of prohibition directed to the aforesaid three superior judges, who are also made respondents herein, commanding them and each of them to desist and refrain from acting as Justices of the said District Court of Appeal in the said cause wherein the petitioner is one of the appellants, and for such other and further relief as may be meet in the premises.

The manifest purport of the foregoing application for these writs is that of presenting to this court for present determination the interpretation of that certain recently adopted amendment to the Constitution of California known as the "Judicial Council Amendment." Said amendment purports to add to article 6 of the Constitution a new section to be numbered 1a, and also to amend sections 6, 7, and 8 of said article 6. Section 1a thereof provides that "there shall be a judicial council," and provides for the constituent members thereof, and that "the Chief Justice or Acting Chief Justice shall be chairman," and that the clerk of the Supreme Court shall act as secretary of the council. It contains certain other provisions to be commented upon in the course of this discussion, but the particular provision requiring present interpretation is that portion of subdivision (6) of said section 1a which reads as follows:

> "The chairman shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred. * * * The several judges shall co-operate with the council, shall sit and hold court as assigned."

Before entering upon the discussion as to the scope and meaning to be given to that portion of section 1a of said amendment last above quoted as applied to the immediate situation before us, it may be well to take note of the fact that nowhere in the body of said entire amendment are the designations "Supreme Court" or "District Court of Appeal" made use of as conveying the express intendment of its framers that these appellate tribunals, or either or any of them, should come within its terms. The inference that such was in part its purpose is to be drawn, if at all, from two sources: First, from the fact that the constituent membership of the judicial council is to be made up in part by the designation of the chief justice or acting chief justice of the Supreme Court as its head, and by the selection of one associate justice of said court and of three justices of the District Court of Appeal as part of the membership of said body; and, second, from the very general phraseology of the several provisions of said amendment indicating that its purpose was that of "simplifying and improving the administration of justice," "the expedition of business," the adoption or amendment of "rules of practice and procedure for the several courts," and the making and receiving of reports "respecting the condition and manner of disposal of judicial business." Notwithstanding this paucity of direct reference in the body of this amendment to the appellate tribunals of this state, it is urged upon us by certain of the proponents thereof, appearing in aid of the respondents to this application, that the main object and purpose of this amendment to the Constitution was that of its application to these appellate tribunals, with a view to relieving an existing, and, to the minds of some of these, an alarming, state of congestion in the calendars and judicial business of these tribunals, and that for the attainment of these objects and purposes a most liberal, if not revolutionary, interpretation should be given to its terms. It is further to be noted in this immediate connection that the word "congested" in its application to court calendars is employed but once in the body of said amendment and that in the portion thereof above quoted defining the powers and duties of the chairman of the judicial council in his effort "to expedite judicial business." The extent of such congestion, the tribunals wherein it exists, and the precise nature, extent, and duration of such remedial measure as the framers of this amendment intended the judicial council or its chairman to inaugurate are nowhere dealt with therein outside of the brief paragraph above set forth.

[1] Notwithstanding these obvious deficiencies in the way of preciseness of statement as to the tribunals to which its provisions were intended to be applied, and also as to the nature and scope of its remedial procedure for the relief of whatever congestion exists in the disposal of judicial business in the courts of last resort, we have arrived at certain preliminary conclusions. They are, first, that it sufficiently appears from the body of this amendment, when read as a whole, that it was intended to have application to the entire judicial system of the state of California, including the Supreme Court and the several District Courts of Appeal; second, that it was intended to confer upon the judicial council certain powers such as are enumerated in subdivisions (1), (2), (3), (4), and (5) of section 1a of said amendment; third, that it was intended to confer upon the chairman of the judicial council certain powers and duties having reference to whatever state of congestion he may find to exist in the calendars of the courts or judges of this state, with a view to a speedy relief of such congestion, and "to expedite judicial business" by so doing. What is the measure and exercise of these powers and duties by the official to whom they are intrusted is the immediate problem presented in the proceeding before us.

[2] As we have already seen, the language employed in this amendment, "To assist a court or judge whose calendar is congested," because of its generality and absence of specific application and intendment, sheds but little light upon the proper interpretation to be given to this particular provision thereof under review in the instant proceeding. The phrase "to assist a court or judge whose calendar is congested" is, to say the least, an unfortunate expression in view of the meaning which had already been assigned by this court to a similar phrase in a statute having a similar object. In the case of People ex rel. v. Hayne, 83 Cal. 111, 118, 23 P. 1, 7 L. R. A. 348, 17 Am. St. Rep. 211, this court construed the phrase "to assist the court" as conferring no judicial functions upon the commissioners provided for by the act of 1889 (Stats. 1889, p. 13), but merely invested the commissioners to be appointed under said act with power to perform such preliminary service in the way of examining causes, searching libraries, or even drafting such opinions and conclusions as were preparatory to the order or judgment of the court which could only properly be held to constitute the exercise of its judicial power. It is true that in that case the construction put upon said phrase was constrained by the fact that the Legislature had no constitutional power to invest the commissioners provided for in said act with judicial functions, and for that reason the interpretation compelled in that case is not controlling here; but the fact that it was in that earlier case given the foregoing limited interpretation compels us to look beyond its own phrasing for a broader meaning. We find this broader meaning impliable from a succeeding sentence in the same provision, wherein it is declared that the several judges thus assigned "to assist a court or judge whose calendar is congested" are to "sit and hold court as assigned." The implication is thus clear that such judges as are thus assigned shall exercise judicial functions while operating under such assignment.

[3] Having reached this conclusion, we are next brought to the consideration of the tribunal or tribunals wherein the judicial functions of such assigned judges are to be exercised under their said appointment pursuant to the provisions and purposes of this amendment. This brings us to the individual case before us; and while the determination of this cause involves, strictly speaking, only the validity of the order of

the chief justice, acting as ex officio chairman of the judicial council, and the further order of the presiding justice of Division 2 of the District Court of Appeal in and for the Second Appellate District, it also involves a consideration of those sections of article 6 of the Constitution which relate to the establishment and constituent nature and powers both of the Supreme Court and of the several District Courts of Appeal and of the membership of each, and for this reason we deem it advisable to deal with the problem before us in its present or possible application to the judicial system of California as a whole. The Supreme Court of California was reorganized by the Constitution of 1879 and by the incorporation therein of article 6 of said Constitution. Section 2 of said article provided that—

> "The Supreme Court shall consist of a chief justice and six associate justices."

The section further provided for the division of the Supreme Court into departments, with power in the chief justice to assign three of the associate justices to each department and to change such assignments from time to time, and that the presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment, any four justices may, either before or after judgment by a department, order a case to be heard in bank. The chief justice may convene the court in bank at any time and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in bank; but, if four justices so present do not concur in a judgment, then all of the justices qualified to sit in the cause shall hear the argument, but to render a judgment the concurrence of four judges shall be necessary. In case of the absence of the chief justice from the place at which the court is held the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

The foregoing section of article 6 of the Constitution has remained unchanged in form to the present time, and it is to be noted that in said section, and also in section 4 of the same article as originally framed, there was no provision for the selection of justices or judges pro tempore to act in the place of a justice of the Supreme Court disqualified or unable to act in a cause pending before it. Section 4 of article 6 referred originally to the jurisdiction of the Supreme Court and remained in its original form until the year 1904, when said section was so revised as to provide for the organization and jurisdiction of District Courts of Appeal. Three District Courts of Appeal were then created and the jurisdiction of these defined. The jurisdiction of the Supreme Court was also therein redefined in view of the creation of these intermediate tribunals. These District Courts of Appeal as to their constituency and method of action were framed upon the model of the Supreme Court. One of the justices elected or appointed as such to each was to be the presiding justice thereof. The presence of three justices in each was made necessary for the transaction of any business by such court, except such as might be done at chambers, and the concurrence of three justices was made necessary to pronounce a judgment.

This amendment to the original section further provided that, whenever any justice of the Supreme Court was for any reason disqualified or unable to act in a cause pending before it, the remaining justices might select one of the justices of a District Court of Appeal to act pro tempore in the place of the justice so disqualified or unable to act. The section as amended also contained the provision that, whenever any justice of the District Court of Appeal was for any reason disqualified or unable to act in any cause pending before it, the Supreme Court might appoint a justice of the District Court of Appeal of another district or a judge of the superior court to act pro tempore in the place of the justice so disqualified or unable to act. This section as amended also provided for the granting of hearings before the Supreme Court in causes heard and determined by District Courts of Appeal. Section 4 of article 6 of the Constitution as thus amended remained in the above form until the year 1918, when it was again amended so as to provide for the creation of two additional divisions to be added to the District Courts of Appeal, similarly constituted as to membership and powers, one of which was to form Division 2 of the District Court of Appeal in and for the First Appellate District and the other of which was to form Division 2 of the District Court of Appeal of the Second Appellate District. This later amendment also provided that, in case of the appointment of a justice or justices pro tempore for the Supreme Court, such justice or judge pro tempore might be selected from among the judges of the superior court, as well as from the District Court of Appeal. The section was further amended so as to provide that the presence of two justices should be necessary for the transaction of business in the District Courts of Appeal and the concurrence of two justices in such courts should be necessary to pronounce a judgment. The foregoing sections of article 6 of the Constitution have since remained in their original or thus amended form up to the time at least of the adoption of the recent amendment to article 6 of the Constitution here under review.

Before proceeding to consider the provisions of the foregoing sections of article 6 of the Constitution in the light of the recent amendment it may be timely to take note of certain decisions of the Supreme Court which have an important bearing upon their interpretation. The first of these is that of the very early case of People v. Wells, 2 Cal. 198, wherein the question arose as to the power of the Legislature to declare that a vacancy existed in the constituent membership of the Supreme Court by reason of the fact that one of its duly elected justices was temporarily absent from the state, and also as to the power of the Governor to appoint a justice to fill such declared vacancy. Chief Justice Murray in a remarkably well-reasoned opinion declared the act of the Legislature to be unconstitutional and the appointment by the Governor to be invalid. In so doing he quoted the language of the Constitution of 1849, which stated that the Supreme Court of California "shall consist of a chief justice and two associate justices," and held that these words "limit the number and ex vi terminorum forbid the possibility of there being more than three."

Another case bearing upon the subject is that of In re Jessup, 81 Cal. 408, 459, 21 P. 976, 22 P. 74, 1028, 6 L. R. A. 594, wherein in certain of the later stages of that somewhat famous case this court had occasion to consider the effect of a clause which had been added to section 45 of the Code of Civil Procedure which provided in substance, that the concurrence of five justices of the Supreme Court should be required in order to the granting of a rehearing after a department decision. Chief Justice Beatty, in delivering the opinion of the court upon this question, declared that this provision of the Code was invalid as an attempt to change the constitutional number of the membership of the Supreme Court required to concur in a judgment or order.

The case of Reeve v. Colusa Gas, etc., Co., 151 Cal. 29, 91 P. 802, has also a bearing upon the subject in hand. In that case the matter of the interpretation of the provision which was added to section 4 of article 6 of the Constitution in 1904, authorizing the substitution of a justice of the District Court of Appeal in the place of a justice of the Supreme Court disqualified or unable to act in a cause pending before it, came up for consideration. The above-entitled case had been decided in department. A rehearing was granted by the court in bank and the cause was placed upon the calendar of the full court for further hearing. In the meantime Justice Sloss had become a member of the court, and, deeming himself disqualified through interest, declined to sit in the case. Justice McFarland was ill and unable to be present at the hearing in bank. Accordingly the court selected Justices Cooper and Harrison of the District Court of Appeal in and for the First Appellate District to act pro tempore, the former in the place of Justice Sloss, and the latter in the place of Justice McFarland. The records of this court disclose that said cause was placed upon the calendar of the court in bank for hearing, and was argued upon the 23d day of February, 1906, before the court thus constituted, and was decided upon June 21, 1906, by a four to three decision, Justices Shaw, Angellotti, Harrison, and Chief Justice Beatty joining in the main opinion, and Justices Henshaw, Lorigan, and Cooper dissenting. A petition for rehearing was filed on July 10, 1906. When such petition came on for judicial action, Justice McFarland, having recovered from his illness, was able to function, and did so by joining the minority in an order granting a rehearing, on July 19, 1906, in which action Justice Harrison did not participate, but Justice Cooper did, Justice Sloss as to that cause being still disqualified. Thereupon the respondents moved the court to set aside its order granting such rehearing upon the ground that Justice Harrison, sitting pro tempore for Justice McFarland as to that cause, should, and Justice McFarland should not, have acted in the premises. The court, without going deeply into the merits of the matter, on April 4, 1907, decided that the order should stand. The case is interesting not so much on account of what was expressly decided, but because of the incidental light which it casts upon the operations of the Supreme Court under the amendment providing for the selection of justices pro tempore when one or more of the regularly constituted members of the court were disqualified or unable to act in respect to any cause or matter requiring the exercise of judicial functions. Our records disclose that between February 23, 1906, when Justices Cooper and Harrison were selected to act as Justices pro tempore in said cause, and April 4, 1907, when the decision of the court upon the motion to set aside its order granting a rehearing was handed down, the Supreme Court functioned as a judicial tribunal frequently with Justices Sloss and McFarland participating in the calling of calendars and decisions of causes other than the Reeves Case, and that, in fact, upon the very day, viz. June 21, 1906, upon which the Reeves Case was originally decided by the four to three decision of the court in bank above referred to, the Supreme Court in bank decided the case of People v. Weber, 149 Cal. 325, 86 P. 671, in which decision Justice Sloss participated and Justice Cooper acted as Justice pro tempore for Justice McFarland, who was still unable to act, but for whom Justice Harrison was still acting in the Reeves Case as a justice pro tempore.

We thus arrive at a contemporaneous interpretation of the scope and effect of the constitutional provisions permitting the selection of justices pro tempore in the Supreme Court and in the District Courts of Appeal prior to the adoption of the most recent amendment here under review. The importance of the foregoing contemporaneous interpretation of the constitutional provisions relating to justices pro tempore becomes apparent when we consider more closely the constituent nature and method of functioning of these two tribunals under the Constitution as it stood prior to its recent amendment. Section 2 of article 6 provided that "the Supreme Court shall consist of a chief justice and six associate justices." Section 4 of the same article as amended in 1918 provides that the Courts of Appeal for the First and Second Appellate Districts shall each consist of two divisions of three justices each. The court of the Third Appellate District shall consist of three justices. Section 2 of said article defines how the Supreme Court shall perform its judicial functions. The court may sit in departments and in bank. When the court sits in its departments each of its said departments shall have three associate justices and each of said departments shall have the power to hear and determine causes. The presence of three justices shall be necessary to transact any business in either of the departments, and the concurrence of three justices therein shall be necessary to pronounce a judgment. When the court sits or acts in bank the concurrence of four justices shall be necessary to order a case, heard and decided in department, to be heard in bank; and the concurrence of four justices shall be necessary to pronounce a judgment, provided that, if a cause is orally argued in bank, the concurrence of four justices who have heard such argument shall be necessary to pronounce a judgment therein. In the creation of the several District Courts of Appeal the same general plan and procedure for the functioning of these courts were followed and the same powers granted with regard to pro tempore justices. It would thus appear that an individual justice of the Supreme Court or of the District Court of Appeal possessed, as such, no power to perform any judicial function other than that to be performed by him as a component member of a group acting either in department or in bank in the Supreme Court or functioning in a like group relation in an appellate court. The persons who were selected to act as justices pro tempore of either court blended into the already constituted entity of which for the time being they were to form a part, and in so doing replaced those individual members of that entity who in relation to particular causes or calendars were disqualified or unable to act. In so doing they "assisted the court"; and it is interesting to note that the plan of calling in pro tempore justices as adopted in 1904 was evidently intended to be one of the ways then devised to relieve "congestions," since the same amendment which created the District Courts of Appeal for that then much-needed relief also provided for the maintenance of the man power of both courts by the selection of justices pro tempore in each as the emergency required.

[4] It has, however, never been considered nor is it now contended, that the power then reposed in the justices of the Supreme Court or of the District Courts of Appeal to make selections of justices or judges to act in the stated emergencies as justices pro tempore, however flexible its operation as disclosed in the Reeves Case, could be so indefinitely expanded as to permit either of these tribunals to so far replace its constituent membership as to create or constitute a Supreme Court or a District Court of Appeal so far composed of justices pro tempore as to exercise the judicial functions of the regularly constituted tribunal. It has never, for example, been considered, nor is it now contended, that, under the terms of the amendments of 1904 or 1918 of the Constitution relating to pro tempore justices, the members of the Supreme Court or District Courts of Appeal were thereby invested with the power to substitute for themselves, acting as a group in the performance of the judicial function, another body of men composed of justices pro tempore, and, as such, empowered to exercise the functions of a Supreme Court or District Court of Appeal; in other words, it was never intended to provide for the creation of a court pro tempore. To so interpret these provisions in said amendments, evidently intended to afford temporary and emergency relief, would be to encourage the violation of a very vital principle of popular government which is none other than that of the right of the people of a commonwealth to have their essential rights, liberties, and interests in respect to person and property heard and determined by courts of last resort, the constituent membership of which is composed of public servants of their own selection. That the people might transfer the direct exercise of this selection to those whom they may have chosen to administer the functions of our representative scheme of government is undoubted, but the text of such transfer, whether embodied in a Constitution or a statute, should be plain and unambiguous.

[5, 6] Having thus far interpreted the several provisions of article 6 of the Constitution as these existed prior to the recent amendment of said article known as the "Judicial Council Amendment," we now arrive at the interpretation of said amendment. In so doing we are to treat said amendment as a whole and are to consider it in the light of our foregoing interpretation of the provisions of said article 6 of the Constitution which it purports to amend. We are, of

course, to endeavor to construe it in the light of whatever evils or defects in the administration of justice we shall find it to have been designed to remedy. In this latter effort we have not found ourselves greatly aided by considerations supposed to have preceded or even attended the formulation of this measure, nor by suggestions made to the electors through whatever propaganda accompanied its proffer for adoption or rejection by said electorate. Such aids to the interpretation of a written document, while available to the courts, are not at all to be considered as controlling, since whatever may have been the intent of the proponents of a particular change in a law must at the last analysis be derived from the language of the proposed enactment purporting to effect such change. Tynan v. Walker, 35 Cal. 634, 95 Am. Dec. 152; Estate of Young, 123 Cal. 337, 55 P. 1011, and cases cited. When we examine this amendment as a whole we discover that it embodies two main purposes, the first of which in the order of expression is that portion of section 1a thereof which proceeds to create a judicial council and to invest that body with certain powers and duties chiefly administrative in character, and, in the main, similar to provisions in the statutes of several other states relating to judicial councils. The other purpose disclosed by an inspection of this amendment is that expressed in subdivision (6) thereof which purports to invest the chief justice of the state, acting ex officio as chairman of the judicial council, with certain powers and functions through the exercise of which he is to "seek to expedite judicial business and equalize the work of the judges." It is with the scope and method of the exercise of these powers and functions that we are, in the instant proceeding, chiefly, if not wholly, concerned. In entering upon this inquiry we do not feel ourselves bound to choose between the rules defining the divergent paths of strict and of liberal interpretation; but if we were so bound we would feel constrained to follow the path of liberality in interpreting and applying the terms of this amendment with a view to aiding in the achievement of its avowed object, viz. that of "expediting judicial business," since as a court of last resort we are more vitally concerned than any other official or unofficial organization in this state in achieving that result. We are not, however, for that reason, to neglect or minify those other certain cañons of interpretation which should guide and control the courts in determining the extent and limitations of proposed changes in established laws, and especially in the organic law. One of the most important of these is that relating to repeals by implication. It is a doctrine of universal acceptation that repeals by implication are not favored in the interpretation of laws. No higher authority for this doctrine need be cited than that of Judge Cooley in his great work on Constitutional Limitations, wherein he thus states the rule and outlines its application:

> "Repeals by implication are not favored; and the repugnancy between two statutes should be very clear to warrant a court in holding that the later in time repeals the other when it does not in terms purport to do so." Cooley, Const. Limitations (7th Ed.) pp. 216, 217, and cases cited.

The rule is even more strongly stated by the latest utterance of this court upon the subject wherein it is declared:

> "Repeals by implication are not favored and are recognized only when there is an irreconcilable conflict between two or more existing legislative enactments." Railroad Comm. v. Riley, 192 Cal. 54, 57, 218 P. 415, 417, and cases cited.

[7] The older authorities supporting this rule are fully collated in 23 California Juris. pp. 694, 695. The application of this principle to the instant problem is attended with another principle of interpretation of almost equal importance, which is that, when in any enactment there appears an express modification or repeal of certain provisions in a former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal. This upon the principle "expressio unius, est exclusio alterius;" and in such a case an implied modification or repeal of such portions of the former law as are not expressly referred to as being repealed or modified is to be all the more avoided in determining the intent and effect of the latter enactment. Crosby v. Patch, 18 Cal. 439, 441.

[8] The application of the foregoing principle to the instant situation is this: By the terms of section 6 of said amendment the previously existing provisions of the Constitution respecting superior courts are expressly modified and to that extent repealed in so far as these related to the number of superior judges who might function in said courts in the several counties of California. This was accomplished by the provision in said section 6 of the amendment stating that—

> "There may be as many sessions of a superior court at the same time as there are judges elected, appointed or assigned thereto."

This express provision read in connection with the language of section 1a of said amendment would expressly authorize the chairman of the judicial council to increase the number of those who could exercise the judicial function in the superior courts; but there is no such express provision with relation to the appellate courts, and the absence thereof renders fully applicable both of the foregoing rules forbidding repeals by implication. Bearing in mind these salutary rules, and bearing in mind, also, the interpretation which has already been given to the several provisions of article 6 of the Constitution as they read prior to the recent amendment, we apply ourselves to the specific language of the amendment itself. Subdivision (6) of section 1a thereof, as we have seen, provides that the chairman of the judicial council in his effort to expedite judicial business—

"shall provide for the assignment of any judge to another court of like or higher jurisdiction to assist a court or judge whose calendar is congested."

The phrase "to assist a court" in the above quotation is the only one with which we are presently concerned, since, as to the Supreme and appellate courts, it is only such courts which, in their group constituency, as distinguished from the judges or justices thereof, have calendars which could be congested. The power with which the chairman of the judicial council is therefore invested by the foregoing clause in said amendment is that of assigning judges or justices "to assist" the Supreme Court or the several District Courts of Appeal as these courts were theretofore constituted under the terms of the Constitution prior to said amendment, whenever the calendars of said tribunals had become congested. It was these courts as thus constituted which were to be thus "assisted," and the assistance thus to be rendered was to be that supplied through the assignment of a justice or judge not already a constituent member of the court to be thus assisted to be and to act as one of the members thereof, and, in the language of a later clause in said section of said amendment, to "sit and hold court as assigned." The authority of the judge or justice thus assigned "to sit and hold court" must, however, be interpreted in the light of the already existing provisions of the Constitution relating to the constituent nature of each of said tribunals; and since section 2 of article 6 had already provided that "the Supreme Court shall consist of a chief justice and six associate justices," and since section 4 of said article had, as amended in 1904 and 1918, similarly provided that the several District Courts of Appeal or their divisions should consist of three justices each, and since, as we have already seen, these respective tribunals under said constitutional provisions could only function in certain defined groups composed of the individual justices thereof, it would result irresistibly that the judge or justice so assigned by the chairman of the judicial council "to sit and hold court as assigned" could only do so as a member of one or the other of such groups and could only exercise a judicial function in such relationship to the already constituted membership of said courts respectively as would not change or increase the designated number of the constituent membership thereof as fixed by the terms of sections 2 and 4 of said article 6 of the Constitution as these read prior to said recent amendment; for, were it otherwise, necessarily these prior sections of the Constitution would to that extent have been by implication repealed.

[9, 10] In obedience to the above-stated rule against repeals by implication we should therefore diligently seek for an interpretation of the foregoing clauses in the recent amendment as would not have such effect; and for the like reason we should earnestly endeavor to so construe the same as not to effect any change in the groupings of either of said tribunals or in the number of the departments or divisions thereof as fixed by the provisions of sections 2 and 4 of said article 6 of the Constitution as these read prior to said recent amendment. From these considerations certain deductions would seem logically to follow. The first of these is that in making the assignment of any justice or judge or of any number of such "to assist" the appellate tribunals the chairman of the judicial council was empowered to invest the persons so selected and assigned with no other or different official relation to such courts than that held by the already regularly constituted members thereof, which, as we have seen, was merely that of blending into the group constituency thereof in order, in that relation, to exercise the judicial function; in other words, the individual justice or judge so assigned was to occupy substantially the same relationship to the already constituted group denominated "the court" as that occupied by justices pro tempore under the terms of article 6 of the Constitution as it stood prior to such amendment. In stating this conclusion we are not, however, to be understood as holding either that the former provisions of article 6 of the Constitution relating to justices pro tempore has been repealed or that the change in the Constitution wrought by this amendment has not broadened the conditions which, under the Constitution as it formerly stood, were a limitation upon the power of appointment of justices pro tempore.

As to the first of these suggestions, it would seem to be apparent that it was the express purpose of the framers of this amendment to retain unchanged in their terms, except in one regard, the former constitutional provisions relating to the appointment of justices pro tempore, since, by the succeeding sentence of the paragraph of section 1a immediately under review, the chairman of the judicial council is given power to assign a justice or judge "to act for a judge who is disqualified, or unable to act." When we read this express transfer of power to the chairman of the judicial council to assign justices and judges pro tempore under the precise conditions which attended their selection prior to said amendment, and when we consider the same in the light of the preceding clause authorizing the assignment of justices or judges "to assist" these courts, we must assume, in order to give effect to both, that it was the intention of the framers of this amendment to so broaden the former provision as to authorize the selection of justices or judges pro tempore to assist said courts when their calendars were congested, although the regularly constituted justices of said courts who were thus, for the purpose of hearing particular causes or calendars, replaced *were neither disqualified nor unable to act.*

It may be argued against this interpretation that the phrase "to assist a court or judge whose calendar is congested" if given this broader meaning removes the necessity for the succeeding phrase "to act for a judge who is disqualified or unable to act." This argument, it must be conceded, brings us face to face with the following dilemma: If the first above-quoted clause is *not* to be given the broader meaning above assigned to it, then it becomes merely waste and idle words, since the power to make use of pro tempore judges under the former terms of the Constitution would be in no wise changed; on the other hand, as is argued, if said first-quoted provision *is* to be given such broader meaning, then the succeeding clause becomes waste and idle, since it is fully covered under the broader meaning of the preceding grant of power. Confronted with this situation, we are reminded that between Scylla and Charybdis the wise Ulysses found safety in a middle course and that we may profit by the ancient example.

[11] Between two apparently conflicting interpretations of a law equally adaptable, that one is to be preferred which will give effect to the entire language thereof rather than that which would destroy any portion of it and to that extent defeat the legislative intent. Civ. Code, § 3541; Cuthbert v. Woodman, 185 Cal. 43, 45, 195 P. 673. It is possible to preserve in its entirety the foregoing paragraph in subdivision 1a of said amendment with the aforesaid broader significance assigned to the first above-mentioned clause thereof by assigning to the succeeding clause thereof an intent on the part of its framers to transfer the pre-existing power of selecting pro tempore judges, to serve in cases of disqualification or inability to act on the part of those whom they were to replace, from the courts formerly invested with the exercise of such power, to the chairman of the judicial council in the interest of the unification of action in that regard, and that, in order to clarify such intent, the particular clause referring to such emergencies and providing for such transfer was inserted in said amendment. Such an interpretation enables us to give effect to the entire provision without the violation of any of the foregoing cañons of interpretation. That such an interpretation of the foregoing provisions of the recent amendment, when read as a whole, would be susceptible of practical application, we entertain no doubt; and that such an interpretation would involve no necessary repeal by implication or otherwise of the former provisions of the Constitution relating to the constituent membership or functioning of either the Supreme Court or District Courts of Appeal we are equally sure. And we would go further and say that such a plan, if put into practical operation, would materially assist said courts in relieving congested calendars, wherever such exist, through increasing the man power of such courts without disturbing either their essential constituency or method of operation in the dispatch of their judicial business. A case and an illustration may make this more clear.

In the matter of People v. Ruef, 14 Cal. App. 576, 114 P. 48, 54, Chief Justice Beatty, in the opinion touching a rehearing in the Supreme Court, referred interestingly to the methods of work and of the activities of the members of such court preparatory to the final exercise of the judicial functions of the court itself. In addition thereto it may be said with reference to both the Supreme Court and the several District Courts of Appeal that only a small portion of the time of the individual membership of each of said courts is, during any period, occupied in such group action as that of hearing calendars or handing down opinions. During the greater portion of the year the individual members of these courts are occupied in chambers; in examining briefs and records; in library research; in preparing opinions or reviewing those of their associates similarly prepared. These essential labors may be, and frequently in the past have been, performed by individual justices in cases in which they were qualified to act while their associates with the aid of justices pro tempore sitting in their places were occupied in calling calendars or hearing arguments in which they were disqualified to act, or in which for one reason or another they were unable to be present in court session. The case of Reeve v. Weber, supra, well illustrates the flexibility of the provisions of the Constitution relating to justices pro tempore prior to the recent amendment; and we can see no serious obstacle in the way of so far enlarging that flexibility as to permit justices or judges, sitting and acting in a pro tempore relation to the regularly constituted courts, performing similar functions when the regularly elected or appointed members thereof were neither disqualified nor unable to act. The putting into operation of such a plan would seem to be merely a matter of routine and as such within the entire control of the members of these courts using the same for the more efficient dispatch of judicial business and the relief of congested calendars, without in any way disturbing the constituent organization of such courts as ordained by the Constitution prior to the adoption of said amendment.

[12] When this much has been concluded it would seem to logically follow that the order made by the chief justice acting ex officio as chairman of the judicial council in assigning Superior Judges Archbald, Craig and Guerin "to assist the District Court of Appeal, Second Appellate District, Division 2," may be upheld as a proper exercise of his powers under the terms of said amendment. It is contended that the use in said order of the phrase to the effect that the judges so assigned "are hereby assigned to sit and hold court as justices of the District Court of Appeal" goes beyond the granted powers of that official under the terms of said amendment as the same has been herein interpreted; but this phrase, if construed to refer to these judges in their individual relation to said court, is subject to no such objection. The difficulty with this proceeding springs not from the order of the chairman of the judicial council above referred to, but from the interpretation sought to be placed thereon by the division of the District Court of Appeal to which these judges have been so assigned. Pursuant to such assignment the said Second Division of said District Court of Appeal made an order that the particular cause wherein the petitioner herein is an appellant be placed on the calendar of said division for hearing and argument before the aforesaid three superior judges, to whom, as said order reads, "the said cause is hereby assigned for hearing, determination, and judgment." It thus appears as the necessary effect of the foregoing order that the three superior judges so individually assigned to assist said division of the District Court of Appeal are to sit and act not in that individual relationship to said court which each of them would otherwise have occupied as justices pro tempore under the terms of the Constitution as it formerly read and as we have herein construed it to mean, but in an entirely different relationship, viz. that of a group of justices pro tempore sitting as a court, performing all of the judicial functions of a court and particularly performing all of the judicial functions of a division of said Court of Appeal. It would seem plain that, in thus setting up what is in effect a new group of justices who are to thus sit and act as a court and in effect as a division of said court, the District Court of Appeal, so attempting to do, could be upheld in such action only upon the theory that the provisions of section 4 of article 6 of the Constitution as amended in 1918 have by implication been repealed in so far as those provisions declare that there shall be but two divisions of said District Court of Appeal.

Again referring to the principle that repeals by implication are not favored and to the special application of such principle to cases wherein the suggested and altogether implied repeal is revolutionary in its character and effect, we have earnestly sought for an interpretation of the provision of section 1a of said amendment which would entail no such extreme consequences, and which would yet enable said provision to be given such operation and effect as would suffice to accomplish the purposes which prompted its adoption. Such an interpretation is the one already herein declared, which involves no material repeal or alteration in the previous provisions of the Constitution, and which, if given operation in the spirit of liberality and flexibility with which the previous changes in the organic law relating to justices pro tempore have been construed and applied, but with the broader scope in one respect which we think this amendment in its application to appellate tribunals permits, would, in our opinion, be productive of the desired result. This result would be to permit assigned justices or judges under the amendment to function as justices or judges pro tempore functioned under the provisions of the Constitution as they existed prior to the amendment, with the added right to so function in causes wherein the regular justices so replaced were neither disqualified nor unable to act. The assistance so afforded would seem to meet the necessity for added man power in such courts as is contended for by counsel for respondents and at the same time not disturb the operations of the regularly constituted court, as contended for by counsel for petitioner.

We therefore hold that the order of Division 2 of the District Court of Appeal in and for the Second Appellate District, in so far as it undertakes to authorize Judges Archbald, Craig, and Guerin to sit and act in the group relation of a court and of a division of said District Court of Appeal, and in such relation and capacity to hear, determine, and adjudge the case of the appellant and petitioner herein pending upon appeal in said District Court of Appeal, is invalid; that such order of said division of said court should upon this application for a writ of review be annulled; and that a writ of prohibition should issue enjoining and prohibiting the respondents Archbald, Craig, and Guerin from exercising the judicial functions of a court and from hearing, determining, and adjudging the cause of the appellant and petitioner herein in that capacity and under the direction of said invalid order.

The said order is annulled and a writ of prohibition is ordered to issue accordingly.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SEAWELL, J.

200 Cal. 798

LLOYD A. LANDON, Petitioner, v. District COURT OF APPEAL, SECOND APPELLATE DIST., DIVISION 2, et al., Respondents. (L. A. 9634.)

(Supreme Court of California. Feb. 28, 1927.)

In Bank. Application for certiorari to review an order of the District Court of Appeal, Second District, Division 2, designating judges of the Superior Court assigned to assist such court to sit as a separate division thereof. Order annulled.

Munson T. Case and William G. Randall, both of Los Angeles (Wm. J. Hunsaker, and Daniel M. Hunsaker, both of Los Angeles, and F. M. Angellotti and Wm. B. Bosley, both of San Francisco, of counsel), for petitioner.

R. P. Henshall, of San Francisco, amicus curiæ.

U. S. Webb, Atty. Gen., John Perry Wood, of Los Angeles, Max Thelen and Warren Olney, Jr., both of San Francisco, for respondents.

Thos. C. Ridgway, of Los Angeles, amici curiæ.

PER CURIAM. While the situation involved in this proceeding differs in certain respects from that involved in the matter of Fay v. District Court of Appeal et al. (Cal. App.) 254 P. 896, this day decided, there is no difference in the legal principles applicable to each. Upon the authority of Fay v. District Court of Appeal, supra, it is ordered that a like order and writ accordingly issue.

HOMAN v. BOARD OF DENTAL EXAMINERS OF CALIFORNIA et al. (Civ. 5652.)★

(District Court of Appeal, First District, Division 2, California. March 8, 1927. Hearing Granted by Supreme Court May 5, 1927.)

1. Physicians and surgeons 🔑11(2)—Not until judgment charging dentist with major misdemeanors is obtained can license be revoked on such grounds (Dental Act, §§ 12, 13).

Since Dental Act (Deering's Gen. Laws 1923, pt. 1, p. 682) §§ 12, 13, declaring that license of dentists may be revoked for major misdemeanors, provides for hearing in superior court, license cannot be revoked on such grounds until judgment is obtained in superior court.

2. Physicians and surgeons 🔑11(3)—Charge dentist "bartered" for nonresident's license to protect illegal practitioner held not to charge unprofessional conduct warranting cancellation of license (Dental Act, § 13).

Charge that licensed dentist "bartered;" i. e., negotiated for, for license of Chicago dentist, to be used by licentiate to protect illegal practitioner in his office, *held* not to properly charge as ground for cancellation of license unprofessional conduct within Dental Act (Deering's Gen. Laws 1923, pt. 1, p. 682) § 13, by aiding unlicensed person to practice dentistry unlawfully.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Barter.]

3. Physicians and surgeons 🔑11(3)—Evidence held not to sustain charge dentist bartered for license to protect unlicensed practitioner.

Evidence *held* not to sustain charge that licensed dentist bartered for license of Chicago dentist, to be used by licentiate to protect illegal practitioner in his office.

4. Physicians and surgeons 🔑11(2)—"Certificate," within Dental Act prohibiting bartering therefor held to have been used in ordinary meaning of license (Dental Act, § 12).

"Certificate," within Dental Act (Deering's Gen. Laws 1923, pt. 1, p. 682) § 12, declaring it to be unprofessional conduct to barter therefor, *held* to have been used in ordinary meaning of license.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Certificate.]

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Proceeding for writ of review by W. W. Homan to review an order of the Board of Dental Examiners of California and others. From a judgment for respondents, petitioner appeals. Reversed, and judgment ordered granting writ.

Paul F. Fratessa and Stanislaus A. Riley, both of San Francisco, for petitioner.

Frank J. Burke, of Petaluma, for respondents.

STURTEVANT, J. The plaintiff commenced a proceeding to obtain a writ of review for the purpose of obtaining a judgment annulling the action of the defendant board, which purported to revoke the license of the plaintiff to practice dentistry. Before proceeding to discuss the attacks made by the plaintiff, it is well to call attention to the fact that, by virtue of the provisions of the statute (Deering's General Laws, 1923, part 1, p. 682), it is made unlawful to practice dentistry without first obtaining a license. The statute applies to college graduates and others. After the application has been approved by the board of dental examiners the statute authorizes the issuance to the applicant of a license. The license so issued continues in force until the 1st day of May following, and thereafter so long as the holder pays the annual tax provided by the statute. However, the statute contains a condition subsequent to the effect that the licentiate must, within six months, register his license with the county clerk of the proper county, and unless he does so the license is forfeited. The statute authorizes the secretary of the board of dental examiners to issue a certified copy of the license. When an applicant asks that his license be registered, the statute requires that he shall exhibit to the county clerk his license or a certified copy of the

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★Superseded by opinion of Supreme Court, 262 P. 324.

same. It also requires that the applicant make and file with the county clerk—

> "an affidavit stating his name, age, birthplace, the number of his license and the date of its issue, that he is the identical person named in the license; that before receiving the same he complied with all the preliminary requirements of this statute (and the rules of the board of dental examiners as to the terms and the amount of study and examination); that no money other than the fees prescribed by this statute (and said rules), was paid directly or indirectly for such license, and that no fraud, misrepresentation or mistake in a material regard was practiced, employed or occurred by any person in order that such license should be conferred." Section 8.

The statute requires the county clerk to keep such affidavits in a book. It authorizes the county clerk to issue—

> "a certificate of registration in his county, which shall include a transcript of the registration. Such transcript and license may be offered as primary evidence in all courts of the facts therein stated. A copy of such certificate of registration shall be sent by the county clerk to the secretary of the board within five days after it is made."

Heretofore a complaint was filed before the defendant board which, among other things, alleged as follows:

> "Pursuant to the provisions of section 12 of the Dental Law of the state of California, I do hereby charge W. W. Homan, who is and was, at all of the times mentioned herein, a regularly licensed and practicing dentist in the state of California, with unprofessional conduct as the same is defined in section 12 of said law aforesaid, specifying as the basis of such charge the following facts:
>
> "That on or about the 26th day of September, 1924, said W. W. Homan did, in writing, barter for the license of one Frank J. Ryan of Chicago, Ill., said license to be used by Homan for the purpose of protecting an illegal practitioner in his office, or in other words, to be used as evidence of the holder's qualification to practice dentistry;
>
> "That by said acts and consent of W. W. Homan, as herein set out, said W. W. Homan did barter for the license of F. J. Ryan, a legal practitioner; that all of said acts as above set out are contrary to the provisions of said dental law."

The defendant was duly notified, he appeared at the hearing, a hearing was had, and the defendant board entered its judgment revoking the plaintiff's license. In this proceeding the plaintiff contends that the written charge was insufficient and that the evidence was insufficient to support the findings of the defendant board.

[1] Section 12 of the statute enumerates ten or more acts of persons claiming to be licensed dentists, which acts are designated misdemeanors. Section 13 of the statute provides:

> "Any dentist may have his license revoked or suspended by the board of dental examiners for any of the following causes: (1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction or a certified copy thereof, certified by the clerk of the court, or by the judge in whose court the conviction is had, shall be conclusive evidence. * * * (3) for unprofessional conduct or for gross ignorance or inefficiency in his profession. Unprofessional conduct is hereby defined to be: * * * Aiding or abetting any unlicensed person to practice dentistry unlawfully. * * *"

The offense last mentioned clearly contemplates an executed act as distinguished from an attempt to commit an act of unprofessional conduct.

Section 12, defining misdemeanors, among others designates the following:

> "Any person * * * shall be guilty of a misdemeanor, * * * who (1) shall sell or barter or offer to sell or barter any dental degree or any certificate or transcript, made or purporting to be made, pursuant to the laws regulating the license and registration of dentists; or (2) shall purchase or procure by barter, any such diploma, certificate or transcript, with intent that the same shall be used as evidence of the holder's qualification to practice dentistry, or in fraud of the laws regulating such practice. * * *"

To constitute the offense last designated it will be observed that it is not necessary that the charge should contain an averment that the improper purpose was actually accomplished. In other words, the charge is similar to the criminal offenses commonly designated as attempts to commit crimes. If the charge last mentioned is made the subject-matter of a criminal proceeding, and if the defendant is found guilty, then by virtue of subdivision 1 of section 13 the judgment of conviction may be conclusive evidence on which the dental board may revoke the license of the alleged practitioner; however, until such judgment is obtained, the alleged purported attempt does not constitute grounds for revoking a license. Section 13.

If it be claimed that many of the acts enumerated in section 12 are clearly acts of unprofessional conduct, as well as the acts enumerated in section 13, and therefore such acts are equally grounds for revoking a license, it is sufficient to say that the Legislature has defined the rights and has provided the remedy. As to the acts first mentioned it has declared that the same are major misdemeanors; that as such they are to be heard and determined by a superior court instead of an administrative board; that, if a judgment is entered against a practitioner, such judgment is a basis for revoking a license; but until such judgment is obtained there is no legislative authority for revoking on such grounds.

[2, 3] The respondent board contends that the charge placed before it constituted a charge of "aiding or abetting any unlicensed

person to practice denistry unlawfully. * * *" Section 13. Picking up the charge by its four corners and construing the language as favorably as we may, we are unable to uphold the claim. Moreover, the evidence introduced did not go far enough to sustain the claim. The pleading did not name "any unlicensed person," who, it was claimed, was aided or abetted. The proof did not cover that element. The proof did not show that any person other than Dr. Homan, whether licensed or otherwise, did any act in the office of the petitioner which is defined as practicing dentistry (section 11); or, if such act was done, that it was done while the petitioner unlawfully held the possession of Dr. Ryan's license, and such act was done thereunder. The proof did not show that the man, claiming to be Ryan, did not hold a lawful license. The defendant board claims it was not bound to introduce the proof and it cites and relies on People v. Boo Doo Hong, 122 Cal. 606, 55 P. 402. We are not called upon to decide the point because of the failure of proof on other material elements. However, it may be noted that the statute provides, as we have quoted above, a procedure which makes the records of the defendant board contain legal evidence of the status of the license of each practitioner, and therefore the defendant board is as fully informed as to the status of the license of each practitioner as is the practitioner himself. Under these circumstances it may be doubtful if the rule stated in the Boo Doo Hong Case applies to proceedings maintained under this statute.

The appellant claims that he did not "barter" for the license, and he calls to our attention that one meaning of the word is "to exchange one commodity for another." True, that is one meaning, but another meaning is to "negotiate for." The word "barter" was used by the pleader in the last sense.

[4] The appellant points to the fact that section 12 mentions degree, certificate, and transcript, but does not mention license, and he argues that the statute does not prohibit one from bartering for a license. We cannot say that we agree with him. Every license is ordinarily referred to as a "certificate" or "license certificate." There is nothing on the face of the statute showing that the word "certificate" was not used in section 12 as having that ordinary meaning.

As the pleading under attack appears to us to be an attempt to plead a cause of action under section 12, and not under section 13, other points made by the petitioner do not call for an expression by the court.

The judgment is reversed, and the trial court is directed to enter a judgment granting the writ as prayed.

We concur: KOFORD, P. J.; NOURSE, J.

81 Cal. App. 715

ROSENBERG et ux. v. SAN FRANCISCO STORAGE CO. (Civ. 5646.)★

(District Court of Appeal, First District, Division 1, California. March 12, 1927. Hearing Denied by Supreme Court May 10, 1927.)

1. Warehousemen 🔑34(7)—Evidence held to sustain findings as to deposit and value of property converted by warehouseman.

In action against warehouseman for conversion, evidence *held* to sustain findings as to fact of making deposit claimed and as to value of property, question of credibility of witnesses being for trial court before whom case was tried.

2. Appeal and error 🔑994(3)—Credibility of witness was for trial court in action tried to court.

Question of witness' credibility was for trial court, where action was tried to court.

3. Warehousemen 🔑24(7)—Warehouseman's limitation of liability by contract did not extend to subsequent deposits unless assented to (St. 1909, p. 437).

Fact that warehouseman limited its liability on deposits, in accordance with St. 1909, p. 437, did not, of itself, limit liability as to subsequent deposits of personal property received, in absence of assent, express or implied, of persons making deposits.

4. Warehousemen 🔑24(7) — Where original deposits with warehouseman were under contract limiting liability, subsequent deposits held subject to limitation (St. 1909, p. 437).

Where deposits of personal property were received by warehouse under contract limiting liability to $25 for each package, as provided by St. 1909, p. 437, persons making such deposits *held* bound by limitation on liability as to subsequent deposits, though no receipts were issued therefor, as persons making deposits impliedly assented to limitation of liability as to subsequent deposits.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Samuel Rosenberg and wife against the San Francisco Storage Company. Judgment for plaintiffs, and defendant appeals. Modified, and, as modified, affirmed.

Hearing denied by Supreme Court; CURTIS and PRESTON, JJ., dissenting.

Dowd & Reagh, of San Francisco, for appellant.

Brownstone & Goodman, of San Francisco, for respondents.

CASHIN, J. An appeal from a judgment in an action for conversion.

The complaint alleged that appellant corporation, which conducts a storage warehouse, received from respondents for storage certain personal property owned by them which it failed to redeliver on demand.

★Hearing denied by Supreme Court.

Judgment was entered for the plaintiffs in the sum of $440, the value of the property according to the findings of the trial court, with interest thereon at the legal rate from November 3, 1923, to the date of the judgment, and costs.

Appellant urges as grounds for reversal of the judgment that the findings are unsupported by the evidence, and that its liability, if any, was limited by contract.

Appellant admitted the receipt of several parcels of personal property from respondents, but denied the receipt of four parcels which the latter claimed were deposited and not redelivered. The first deposit of thirteen parcels was made on November 5, 1921, by respondent Lois Rosenberg, then unmarried, the receipt therefor being issued in the name of Miss Alexander. Subsequently, on May 15, 1922, three parcels were deposited and a fourth on August 11, 1922, the number regarding which there is no dispute aggregating seventeen parcels. Respondents intermarried in June, 1922, and, according to the testimony of the husband, the four parcels in dispute were owned by the spouses and were deposited subsequent to the marriage. The date of this deposit was not shown, but it may be inferred from the testimony that it was between the date of the marriage and September 15, 1922, when the seventeen parcels mentioned were redelivered to respondents. It appears that a receipt, which respondents were then requested by appellant to sign, contained, in addition to those redelivered, a description of the four parcels in question. It further appears that following the first deposit a storage receipt and contract containing limitations of liability was received by respondents; that a list of the parcels was contained therein and, according to the testimony of its officer, it was the practice of appellant, as other deposits were made, to add the latter to a duplicate of the receipt and list retained by it. This receipt was inclosed with a letter calling attention to the terms and conditions contained therein, and requesting that if the terms were not satisfactory the corporation be at once notified. No receipts for subsequent deposits were, according to the testimony of the respondents, issued to them.

[1, 2] It is urged by appellant that the testimony of the husband as to the fact and value of the deposit in question was uncertain and contradictory to a degree which destroyed his credibility. While his recollection of events was not clear, and his testimony was vague and uncertain in many particulars, yet the question of his credibility was for the trial court, and we cannot say that the evidence was insufficient to support its findings on these issues.

The material parts of the receipt and contract mentioned were as follows:

> "Received for the account of Miss Alexander the goods enumerated in the schedule annexed for storage upon the following terms and conditions: It is agreed * * *
>
> "The responsibility of this warehouse for any piece or package or its contents is limited to the sum of $25 unless the value thereof is made known at the time of the storing and receipted for in the schedule, and an additional charge made for the higher valuation.
>
> "Unless notice be given in writing to the warehouse within five days, the terms will be deemed to be correct and complete."

The receipt made no provision for subsequent deposits, and appellant was not apprised of the value of the parcels then or subsequently received for storage.

[3] As provided by statute (Stats. 1909, p. 437) appellant by contract might, and in the first instance did, limit its liability, but whether such liability was also limited as to the subsequent deposits depended upon the assent, express or implied, of respondents.

The letter containing the receipt and contract was addressed to Miss Alexander and received by Lois Rosenberg, and, according to the testimony of her husband, this receipt was seen and possibly read by him. He further testified that no receipt was demanded for the deposit in question, nor does it appear that appellant was notified that this deposit was made on a separate account. It was further shown that no account with the husband was opened by appellant, but that the storage charges on all the deposits were made in the first instance to the account of Miss Alexander and subsequently to Mrs. S. Rosenberg, and that statements of account were so issued and paid.

[4] It is clear that appellant understood that all subsequent deposits were made under the terms and conditions of the original agreement; and we are of the opinion that the only conclusion reasonably to be drawn from the evidence is that its terms were adopted and assented to by respondents, and that both were bound by the limitation of liability contained therein.

Under this view the conclusion of the trial court that respondents were entitled to judgment for the full value of the property cannot be sustained. It is therefore ordered that the judgment which, including interest, was entered for the sum of $505.97 be modified by deducting therefrom the sum of $390.98; and since, as thus modified, the respondents are not entitled to costs (Code Civ. Proc. § 1025), the award of $22.20 as costs of suit is stricken therefrom. As thus modified, the judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

GRAY v. HALL, County Clerk. (Civ. 3115.)★

(District Court of Appeal, Third District, California. March 16, 1927. Hearing Granted by Supreme Court May 12, 1927.)

1. Judgment ⚷485—On collateral attack only question involved is whether judgment is void on its face.

On collateral attack of a judgment, the only question involved is whether judgment is void on its face.

2. Judgment ⚷499—To determine validity of judgment on collateral attack by one not party, courts are limited to examination of judgment roll only.

In order to determine the validity of a judgment on collateral attack by one not party to action, the courts are limited to an examination of the judgment roll alone.

3. Judgment ⚷279—Order extending time to answer after default held not part of judgment roll (superior court rule 26; Code Civ. Proc. § 670).

Where order extending defendant's time to answer after default was not part of judgment roll, in view of Code Civ. Proc. § 670, and superior court rule 26, requiring copy of ex parte order to be served on adverse party within one day, it was error to admit in evidence order extending time to answer.

4. Pleading ⚷218(3)—Order overruling demurrer is not subject to amendment on ex parte application.

An order overruling a demurrer to a petition is not subject to amendment on an ex parte application.

5. Judgment ⚷106(2)—Answer filed after default held ineffective for any purpose.

Filing of an answer after entry of default is ineffective for any purpose.

6. Judgment ⚷106(3)—Defendant, not having filed answer to amended complaint after reversal of judgment, held properly defaulted, though original answer was on file.

Where judgment in original action was reversed on appeal, and thereafter amended complaint was filed and demurrer thereto was overruled and defendant was in default of answer, default was properly entered, even though answer to original complaint was on file, since original pleadings served no purpose as pleadings.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Application for writ of mandate by Harry J. Gray against Harry W. Hall, County Clerk of Sacramento County and ex officio Clerk of the Superior Court in and for Sacramento County. From a judgment denying the writ, petitioner appeals. Reversed.

Chas. A. Bliss, of Sacramento, for appellant.

John R. Connelly and Evan J. Hughes, both of Sacramento, for respondent.

FINCH, P. J. This is an appeal from the judgment denying petitioner's application for a writ of mandate.

In the year 1921 the petitioner commenced an action against P. L. Yarbrough and Elmer H. Gum, sheriff of Placer county, and recovered judgment therein. The judgment was reversed on appeal. Gray v. Yarbrough, 61 Cal. App. 724, 215 P. 914. Thereafter Gray filed his second amended complaint, to which Yarbrough demurred. His demurrer was overruled September 17, 1923, and he was given ten days within which to answer. Respondent's answer herein admits that Yarbrough, "being then in court and represented by counsel, duly waived notice of such decision and order," and that "respondent, county clerk, did, on * * * 29th day of September, 1923, enter the default of said P. L. Yarbrough." April 1, 1924, judgment was rendered in favor of Gray. In so far as material to the questions raised by this appeal, the judgment in that case is as follows:

"In this action the defendants * * * were regularly served with plaintiff's second amended complaint herein, and defendant P. L. Yarbrough having filed a demurrer thereto, which demurrer was by the court overruled, and said defendant P. L. Yarbrough having failed to answer plaintiff's said second amended complaint within the time allowed therefor, and the defendant Elmer H. Gum, as sheriff of Placer county, Cal., having failed to answer or demur to said second amended complaint, and the legal time for answering having expired, the defaults of said defendants P. L. Yarbrough and Elmer H. Gum, as sheriff of Placer county, Cal., were duly entered according to law.

"Now, on this day, on application of Chas. A. Bliss, Esq., attorney for said plaintiff, and upon legal evidence presented in support of said second amended complaint, the court finds that all of the allegations of plaintiff's second amended complaint are supported by legal evidence and are true; and it is hereby ordered that judgment be entered herein against the said defendant P. L. Yarbrough * * * in accordance with the prayer of said plaintiff's second amended complaint on file herein:

"Wherefore, by reason of the law and the premises aforesaid it is ordered, adjudged, and decreed * * * that the judgment which defendant Yarbrough obtained against * * * F. W. Herbert * * * for the sum of * * * $1,573.37 in the superior court of Placer county, Cal., on the 2d day of May, 1921, as described in plaintiff's second amended complaint, was obtained by defendant Yarbrough as trustee for, and for the benefit of, plaintiff, and said judgment has inured to the benefit of and now belongs to said plaintiff, and that said P. L. Yarbrough never had any interest therein or right thereto; that defendant P. L. Yarbrough be and he is hereby required to make and execute the necessary transfers and assignments to convey and transfer said judgment to plaintiff, and in the event of the neglect or failure of said P. L. Yarbrough to assign and transfer said judgment to plaintiff, the clerk of this court be, and he is hereby, directed to make the nec-

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★Superseded by opinion of Supreme Court, 265 P. 246.

essary transfer and assignment thereof to this plaintiff."

That judgment "has never been appealed from, vacated, or set aside." December 12, 1924, Gray served upon Yarbrough a notice and demand to transfer the judgment against Herbert, as provided in the foregoing judgment in the case of Gray v. Yarbrough, but Yarbrough refused to make the transfer. Due proof of such demand and refusal was filed with the respondent herein, and demand was made upon him to make the transfer as directed by the judgment. Respondent refused to make the transfer and this suit followed.

[1, 2] In respondent's brief it is said:

> "The only point of law involved in this appeal is whether or not the judgment entitled Harry J. Gray, Plaintiff, v. P. L. Yarbrough and Elmer H. Gum, * * * Defendants, * * * is void upon its face. In order to determine the validity of a judgment the courts are limited to an examination of the judgment roll alone."

As applied to the judgment under consideration, the attack being collateral and by one not a party to the action in which the judgment was rendered, respondent's statement is strictly correct. Crouch v. H. L. Miller & Co., 169 Cal. 341, 343, 146 P. 880; People v. Davis, 143 Cal. 673, 675, 77 P. 651; Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 674, 74 P. 301; Whitney v. Daggett, 108 Cal. 232, 235, 41 P. 471. It has been said, however, that:

> "If the parties admit the facts which show that the judgment is void, or if they are established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where the judgment is void upon its face." Akley v. Bassett, 189 Cal. 625, 639, 209 P. 576, 581.

[3] Over petitioner's objection that "it is irrelevant, immaterial, and incompetent and is not a part of the judgment roll, and for the further reason that the order is void under rule 26 of this court," the court admitted in evidence an order which, after the entitlement of the court and cause in the case of Gray v. Yarbrough reads as follows:

> "Upon good cause showing, it is hereby ordered that the defendant in the above-entitled action have to and including the 29th day of September, 1923, in which to file his answer in the above-entitled action.
>
> "Dated this 27th day of September, 1923.
>
> "Peter J. Shields,
> "Judge of the Superior Court."

Rule 26 provides that:

> "Every order obtained ex parte * * * must * * * be served by copy on the attorney of the adverse party within one day after it has been obtained, or it may be treated as void."

This order was not served upon the plaintiff in that action but it was filed September 27, 1923. Over petitioner's objection the court also admitted in evidence Yarbrough's answer to the second amended complaint in that action filed September 29, 1923, but after the entry of defendants' default therein.

[4, 5] The order extending Yarbrough's time to answer is not a part of the judgment roll. Code Civ. Proc. § 670. For that reason it was error to admit it in evidence. Respondent contends that it may be treated as an amendment of the order overruling the demurrer and as such a part of the judgment roll. Such an order is not subject to amendment on an ex parte application. Neither does the order extending the time in which to answer purport to amend the order overruling the demurrer. The filing of the answer after the entry of the default was ineffective for any purpose. Irvine v. Davy, 88 Cal. 495, 497, 26 P. 506; Christerson v. French, 180 Cal. 523, 525, 182 P. 27. The judgment recites that the default of the defendant was "duly entered according to law." This recital is conclusive on collateral attack. Catanich v. Hayes, 52 Cal. 338, 339; Sacramento Bank v. Montgomery, 146 Cal. 745, 751, 81 P. 138; Crouch v. H. L. Miller & Co., 169 Cal. 341, 345, 146 P. 880; Sheehan v. All Persons (Cal. App.) 252 P. 337, 339.

[6] Respondent contends that the clerk was without authority to enter the default because Yarbrough's answer to the original complaint was on file; that, after the first judgment was reversed, the "plaintiff filed an amended complaint * * * practically identical with his original complaint * * * except for the addition of certain allegations to avoid the statute of limitations"; that such answer "is a complete answer to all the allegations of the amended complaint with the exception of the allegations in reference to the time of the discovery of the alleged fraud, an admission of which, all other material facts being denied, did not entitle plaintiff to judgment." Respondent offered the original complaint in evidence, but petitioner's objection thereto was sustained. The contents of that complaint therefore cannot be considered. Even if the pleadings in Gray v. Yarbrough, which were not admitted in evidence, but are set forth in the transcript, might be considered, they would not help the respondent. After the second amended complaint was served and filed Yarbrough demurred thereto on general and many special grounds, and, after his default was entered, he filed an answer to that complaint. It appears therefore that he did not rely upon his answer to the original complaint as an answer to the second amended complaint, and neither party treated it as such. The second amended complaint superseded the original complaint, and, after the filing of the former, neither the latter nor the answer thereto served any purpose as a pleading. Schlake v. MacConnell, 69 Cal. App. 207, 209, 230 P. 974; Morris v. Hartley, 26 Cal. App. 61, 69, 146 P. 73. The case of Lincoln County Bank v. Fetterman, 170 Cal.

357, 149 P. 811, relied on by respondent, is not in point. That case involved a slight trial amendment which "raised no new issue and presented no new proposition which the defendant was called upon to meet." The court said:

> "The original answer was not only not eliminated by virtue of the amendment to the complaint, but was the answer joining the issues upon which the action was tried. It was an essential part of the judgment roll."

The contention in that case was that the defendant was entitled to a continuance on the ground that he was not then prepared to plead and meet the new issue raised by the amendment. Redington v. Cornwell, 90 Cal. 49, 27 P. 40, cited by respondent, merely holds that, after the filing of an amended complaint, the original complaint may be considered as a part of the record for the purpose of showing when the action was commenced and whether a new or different cause of action was introduced by the amended complaint.

The judgment is reversed.

We concur: HART, J.; PLUMMER, J.

81 Cal. App. 719

In re LASLEY. (Civ. 5524.) ★

(District Court of Appeal, Second District, Division 2, California. March 13, 1927. Hearing Denied by Supreme Court May 12, 1927.)

Attorney and client ⚷61—Where order admitting petitioner to bar was set aside for fraud, petitioner was never an attorney, and therefore could not be "reinstated."

On application for reinstatement as an attorney, where petition showed that the order admitting petitioner to the bar was set aside because of petitioner's fraud in procuring it, *held*, that in legal effect petitioner had never been an attorney and could not be "reinstated" as such.

Application by James Frank Lasley for reinstatement as an attorney at law. Petition denied.

Percy V. Hammon and James E. Mahon, both of Los Angeles, for petitioner.

WORKS, P. J. This is an application for reinstatement as an attorney at law.

The petition shows that an order was made admitting petitioner to the bar, but that it was later set aside because of the fraud of petitioner in procuring it. It is under these circumstances that he asks for a reinstatement. In legal effect petitioner has never been an attorney at law in this state. He therefore cannot be "reinstated" as such. In re Mash, 39 Cal. App. 548, 551, 179 P. 897; In re Stevens, 197 Cal. 408, 241 P. 88. It is true that in the first of these cases the Supreme Court recognized an application for reinstatement as an application for admission to the bar. This, however, was after the District Court of Appeal had granted the application and when the matter was before the higher tribunal upon an application for a transfer. The present proceeding is at quite a different stage. Moreover, while petitioner, in his points and authorities, appears possibly to exhibit a willingness that his petition may be considered as an application for admission, he nevertheless contends that he is entitled to a reinstatement. We are in doubt whether he intends his petition as one for admission, for the reason that he refers in his brief to readmission and not to admission. For instance, at the beginning of the brief he alludes to his petition "for reinstatement, or readmission, or restoration, or whatever the court deems advisable to call it."

We have no desire to be unduly technical in such matters, but under all the circumstances attending the application we think it were better, if petitioner be so advised, if he will file an application for admission to the bar in the form which is usual and which is understood and acted upon by the board of bar examiners in the performance of its labors under the law.

Petition denied.

We concur: CRAIG, J.; THOMPSON, J.

82 Cal. App. 11

BLODGETT v. SUPERIOR COURT OF SANTA BARBARA COUNTY et al.

(Civ. 5630.)

(District Court of Appeal, Second District, Division 1, California. March 22, 1927.)

Mandamus ⚷154(7)—Unless petition shows arbitrary refusal to try case, mandate will be denied on assumption case will be set for trial on request.

Where petition for writ of mandate to require court to try case does not show that court's refusal to try case was arbitrary or without sufficient cause, appellate court will assume that, on request, case will be set for trial without unnecessary delay and deny writ.

Application by D. T. Blodgett for writ of mandate to be directed to the Superior Court of the County of Santa Barbara and John L. Hudner, Judge presiding, requiring respondents to proceed with the trial of a certain cause. Writ denied.

D. T. Blodgett, in pro. per.

PER CURIAM. The gist of the case is shown by the following alleged facts: In respondent court an action is pending, wherein the petitioner, as plaintiff, sues one Greenfield to recover damages for libel. By order

★Hearing denied by Supreme Court.

made on February 14, 1927, the case was set for trial for March 9, 1927, and it was further ordered that a jury be summoned for trial of the cause at that time. Said order was never vacated or modified. On March 9, 1927, petitioner "appeared in open court and demanded that said superior court proceed to try said cause as provided by the foregoing order, but said court refused and still refuses to try said cause."

When the original petition herein was presented this court gave leave to petitioner to file an amendment to the petition, for the purpose of showing the facts relating to the grounds or purported grounds and reasons of the court's refusal to proceed with the trial, or showing in any way that the court's refusal was without sufficient cause. The amendment, however, fails to show that the alleged refusal was arbitrary or without sufficient cause. Therefore we assume that, on further request, duly made, respondent court will reset the cause for trial without any unnecessary delay. It is a just criticism, however, if such be the fact, that the court below allowed the cause to go over beyond March 9th, without entering any order relating to the case.

The petition for writ of mandate is denied.

82 Cal. App. 12

MERZ v. POOLE. (Civ. 3157.)

(District Court of Appeal, Third District, California. March 23, 1927.)

1. Frauds, statute of 🔑23(3)—Person present at sale, who promised to pay for tires furnished another and against whom charge was made, held principal debtor (Civ. Code, § 2794, subd. 2).

Person present at sale who instructed seller to furnish another with tires, and promised to pay cost, *held* liable on obligation as principal debtor, not mere surety or guarantor, under Civ. Code, § 2794, subd. 2, where seller entered charge against him.

2. Sales 🔑52(3)—Sales slip and ledger sheet, showing charge against defendant, held admissible in action for price of tires delivered to third party to show defendant was principal debtor.

In action to recover price of tires, sales slip and ledger sheet *held* admissible to show price was charged to defendant in order to prove that defendant was principal debtor; tires having been delivered to third party.

3. Trial 🔑46(2)—Sustaining objection to question whether buyer had other transactions with seller held not error, absent showing of materiality.

In action to recover price of tires, sustaining objection to question whether defendant had any other transactions with plaintiff *held* not error, where there was nothing in question or in counsel's statement to indicate facts sought to be proved were material.

4. Appeal and error 🔑205—Offer on appeal to show materiality of rejected testimony held too late.

Proof of facts tending to show materiality of excluded testimony, offered for first time on appeal, *held* to come too late.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by Charles Merz against James D. Poole. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Davies, of Marysville, for appellant.
W. P. Rich, of Marysville, for respondent.

FINCH, P. J. This is an appeal by the defendant from the judgment herein in favor of the plaintiff. The facts are summarized in appellant's opening brief as follows:

"Plaintiff is engaged in the sale of automobile tires in the city of Marysville, and the defendant is by occupation a jeweler. It appears that on December 12, 1925, one Dave Johnson, the owner of a motor truck, called upon plaintiff at his place of business about 10 o'clock in the morning, and sought to purchase two tires for his truck, on credit. Johnson had a hauling contract with the Yuba River Lumber Company, a corporation, of which the defendant, Poole, was the secretary-treasurer. Credit was refused to Johnson, and later, in the afternoon of the same day, Johnson returned to the store of plaintiff, accompanied by the defendant. The testimony as to what actually occurred at that time is conflicting. Plaintiff says that the defendant requested him to furnish Johnson with the tires, and charge them to defendant; that he (the defendant) would pay half of the bill on October 1st, and the balance every two weeks. The other witness on behalf of plaintiff is one of plaintiff's employees, and he testified that the defendant stated to plaintiff: 'Go ahead; put the tires on, Charlie; and I will pay for them all right; put them on.'

"The defendant denies making either of the statements testified to by plaintiff, and his employee, and his version of the conversation is that, in response to the questions by plaintiff, defendant informed him that Johnson was working for the Yuba River Lumber Company and would continue to do so until the end of the season; that at no time did the defendant request plaintiff to furnish the tires to Johnson, nor did he offer to pay for any tires, nor did he purchase any tires from plaintiff. Subsequently, and one day after this conversation, Johnson appeared at the store of the plaintiff, and two tires of the value of $336.70 were delivered to him and placed upon his truck. The defendant was not present. At that time Johnson affixed his signature to Plaintiff's Exhibit No. 1, which exhibit purports to be a sales tag showing that defendant here was charged with two tires of the value of $336.70."

Plaintiff testified:

"On September 12th in the morning about 10 o'clock a young fellow came into my place, Mr. Johnson there, and asked if he could buy a couple of tires on time. I told him no, I didn't know him, in a nice way, told him I didn't do business that way. Along in the afternoon about 1 or 2 o'clock Jim Poole and Johnson came into the store, looked at the tires, and Jimmy says, 'Well, I owe this fellow some money. * * * You give him the tires and charge them to me. * * * I would like a little time on this. I will pay half of it on October 1st, and I will pay you every two weeks, one quarter. * * * The next day Johnson brought the two wheels in, put the tires on. I charged them to Jim Poole, wrote the terms out on a slip which I have here, and Johnson signed it received by him. * * * That was the market price at that time."

Another witness, one of the plaintiff's clerks, testified that, at the time referred to in the plaintiff's testimony, the defendant said to the plaintiff:

"Go ahead, put the tires on, Charlie, and I will pay for them."

The sales slip referred to in the plaintiff's testimony was introduced in evidence, as was also the ledger sheet upon which the plaintiff charged the price of the tires to defendant.

[1-3] The evidence is clearly sufficient to justify the finding that the defendant's promise was an original obligation on his part to pay for the tires, and made him the principal debtor, and not a mere surety or guarantor. Civ. Code, § 2794, subd. 2; Scribner v. Schenkel, 128 Cal. 250, 253, 60 P. 860; Jan Wai v. Smith-Riddell Co., 55 Cal. App. 59, 65, 202 P. 952; Cole v. Bux, 49 Cal. App. 718, 719, 194 P. 71; Meyers v. McKillop, 37 Cal. App. 144, 145, 173 P. 773. The sales slip and ledger sheet were admissible in evidence for the purpose of showing that the price of the tires was charged to the defendant, because, if Johnson had been charged therewith, that fact would have tended to show that he was the principal debtor. McClenahan v. Keyes, 188 Cal. 574, 582, 206 P. 454. The defendant testified in his own behalf. During his direct examination the following occurred:

"Mr. Davies: I will ask you did you have any other transactions with reference to tires after the 12th day of September with Mr. Marz? A. Yes, sir. Mr. Rich: If it concerns these tires, well and good, otherwise it is immaterial and incompetent and I object to it. Mr. Davies: I want to find out any transaction of any kind. The Court: Objection sustained."

[4] Appellant contends that this ruling was error. There is nothing in the question or in the statement made by counsel for defendant to indicate that the facts sought to be proved were in any respect material. Counsel for appellant states in the opening brief that he intended to follow up the question asked with proof of facts which he claims would have been material. His explanation of his purpose comes too late. It should have been made to the trial court to enable that court to determine whether such facts were material.

The judgment is affirmed.

We concur: PLUMMER, J.; SHIELDS, Justice, pro tem.

82 Cal. App. 1

FELTON WATER CO. v. SUPERIOR COURT IN AND FOR SANTA CRUZ COUNTY et al. (Civ. 5778.)

(District Court of Appeal, First District, Division 1, California. March 21, 1927.)

1. Prohibition 🔑29—In prohibition to arrest contempt proceeding for violating judgment, directed to defendants and their agents, court will assume that respondent was defendants' agent.

Where facts leading to issuance of order to show cause why petitioner for writ of prohibition should not be adjudged in contempt for failure to comply with judgment, directed to defendants and their agents, are not disclosed by record, court will assume that order was based on acts alleged to have been committed by petitioner while acting as agent of parties bound by decree.

2. Appeal and error 🔑447—Prohibitive injunction against diversion of water was not suspended by appeal.

Where injunction prohibited diverting of water of certain brook, in absence of contrary showing, appeal did not suspend power of trial court to enforce it not only against parties to action, but against agents of parties having knowledge of it, or persons acting in collusion with them.

3. Prohibition 🔑28—Whether one violating injunction against diversion of water acted as agent of parties enjoined, or in exercise of paramount right to divert it, held for trial court.

Where defendant in contempt proceeding violated injunction against diversion of water, whether it acted as agent of parties enjoined or in collusion with them, or in exercise of paramount right to divert waters of stream, are questions for trial court.

4. Prohibition 🔑11—Prohibition does not lie to prevent subordinate court from deciding erroneously.

Writ of prohibition does not lie to prevent subordinate court from deciding erroneously, but party aggrieved will be left to pursue ordinary remedies.

5. Prohibition 🔑3(2)—Prohibition will not ordinarily issue where certiorari will lie to review judgment.

Writ of prohibition will not ordinarily issue where certiorari will lie to review judgment, unless it appears that applicant for writ will necessarily be injured if tribunal is permitted to proceed.

Application for a writ of prohibition by the Felton Water Company, prayed to be directed to the Superior Court in and for the County of Santa Cruz, Harry C. Lucas, Judge, to arrest further proceedings in contempt. Writ denied.

Peck, Bunker & Peck, of Oakland, Ralph Smith, of Santa Cruz, and R. T. Harding, of San Francisco, for petitioner.

Geo. W. Smith, of Santa Cruz, for respondents.

CASHIN, J. An application for a writ of prohibition to arrest further proceedings by the respondent court on an order to show cause why petitioner should not be adjudged in contempt of court for failure to comply with a judgment entered therein.

Petitioner is a corporation organized for the purpose of supplying water to the inhabitants of the town of Felton and its vicinity. It alleges the right to divert for that purpose the waters of Limestone brook, in Santa Cruz county, to the extent of 86,000 gallons per day; that, in the exercise of its right, the waters of the stream to the extent claimed have been continuously diverted since the month of June, 1925, and have been dedicated to and impressed with a public use. These averments were denied by respondents, and no evidence in support of the right claimed or of the facts alleged was adduced. It is further averred that petitioner in August, 1926, commenced an action in respondent court against the Forest Lakes Mutual Water Company, Seminary Avenue Land Company, corporations, George Fetherston, and others to condemn as against the lands of defendants the right to divert from this stream 150,000 gallons of water daily, including the 86,000 gallons mentioned above, and that the action is now pending; that in an action in the same court, entitled "Forest Lakes Mutual Water Company and Seminary Avenue Land Company, corporations, plaintiffs, v. Santa Cruz Land Title Company, a corporation, George Fetherston et al., defendants," numbered 9954, in which action petitioner herein was not joined as a party, a judgment was entered enjoining the defendants and their agents from diverting the waters of Limestone brook; that subsequently in the same action an order to show cause was issued by respondents and served on petitioner, requiring it to show cause why it should not be punished for contempt of court for failing to comply with the injunction. Petitioner contends that, not having been joined as a party, it was not bound by the judgment, and that respondents are without jurisdiction to adjudge petitioner guilty of contempt.

It appears that plaintiffs in the action last mentioned, which was filed on June 8, 1925, sought to quiet their title to the waters of the stream and to restrain the defendants from diverting them. The defendants answered, and upon the issues the court found that plaintiffs were the owners as against defendants and entitled to the use and benefit of all the waters naturally flowing therein within the limits of the lands owned by plaintiff Seminary Avenue Land Company, and that, contrary to the claim of defendants, no diversion thereof had been made by them or their agents prior to June, 1925; that defendant Fetherston was the owner of substantially the whole of the issued capital stock of Felton Water Company, which was an agent employed by him in supplying water to certain lands described in the pleadings; that it was not true, as alleged by defendants, that the inhabitants of the town of Felton were supplied by water diverted from the stream, or that the waters therefrom had been dedicated to a public use to be supplied through the Felton Water Company. A judgment was entered on September 8, 1926, enjoining the defendants and their agents, particularly the Felton Water Company, from obstructing the flow of the stream or diverting the waters above the lands of the Seminary Avenue Land Company or within the limits of the land owned by defendant Fetherston as described in the pleadings, it being further provided therein that the injunction should not be stayed or suspended by an appeal from the judgment. An appeal was taken therefrom and is now pending.

[1] The facts which led to the issuance of the order to show cause are not disclosed by the record. It appearing, however, that the injunction was directed to the defendants and their agents, we must assume that the order was based upon acts alleged to have been committed by petitioner while acting as the agent for one or more of the parties bound by the decree.

[2] The injunction was prohibitive, and the appeal did not suspend the power of the trial court to enforce it not only against the parties to the action, but against those having knowledge of it, provided they are servants or agents of the parties enjoined or are acting in collusion with them. United Railroads, etc., v. Sup. Ct., 172 Cal. 80, 155 P. 463; Wolf v. Gall, 174 Cal. 140, 162 P. 115; Berger v. Sup. Ct., 175 Cal. 719, 167 P. 143, 15 A. L. R. 373.

[3-5] Assuming that acts alleged to be violative of the injunction were committed by petitioner, whether it acted as the agent or servant of the parties enjoined or in collusion with them, or, as claimed, in the exercise of a paramount right to divert and distribute the waters of the stream, are questions which the trial court is empowered to determine. A writ of prohibition does not lie to prevent a subordinate court from deciding erroneously, but the party aggrieved will be left to pursue the ordinary remedies for the correction of error (Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903), nor

will it ordinarily issue where, as here, certiorari will lie to review the judgment, unless it appears that the applicant for the writ will necessarily be injured if the tribunal sought to be prohibited is permitted to proceed (Commerial Bank, etc. v. Sup. Ct., 192 Cal. 395, 220 P. 422; Town of Santa Monica v. Eckert, 4 Cal. Unrep. Cas. 92, 33 P. 880; Hayes v. Board of Trustees, 6 Cal. App. 520, 92 P. 492; Hill v. Sup. Ct., 21 Cal. App. 425, 131 P. 1061).

In the instant case, as said in Hill v. Sup. Ct., supra:

> "If the decision of the trial court should be favorable to petitioners, they would have no cause for complaint. If, on the other hand, it should be adverse and the adjudication void for want of jurisdiction, the enforcement of the judgment may be prevented and the judgment declared void under a writ of review."

The writ is denied.

We concur: TYLER, P. J.; KNIGHT, J.

BRENOT v. SOUTHERN PAC. R. CO. et al.★
(Civ. 4158.)

(District Court of Appeal, Second District, Division 2. California. March 28, 1927.)

1. Railroads ⟹411(10)—One occupying land not abutting railroad right of way could not recover under statute for injuries to animals (Civ. Code, § 485, prior to amendment by St. 1915, p. 1281).

Owner of mules, occupying land which did not adjoin railroad right of way, cannot recover from railroad for death of mules under Civ. Code, § 485, prior to amendment by St. 1915, p. 1281, since such statute applied only to proprietor occupying land abutting right of way.

2. Appeal and error ⟹931(1)—Appellate court will make all possible assumptions to support judgment, in absence of finding.

Appellate court must make all possible assumptions which will uphold trial court's decision, as to matters as to which there was no finding.

3. Railroads ⟹411(10)—Railroad's breach of covenant to fence did not entitle occupant of nonadjoining land to recover for injuries to animals.

Owner of mules, occupying land which did not adjoin railroad right of way, cannot recover from railroad for death of mules, who entered onto right of way from a public highway, because of railroad's breach of covenant with grantor of land to maintain fence, since such covenant was obviously to prevent ingress of stock from adjoining land.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by E. L. Brenot against the Southern Pacific Railroad Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Louis P. Boardman and Philip C. Boardman, both of San Francisco, for appellant.

W. I. Gilbert, of Los Angeles, for respondents.

WORKS, P. J. This is an action for damages occasioned by the alleged negligence of the defendants. Plaintiff was the owner of six mules, five of which were killed and one of which was rendered worthless by being run down by one of defendant's trains. Defendants had judgment, and plaintiff appeals.

Points arising on the appeal are presented upon the findings of the trial court. It was found, among other things, that defendants, at the time the mules were run down, were engaged in operating a railroad over a certain strip of land, which strip had been conveyed by deed to one of defendants as a right of way by two men of the name of Porter; that by the terms of the grant the grantee was required "to construct and maintain a good and substantial fence on each side of said strip of land and right of way; that said defendant did thereafter," and before the accident to appellant's mules, "construct and maintain such fence * * * as required by said grant"; that at the time of the accident appellant, "as successor in interest by leasehold" of one of the Porters, "was in the possession and useful occupation of certain lands lying close to, but not bordering upon, the said right of way * * * and which lands belonged to" Porter "at the date of said conveyance by him * * * of said right of way and constituted a portion of the lands through which said right of way had been granted"; that at the time of the accident to the mules the city of Los Angeles, having acquired the right to construct a certain aqueduct across the right of way of respondents, while "in the course of the work of constructing said aqueduct * * * by and with the knowledge and consent of" respondents, "and with their aid and co-operation, * * * did remove a large portion of said fence from the southerly line of said right of way, and did also remove a cattle guard from said right of way, leaving the northerly line * * * entirely fenced, and leaving the southerly line of said right of way and the railroad tracks thereon unfenced and open and without guards * * * and without any protection against the entry of stock thereon; that the aid and co-operation of" respondents " * * * in constructing said aqueduct consisted particularly of the work of removing said cattle guard and shifting said railroad tracks and maintaining the same

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⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★Opinion adopted by Supreme Court 262 P. 732.

* * * for the passage of trains during the course of said work"; that appellant was at the time the owner of the six mules, of the aggregate value of $1,800, "which were on his said premises," confined in a corral in which "they had been impounded for the night by" appellant; that they broke therefrom "and wandered out and along for a mile or more upon" a certain road "to the point where said road formerly crossed said right of way and railroad tracks, at which point they had often been driven across said right of way and railroad tracks to a pasture beyond, and entered upon said right of way and railroad tracks * * * through the opening made and left unguarded, * * * in the fence so previously constructed and maintained along the southerly line of said * * * right of way"; that the mules then proceeded "along the railroad tracks to a point where the right of way was fenced on both sides and where there was a precipitous rise in the ground on one side of said railroad tracks and a sharp decline on the other"; and that at that point they were struck by the locomotive of a freight train of respondents, "rounding a curve just beyond in said railroad tracks," with the result already stated.

[1] The present action is an old one; the complaint having been filed practically a year before the amendment to section 485 of the Civil Code (St. 1915, p. 1281), which is now in effect. Before the amendment, the section read, in part:

> "Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animals so killed or maimed."

Because of the finding of the trial court that the land of which appellant was lessee lay close to, but did not border upon, the right of way of respondents, appellant may not recover under this section as it formerly stood. It has been directly decided (Barbee v. Southern Pac. Co., 9 Cal. App. 457, 99 P. 541) that the relief afforded by the enactment may be resorted to only by a proprietor occupying lands abutting upon a right of way.

There are many cases in other states holding, under the general law of negligence, that a recovery may be had from a railroad company under such circumstances as existed here. Respondents, after having constructed their fence along both sides of their tracks, it will be observed, removed a portion of the structure on one side, thus providing a means of ingress to the tracks, there being no means of egress therefrom except through the break which they had made. It seems that in this state, before section 485 was amended and under the opinion in the case above cited and other adjudications referred to in it, one whose animals crossed intervening lands on the way from his property to a railroad right of way and were there injured or killed, under the circumstances above stated, might not have recovered for the loss suffered. The remedy allowed by the section seems to have been exclusive.

[2, 3] Appellant contends, however, that he is entitled to recover because of the breach by respondents of their covenant, in the deed by which they acquired the right of way, to erect and maintain a fence along the strip acquired. Granting for the sake of argument, without deciding, that the covenant was one running with the land, and that there is no legal objection against appellant, as a lessee and not a holder of title, availing himself of the covenant, we think relief must be denied him on other grounds. It is obvious that the covenant was made for the purpose of preventing ingress of livestock to the right of way from the property of the Porters from which it had been segregated or set apart by the grant. The contiguity of location which must have been contemplated by this purpose has been destroyed. This is evident from the finding of the trial court that the leasehold of appellant did not border upon the right of way but lay close to it. There was no finding as to the ownership of the land lying between the leasehold and the right of way, or as to the nature of the use to which it was being put, and as to those matters, under familiar rules of law, we are bound to make all possible assumptions which will uphold the decision of the trial court. Let us assume, then, that the intervening strip had been condemned as a right of way for a public highway which extended along the railroad right of way and across the entire body of land formerly owned by the Porters, thus entirely segregating the latter right of way from the entire tract on that side, and that at the time of the accident to the mules the public road had been built and was being used by the general public. Would not appellant be in the same situation with others of the general public if his mules emerged from the leasehold, got upon the public road, and thence upon the railroad right of way through the breach in the fence? We think he would. The covenant having been made for the purpose of insuring that livestock of the Porters or of their assignees should not emerge from their lands and thus enter, immediately, upon the right of way, we think it cannot be held to protect appellant from a loss occasioned by the entry of his mules upon the railroad right of way from a public high-

way. No authority is presented to us upon this question, and we know of none.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

82 Cal. App. 94

DICKSON v. KEELER. (Civ. 5755.)

(District Court of Appeal, First District, Division 2, California. March 29, 1927.)

1. Appeal and error ⚷757(1)—Appellant must print in brief or supplement portions of record which he desires to have considered (Code Civ. Proc. § 953c).

Appellant is required, under Code Civ. Proc. § 953c, to print in his brief, or in supplement appended thereto, portions of record to which he wishes court's attention directed.

2. Assignments ⚷58—Assignee of contract for exchange of advertising space may recover for breach prior to assignment, despite objection that contract was not assignable without defendant's consent.

Assignee could recover for breach of contract for exchange of advertising space, where breach occurred before assignment, notwithstanding claim that service was of such nature that it could not be assigned without defendant's consent.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by E. Dickson against Irvin C. Keeler, an individual, doing business under the name and style of Keeler's Hotel Weekly. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert I. Loeb, of San Francisco, for appellant.

Joseph A. Brown and F. A. Anderson, both of San Francisco, for respondent.

KOFORD, P. J. This is an appeal by defendant from a judgment in favor of plaintiff for damages for breach of contract.

Defendant and the assignor or assignors of the plaintiff entered into a contract for the exchange of advertising space. The judgment is based upon the finding that plaintiff's assignor performed its part of the contract but defendant did not.

Two points are raised by the appellant as reasons for reversal. First, he claims the service agreed to be performed by plaintiff's assignor was of such a nature that it could not be assigned without consent of defendant, and that the evidence shows the assignment was made before and not after the breach by defendant giving rise to the cause of action. The findings of fact made by the court show that the breach occurred before the date of the assignment claimed by appellant. Second, he claims the trial court did not give proper weight to the evidence of custom and usage in respect to the time within which the contract should have been performed by the defendant.

[1] Both of these questions involve a consideration of the evidence introduced at the trial. Respondent raises the point that the appellant has failed to comply with section 953c of the Code of Civil Procedure, and the numerous decisions of this court requiring him to print in his brief, or in a supplement appended thereto, such portions of the record to which he wishes to direct attention. The point is well taken. McLaren v. Hards, 39 Cal. App. 104, 178 P. 332; Pasadena Realty Co. v. Clune, 34 Cal. App. 33, 166 P. 1025.

[2, 3] The appellant did not appear to argue nor has he replied to respondent's brief. Furthermore, enough of the evidence is printed in respondent's brief to show, at least prima facie, that the evidence supports the court's finding that the contract was breached before the assignment was made. There is no evidence shown either in appellant's or respondent's brief concerning the alleged custom or usage as to the time within which the contract should have been performed. The evidence printed in respondent's brief, however, shows defendant's persistent neglect to perform the contract extended over a period of several years. The point seems to be wholly without merit.

The judgment appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

82 Cal. App. 5

LINKOUS v. SUNDERLAND, Commissioner of Public Safety and Welfare. (Civ. 5657.)

(District Court of Appeal, First District, Division 1, California. March 22, 1927.)

1. Appeal and error ⚷1099(4)—District Court of Appeal is concluded by construction of city charter and ordinance on previous appeal.

District Court of Appeal is concluded by decision on former appeal, construing provisions of charter and ordinance which are involved in case before it.

2. Municipal corporations ⚷220(6)—Suspending civil service employee more than 30 days in removal proceeding did not entitle him to salary (Fresno City Charter, art. 3, § 22).

Suspending civil service employee for more than 30 days in removal proceeding under Fresno City Charter, art. 3, § 22, *held* not to entitle him to salary, where postponement of hearing before civil service commission was delayed at employee's request.

3. Municipal corporations ⚷218(8)—Civil service board's failure to act on dismissal order before expiration of suspension period would not nullify order of dismissal.

Failure of civil service board to act on order dismissing employee before expiration of period of suspension under city ordinance would not operate, in and of itself, to nullify order of dismissal and restore officer or employee to former position.

Appeal from Superior Court, Fresno County; Denver S. Church, Judge.

Mandamus by Miles R. Linkous against A. E. Sunderland, Commissioner of Public Safety and Welfare of the City of Fresno, to compel restoration of petitioner to the police department. Judgment for petitioner, and defendant appeals. Reversed.

Loren A. Butts, of Fresno, for appellant.

Lindsay & Gearhart and B. W. Gearhart, all of Fresno, for respondent.

KNIGHT, J. Plaintiff instituted this proceeding in mandamus against defendant, as commissioner of public safety and welfare of the city of Fresno, seeking to be restored to the position formerly held by him in the police department of said city. Judgment was entered in plaintiff's favor, and defendant has appealed.

The record discloses the following facts: On November 9, 1925, appellant, as the head of the police department of said city, served written notices on respondent and other police officers of said city, including one Nichols, advising them that they were dismissed from said department upon the ground that they had been indicted by the federal grand jury for "felony, to wit, conspiracy to violate the National Prohibition Enforcement Act." Availing themselves of the benefits of certain civil service provisions of the city charter, the officers mentioned answered the charges contained in the orders of dismissal and demanded a hearing before the civil service commission. The latter appointed November 27, 1925, as the time for said hearing, but prior thereto respondent and Nichols, being represented by the same counsel, joined in a written request to said board, asking that the hearing of the charges against them be continued "until some date subsequent to the trial" on the federal indictment, which request was granted. The trial in the federal court began on November 30, 1925, and ended in the acquittal of respondent and Nichols on January 28, 1926. On the day following they demanded reinstatement in said department. Thereafter, and on February 1, 1926, they were served with amended notices of dismissal, which contained the additional charge of having received money from persons known to be engaged in the unlawful sale of liquor. They answered the amended charge, and the hearing was set for February 17, 1926, on which day and before said charges were heard respondent commenced the instant proceeding in the superior court, and thereupon the board continued the hearing of said charges pending the determination of this proceeding, the trial of which was had in the superior court on February 25, 1926, and judgment entered on March 11, 1926, in favor of respondent, directing that he be forthwith restored to his former position in said department and that appellant issue to him salary warrants covering the period of time from November 9, 1925, to the date of judgment.

Section 22 of article 3 of the charter, relating to the removal and suspension of officers and employees of said city, provides in part that, if the charges made against the officer or employee are answered and demand is made for a hearing before the civil service commission, "the civil service board shall then fix a time and place for, and, according to such rules and regulations as it may adopt, shall conduct a hearing upon the charges and answers, * * * and upon said hearing * * * may order the charges dismissed, in which case the officer or employee shall be restored to duty without prejudice; but if the charges are sustained, the officer or employee shall by virtue of said findings be removed unless the finding in either case is set aside by the city commission. * * * Pending the hearing of any charges, whether before the civil service board or the city commission, the officer seeking to make the removal may suspend the officer or employee whose removal is sought, such suspension to be without pay, unless the charges are dismissed." These charter provisions are supplemented by a code of rules, established by a city ordinance (No. 972), which govern the civil service commission in the exercise of its powers, and rule 11 thereof deals with "removals, reductions, resignations, suspensions, and procedure," being divided into four sections, and section 1 containing three subdivisions. Section 3 thereof reads as follows:

> "Pending action for removal or for disciplinary reasons an employee may be suspended for a period not to exceed 30 days. * * *"

In support of the judgment respondent contends that the limitation of suspension fixed by the section just quoted applies to cases of dismissal, and that since his suspension continued beyond the time allowed thereby it became illegal and, irrespective of the notice of dismissal, operated to restore him to his former position.

Answering this contention, appellant relies upon the case of Nichols v. Sunderland, Commissioner of Public Safety, etc., et al., 247 P. 614, claiming that the precise point urged by respondent here was raised and fully decided there. With reference to that case, it appears that pending the appeal herein, Nichols, who as before stated was represented by the counsel now appearing for respondent Linkous, made original application to Division 2 of this court for, and was granted, an alternative writ of mandate requiring this appellant to show cause why Nichols should not be restored to the position formerly occupied by him in said department. As indicating that counsel for respondent herein at that time believed that the issues of law and fact involved in the Nichols Case were the same as those involved here, appellant calls attention to that part of the petition in the Nichols Case wherein it was alleged that the instant proceeding had been commenced and tried in the superior court; that judgment had been rendered directing the reinstatement of the officer, and that an appeal had been taken and was then pending; and as grounds for making the application for the writ to the appellate court in the first instance stated in the petition as follows:

> "* * * all the questions involved in that action (referring to the instant one) and all questions that are involved in any of the numerous other similar actions can be determined promptly by the appellate court in this proceeding and inasmuch as the decision of the appellate court will be accepted as final by all parties to this proceeding, and other similar proceedings, it is, the petitioners submit, a proper and salutary case for the exercise of the original jurisdiction fixed in the appellate court."

On April 29, 1926, after a hearing on the merits, judgment in that proceeding was rendered in favor of the appellant herein, holding in effect with reference to the point at issue here that the provisions of said section 3 were not available to the petitioner therein, and that therefore he was not entitled to be reinstated. Subsequently a petition for a hearing in the Supreme Court was denied. After quoting rule 11 in full in the fore part of the opinion, the District Court of Appeal construed the same as follows:

> "Turning to rule XI, it will be observed that in subdivision (a) a permanent removal is provided for after hearing or opportunity for hearing; in subdivision (b) a suspension is provided, for provided the civil service board may investigate and approve or disapprove; in subdivision (c) a suspension or dismissal is provided for and the language used clearly indicates that the subordinate may, at the time the proceeding is initiated, be separated from his office, but that thereafter he is to be given a hearing if he demands it, and, if the charges are sustained, then he will be permanently removed—that is, dismissed. As against improper removals, the charter and the rules both enjoin on the civil service board the duty of protecting the subordinate. The charter enjoins on the superior office the duty of promoting 'the efficiency of the public service.' From all of these provisions it is clear that the charter and the rules enacted thereunder authorize (1) a permanent removal; (2) a suspension for disciplinary purposes; and (3) a suspension which will promote the efficiency of the service."

And further on in the opinion, in determining the point urged herein by respondent, the court said:

> "Finally, the petitioner asserts that he has been suspended more than thirty (30) days, and that a suspension for more than thirty (30) days is prohibited by the provisions of Ordinance No. 972. This contention rests on a confusion or intermingling of two separate provisions of the ordinance. It is provided that a subordinate may be disciplined by suspension. It is also provided that the superior may initiate removal proceedings, and, pending the hearing thereof before the civil service board, that the subordinate officer may be suspended. As a disciplinary measure, the ordinance provides that a suspension may not be for a period exceeding thirty (30) days. As an ancillary measure in removal proceedings no limit is placed on the period of suspension. Whether the suspension is of the first class or the second class, the ordinance provides that the subordinate may, on demand, be given a speedy hearing and that the period of thirty (30) days will not necessarily be consumed in either case. Moreover, the facts above recited show that any delays which have occurred in the instant case were the delays caused or requested by the petitioner and not by his superior officers. Under very similar provisions contained in the New York charter the Supreme Court of that state made the same ruling. Halpin v. City of New York, 54 Misc. Rep. 128, 105 N. Y. S. 520."

[1] It would appear from the foregoing that the same provisions of the charter and of Ordinance No. 972 of said city upon which respondent endeavors to support the judgment herein were there considered and were construed adversely to respondent's contentions herein. We are therefore of the opinion that we are concluded by such construction. With due propriety it may be added, however, in answer to the argument made herein by respondent as to the possible consequences of excluding cases of suspension where dismissal is ordered from the operation of the 30-day limitation provision embodied in said section 3 of rule 11, that the courts may always be resorted to for an appropriate remedy to prevent prolonged or unwarranted delay on the part of a civil service board in bringing cases of dismissal to trial; and in this connection it may be stated that it appears from the briefs herein that the amended charges against respondent were in fact heard and sustained on May 12, 1926.

[2, 3] We find no material difference in the facts of the two cases relating to the cause for the delay in bringing the charges to a hearing which would justify a different conclusion in the determination of this appeal. In each case the postponement from November 27, 1925, until January 29, 1926, was granted at the request of the accused, and

the second postponement, to February 17, 1926, was necessarily caused by the filing of the amended charges; but on that day respondent commenced this proceeding, not for the purpose of obtaining a trial before the civil service board, but to compel the commissioner who had ordered his removal to reinstate him upon the ground that as a result of said postponement his suspension had expired by operation of law. Even assuming that by any possible construction the provisions of said section 3 could be held to apply to cases of removal, there is nothing contained in the law of the municipality which would justify the establishment of a rule that failure of the civil service board to act upon an order of dismissal before the expiration of the period of suspension would operate in and of itself to nullify the order of dismissal and restore the officer or employee to his former position. Such a rule must necessarily become a part of the municipal law by legislative act, and cannot be judicially supplied.

In view of the decision in Nichols v. Sunderland etc., supra, and mainly upon the grounds stated therein, the judgment appealed from is reversed.

We concur: TYLER, P. J.; CASHIN, J.

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82 Cal. App. 52

PALO VERDE LAND & WATER CO. v. EDWARDS et ux. (Civ. 5308.)

(District Court of Appeal, First District, Division 1, California. March 25, 1927.)

Waters and water courses 🔑234—Stock of water company held personal property, subject to pledge, and not appurtenant to land (Civ. Code, § 324).

Where water company did not by law provide that water should be sold only to owners of capital stock nor that stock should be appurtenant to the land nor require evidence of title to land in making transfers, shares of stock therein, in view of Civ. Code, § 324, *held* to be personal property, subject to pledge, and not appurtenant to the land, despite articles of corporation providing stock should be located on the land owned by persons desiring to purchase stock.

Appeal from Superior Court, Riverside County; William H. Ellis, Judge.

Action by the Palo Verde Land & Water Company against William B. Edwards and wife. From a judgment for plaintiff, defendants appeal. Affirmed.

Lee R. Taylor, of Los Angeles, for appellants.

Durley & Downes, of Oxnard, for respondent.

CAMPBELL, Justice pro tem. This is an appeal from a judgment in favor of respondent, quieting its title to 80 shares of the capital stock of Palo Verde Mutual Water Company, a corporation, and from an order overruling defendant's demurrer.

Plaintiff pleaded and proved that in December, 1913, it sold to P. H. Bodkin, who was at the time possessed of and claimed title to the west half of the northeast quarter of section 11, township 7 south, range 22 east, S. B. B. & M., in Riverside, Cal., the 80 shares of stock, the title to which is in question, and that such stock was at the same time located on said land. It further appears that, coincident with the sale of the shares of stock to P. H. Bodkin, the same were by him pledged to plaintiff for a balance of the purchase price thereof, and in addition thereto and at the same time P. H. Bodkin and Bella E. Bodkin, his wife, executed a mortgage of the described premises and delivered it to respondent to secure respondent against loss of the purchase price of the stock; that on July 28, 1921, there remained unpaid and due $1,000 of such purchase price, together with interest; that, Bodkin and his wife being in default, respondent proceeded to sell the stock under its pledge agreement with the Bodkins; that at the sale respondent purchased the 80 shares of stock and claims title thereto. It is the title to this stock thus acquired by respondent that it asked the court to quiet against any claim or claims of the appellants.

The appellants pleaded and proved that at the time of the sale of the stock by respondent, under its pledge agreement with the Bodkins, and at the time of the commencement of the action, appellant William B. Edwards was the owner of the land upon which the 80 shares of stock had been located.

Appellants urge four points on appeal: First, that the court erred when it overruled the demurrer of defendants to plaintiff's complaint; second, that the court erred in rendering judgment in favor of plaintiff based upon the findings of fact and conclusions of law in this matter; third, that the court erred in finding and deciding that the 80 shares of stock in question were never made appurtenant to the land; and, fourth, that the court erred in deciding that plaintiff, by the purchase of said stock at the pledgee's sale thereof, became and remained after the pledgee's sale the owner of the same.

If the 80 shares of the capital stock of the Palo Verde Mutual Water Company, represented by its certificate No. 570, became appurtenant to the land described in the certificate, then under section 2986 et seq. of the Civil Code, a pledge of the stock, together with the rights, privileges, and benefits incident thereto bestowed upon the land, is ineffective, as a sale of the real property or an appurtenant thereto under a purported pledge agreement would be void and pass no title to the property involved. The decision of this question—that is, are the 80 shares of stock appurtenant to the land or are they personal property—is determinative of all the questions raised by appellant on this appeal. If the shares of stock are appurtenant to the land, the judgment must be reversed, but, if not, no reversible error appears in the record, and the judgment must be affirmed.

The articles of incorporation and the by-laws of Palo Verde Mutual Water Company, in so far as they pertain to the issue here presented, are as follows:

> "That the purposes for which it is formed are to acquire by appropriation, purchase, or otherwise, water and water rights, * * * to distribute and sell said water at the cost thereof to the stockholders of the corporation only, for use upon the lands within the district and territory hereinafter described, * * * that such stock shall be located only upon land owned by, or the ownership of which is claimed by, the person desiring to purchase said stock; and provided, also, that when stock of the corporation is located upon a tract of land one share shall be issued and so located for each acre thereof," etc.

Article XV of the by-laws provides:

> "Certificates of stock shall be in such form and device as the board of directors shall direct * * * and each certificate * * * express on its face its number, date of issuance, and number of shares for which, and the person to whom it is issued, and the particular description of the land on which the shares are located. The certificate book shall contain a margin on which shall be entered the number, date, number of shares, and the name of the person expressed in the corresponding certificate, and a particular description of the land on which the shares are located."

Article XVI of the by-laws provides:

> "No transfer of stock shall be valid until the surrender of the old certificate and the acknowledgment of such surrender on the books of the corporation."

The certificate of stock pledged to respondent certifies:

> "That Palo Verde Land & Water Company, as pledgee for P. H. Bodkin, is entitled to 80 shares of the capital stock of Palo Verde Mutual Water Company, transferable on the books of the company by indorsement hereon and surrender of this certificate and on purchase by the transferee of the land covered by this certificate. The land covered by this certificate and upon which said stock is located is described as follows:" (description of land).
>
> "Each holder of this certificate must own or claim the ownership of the above described land."

P. H. Bodkin had not paid for this stock and assigned it as security for the purchase price, and the defendants had paid nothing for the stock.

On December 31, 1913, P. H. Bodkin was in possession of the land, claiming to own it, and defendants out of possession claimed ownership, and were subsequently adjudged to be the owners and were put into possession of the lands.

At the time of the purchase of the 80 shares of stock on installments, P. H. Bodkin and Bella E. Bodkin, his wife, executed a written pledge as follows:

> "And I hereby pledge to and deposit with said Palo Verde Land & Water Company 80 shares of the capital stock of Palo Verde Mutual Water Company, a corporation, evidenced by certificate No. 570, as collateral security for the payment of this or any other liability or liabilities of the undersigned to said Palo Verde Land & Water Company, due or to become due, or that may be hereafter contracted.
>
> "In the event of the nonpayment of any of said installments of principal or interest when due, the holder of this note may, at his or its option, declare all of said installments immediately due and payable, and may sell said stock (or so much thereof as may be necessary to raise the amount unpaid hereunder and the expenses of sale), at the principal place of business of said Palo Verde Mutual Water Company, provided that notice of such sale shall be given by publication in a daily newspaper published in Riverside county, Cal., for at least ten consecutive publications before said sale, * * * and it is agreed that the holder of this note may become the purchaser of said stock, or any portion thereof, at such sale. This note is also secured by mortgage of even date herewith."

The expression contained in the articles of incorporation, "that such stock shall be located only upon land owned by, or the ownership of which is claimed by, the person desiring to purchase said stock," forms the basis for the claim by appellant that the shares of stock in question are appurtenant to the land and are therefore real and not personal property.

Section 324 of the Civil Code provides that shares of the capital stock of a corporation are personal property, but contains a proviso that a corporation organized for, or engaged in the business of selling, distributing, or supplying water for irrigation purposes or for domestic use, may in its by-laws provide that water shall only be sold, etc., to the owners of its capital stock, and that such stock shall be appurtenant to certain lands when they are described in the certificates issed therefor; and, when such certificates shall be so issued and a certified copy of such by-laws recorded in the office of the county recorder in the county where such lands are situated, the shares of stock so located on any land shall only be transferred with said land, and shall pass as an appurtenance thereto.

Section 324 of the Civil Code predicates the attributes of personal property to shares of stock in a water company, and that such shares remain personal property unless the corporation shall adopt and record in the office of the county recorder a by-law that the stock shall be appurtenant to the land. It would seem, therefore, that, unless such a by-law be adopted, the stock must remain personal property and not become appurtenant to the land. In Security Commercial Savings Bank of El Centro v. Imperial Water Co., 183 Cal. 488, 192 P. 22, the court intimates that stock might become appurtenant to the land without recording the by-law, but did not expressly so hold. It did not, however, intimate that stock might become appurtenant to the land without the adoption of a by-law to that effect. There is no provision in the by-laws to the effect that the water stock shall be appurtenant to the land, and, of course, there being no by-law to that effect, none was or can be recorded. Nor is there any evidence in the record showing that the water company by its acts or practices held the water stock to be appurtenant to the land upon which it is located. On the contrary, it is the uncontradicted evidence of Mr. P. R. Asmussen, auditor and assistant secretary of the company, that the company did not require evidence of title to the land in making a transfer of the stock. The company transferred the stock upon surrender of properly indorsed certificates of stock, and in making transfers of stock it was not the policy or practice of the company to require evidences of transfers of the lands to the parties to whom the certificates were to be transferred. When a deed has been presented showing a transfer of the land, the company would not transfer the stock to the grantee in the deed but only upon surrender of the original stock certificate properly indorsed, and quite frequently stock has been moved from one location to another, with the consent of the board of directors, when the certificate of stock has been surrendered properly indorsed.

The question here presented is not unlike the one presented in Spurgeon v. Santa Ana Valley Irrigation Co., 120 Cal. 71, 52 P. 140, 39 L. R. A. 701, in which case the court makes a distinction between the issuing of stock and of delivering water. In construing the following provision in the articles of incorporation of the water company:

> "It will deliver water to no one who has not purchased one share of the stock of the company for each acre or fractional part thereof of irrigable land owned by him along the canal of the company, and agreed with the company that said stock shall be transferable only with the land for which it is issued, and that the water delivered shall be used only on the land for which it is issued"

—the court says:

> "The charter does not say that certificates of stock will not be issued until the subscriber or purchaser has agreed that it shall be transferable only with the land for which it is issued, etc. What it does say is that the company will deliver no water except upon the conditions named."

The provision of the articles of incorporation of Palo Verde Mutual Water Company in this case is very similar—"and said water shall be distributed and sold upon and to only such of said lands upon which stock of the corporation shall have been located."

In the Spurgeon Case the court further says that the purchaser of shares of stock at a sale of delinquent stock for nonpayment of assessment might have the certificates for such shares issued to him without the special indorsement that the certificates should be "transferable on the books of the company * * * on purchase by the transferee of the land covered by this certificate," followed by a description of the land described in the original certificate for the stock sold at the sale, the court, using this language:

> "If shares are issued to him without the special indorsement insisted upon in this case by the defendant, he is put upon the same footing with other shareholders, and that without any injury to the company or infringement of its by-laws. He is not by virtue of the mere issuance of the shares entitled to receive any water, and the company is not compelled to deliver any water at any time or place or in any manner inconsistent with its charter or rules. Like an original subscriber, he must become the owner of land within the district designated in the charter and in other respects conforming to its conditions. When he has acquired such land, he may then, with the consent of the company—which it would have no right unreasonably to withhold—have his shares ascribed to such land by endorsement on the certificate, or in any other convenient method.
>
> "The company by its act in selling the delinquent stock, and the original holder by violation of the condition upon which he held it, have effectually severed the connection between the stock in question here and the land to which it was originally ascribed, and there is nothing in the charter or by-laws to prevent its assignment to other lands of like character within the proper district as may be done in the analogous case expressly provided for in the charter. Until this is done it is no disadvantage to the corporation or its other stockholders that these shares should be held in a form that will enable the plaintiff to use them or transfer them. As they do not now and never can oblige the company to deliver water to the plaintiff or any assignee until they are ascribed to land of the requisite character, there is no reason why they should not be issued in a form admitting of their free assignment."

In the Spurgeon Case there was a provision of the articles of incorporation that "the company will act only as an agency for delivering said water to said owners whose right to use the same is appurtenant to their said lands," and a provision of the by-laws that "shares of stock in this company shall not be transferable except with the land for which it is issued, and a conveyance of the land shall legalize a transfer of the stock to the purchaser."

There are no such provisions in the articles of incorporation or by-laws in the instant case. The only provisions to be considered here are in effect: That water shall be distributed only to lands upon which stock has been located, that stock shall be located only upon lands owned or claimed by the purchaser, and that the certificate shall contain a description of the land on which the shares are located.

There is certainly nothing in any of these provisions which would prevent the transfer of the water stock to other lands or which would give to the words "location" or "located" the meaning of "appurtenant," or which would give to the shares of stock the fixed character of real property, contrary to the general provision of the law defining the character of shares of stock of a corporation as personal property.

Appellants cite several cases as sustaining their position. The case of Riverside Land Co. v. Jarvis, 174 Cal. 316, 163 P. 54, is a case where the owner of certain shares of stock had them located upon the land owned by him and the by-laws of the company contained a provision that certificates of stock should be "transferable only with the land to which they are attached," and that the party asking a transfer of the stock should present to the secretary his conveyance of the land before the issuance of a new certificate. Furthermore, the water company had been organized by the persons who were at the time receiving and using water of the system on their lands. In that case the court held that the articles of incorporation, by-laws, and certificate taken together formed an agreement between the stockholders and the company that the stock should be transferable only with the land and conversely that a transfer of the land should pass to the grantee thereof the right to the stock.

The Estate of Thomas, 147 Cal. 236, 81 P. 539, holds that shares of stock of Trabuca Water Company passed by devise with 6 acres of land without specially mentioning the stock; that it was appurtenant to the land for the reason that the water right had been appurtenant to the land before the water company was formed, and that the company was formed for convenience only in distributing water; that section 324 of the Civil Code did not apply, because the amendment to the act adopted in 1895 (St. 1895, p. 118) was not made until some three years after the water right had become appurtenant to the land. In a concurring opinion Mr. Justice McFarland uses this language:

> "Of course, ordinarily, a grant of land does not carry, as appurtenant to the land, certificates of stock in a corporation; but there is nothing in the leading opinion which disturbs that general principle."

In Woodstone Marble & Tile Co. v. Dunsmore Canyon Water Co., 47 Cal. App. 72, 190 P. 213, the facts are very similar to Riverside Land Co. v. Jarvis, supra. There it was conceded and held that the water rights had been appurtenant to the land before the water company was formed and the appurtenancy had not been changed by the organization of the company. In Security, etc., Bank v. Water Co., supra, cited, the by-laws provided that water should be sold and distributed only to stockholders, and that the stock shall be appurtenant to the land and that a certified copy of the by-laws had been recorded, as provided by section 324 of the Civil Code. In Bent v. Second Extension Co., 51 Cal. App. 648, 197 P. 657, it was admitted that the stock was appurtenant to the land and that the provisions of section 324 of the Civil Code had been complied with.

The facts in the cases cited by appellant do not parallel the instant case. Here the articles of incorporation provide that the stock "shall be located only upon lands owned by, or the ownership of which is claimed by the person desiring to purchase said stock." By this very language of the articles of incorporation it is specially provided that it is not necessary for the purchaser of the stock to own the land, but it is sufficient if he shall claim the ownership. These words show the intention on the part of the corporation and the stockholders to be that the stock might be located upon land not owned by the purchaser and therefore not appurtenant to the land and not to pass with a conveyance of it by virtue of a deed, and especially so when the stock was not originally paid for by the party claiming ownership nor by the party subsequently adjudged to be the owner. The evidence shows also that a considerable part of the land within the water district when organized was government land, upon which settlers had made homestead or desert filings and to whom stock was issued upon their claim to the land. Upon their failure to secure patents to the land and the land reverting to the government, under the contention urged by appellant, the government would succeed to the stock as an appurtenance to the land.

Section 324 of the Civil Code, as amended, was in force at the time of the incorporation of the respondent company, it being incorporated in 1908, and it would seem that, if it were the intention of the incorporators that the stock should be appurtenant to the land, they would have so provided in their by-laws and complied with the section relative to recording and thus made the stock appurtenant to the land, which the trial court found not to be appurtenant, and which we think is the correct view.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

81 Cal. App. 772

ZOLKOVER v. PACIFIC ELECTRIC RY. CO. et al. (Civ. 3117.)

(District Court of Appeal, Third District, California. March 18, 1927.)

1. Street railroads 🔑103(2)—Where motorman did not see pedestrian, last clear chance doctrine is inapplicable.

In pedestrian's personal injury action against electric railways, last clear chance doctrine is inapplicable, if motorman did not see plaintiff, since such doctrine is based on fact that defendant, actually knowing of plaintiff's danger, had opportunity to avoid accident.

2. Street railroads 🔑114(13)—Evidence held to support finding pedestrian was guilty of contributory negligence in standing between electric railway tracks.

In action by pedestrian against electric railways for injuries sustained while standing between tracks on which cars were passing, evidence *held* to support verdict that plaintiff was guilty of negligence proximately leading to injury by assuming such position.

3. Evidence 🔑568(6)—In determining speed of electric train in personal injury action, jury may consider that noise of train accentuates idea of speed entertained by many people.

In determining speed of electric train in personal injury action, jury could consider fact that noise and rumble of three-car train would accentuate idea of speed entertained by many people, and that their testimony might not be so reliable as that of motorman, notwithstanding that latter might be classed as interested witness.

4. Street railroads 🔑98(6)—Pedestrians should pay attention to gongs warning change of traffic at street intersection.

Pedestrians, irrespective of any street ordinances regulating crossing of street, are not taking reasonable precautions to insure their own safety when they do not pay attention to preliminary gongs warning all users of streets that course of traffic is about to be changed by semaphores at intersection.

5. Street railroads 🔑85(1)—Motorman's duty and pedestrian's duty are reciprocal.

Duty of motorman of electric train to protect pedestrian, and duty of pedestrian to protect himself, are reciprocal.

6. Appeal and error 🔑977(5)—Refusal to set aside verdict on affidavit based on information and belief will not be disturbed.

Discretion of trial court refusing to set aside verdict of jury on affidavit based on information and belief will not be disturbed on appeal.

7. Jury 🔑131(3)—Examination of prospective jurors to determine merely whether party will desire to exercise peremptory challenge is not permissible.

Examination of prospective jurors for purpose of enabling party to determine whether he will desire to exercise peremptory challenge is not permissible.

8. Appeal and error 🔑703—Refusal of requested instructions cannot be reviewed, where instructions are not set out in transcript.

Court's action in refusing instructions requested by appellant cannot be reviewed, where such instructions are not set out in transcript.

9. Appeal and error 🔑1033(5)—Appellant cannot complain of instructions which are too favorable.

Appellant cannot complain, where instructions are more favorable than facts warrant.

10. Trial 🔑304—In personal injury action, letter signed by jury foreman, which was not presented to other jurors, requesting that defendants recognize moral obligation to compensate plaintiff, must be disregarded by court.

In personal injury action, letter handed court by foreman of jury, requesting that defendants recognize moral obligation to compensate plaintiff for unavoidable accident, must be disregarded, where it had not been presented to the other jurors before verdict for defendant was read.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by Jacob Zolkover against the Pacific Electric Railway Company and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Bertrand J. Wellman and John C. Miles and Samuel Marks, both of Los Angeles, for appellant.

Frank Karr, E. E. Morris, C. W. Cornell, Gibson, Dunn & Crutcher, and N. S. Sterry, all of Los Angeles, for respondents.

PLUMMER, J. Some time between the hours of 5 and 6 o'clock on the evening of November 20, 1922, in the city of Los Angeles, the plaintiff was injured by being run over by one of the trucks of a car of a three-car train, then and there belonging to, and being operated by, the respondent Pacific Electric Railway Company, and brought this action against both-named defendants to recover damages. Judgment went for the defendants, and the plaintiff appeals.

Appellant has not furnished us with any general statement of the facts in this case, but counsel for the respondent Los Angeles Railway Corporation has taken pains to set forth a full account of all the incidents and occurrences connected with the injury of the plaintiff, which, by comparing with the testimony, we find to be so accurate as to justify our adopting the same as correctly presenting all the issues involved herein. We will not attempt direct quotation, but will follow the recital of facts therein set forth.

The injury to the plaintiff occurred at the intersection of Main and Seventh streets in the city of Los Angeles, being one of the busiest intersections in said city. Main street runs northerly and southerly; Seventh street runs easterly and westerly. Both streets are approximately 50 feet in width; that is, from curb line to curb line. On both streets are the tracks of said railway companies. At the time of the injury the respondent Los Angeles Railway Corporation was operating an electric car running in a northerly direction, while the respondent Pacific Electric Railway Company was operating a car running in a southerly direction. Both cars were being operated upon Main street and at the intersection thereof with Seventh street. The plaintiff, for something over three years, had conducted a place of business at number 332 Main street, and was entirely familiar with the intersection referred to, and had crossed the same several times daily for a period of three or four years. The crossing of the intersection involved was, at the time of the injury, controlled by traffic signals. This control related, however, only to vehicular traffic, including street cars.

Semaphores were used for controlling the movement of traffic. When traffic was moving east and west on Seventh street, the semaphores on the northeast and southwest corners of the intersection displayed at right angles to the flow of traffic a white sign marked "Go," while the semaphores on the southeast and northwest corners displayed at right angles to the flow of traffic north and south a red sign marked "Stop." Prior to a change in the direction of traffic, a bell would ring, and the semaphore marked "Go" for east and west bound traffic would drop, and a "Stop" signal would rise in its place. After an interval of ten seconds, the semaphore marked "Stop" for north and south bound traffic on Main street would drop, and a "Go" signal would be raised, this being the signal for traffic to proceed north and south. The ringing of a bell about ten seconds before a change in the direction of the traffic was given for the purpose of permitting vehicles and persons thereon moving in the then direction of the traffic allowed time to clear the intersection and also as a warning not to enter upon the intersection in the direction of the traffic about to be stopped. At the time in question the plaintiff was in perfect health, possessed good eyesight and good hearing, was active in body, and able to move about freely. The plaintiff, when at the intersection of Main street and Seventh streets, prior to executing his purpose of crossing Main street by going over the same in an easterly direction parallel with the south line of Seventh street, observed that there was standing on the north side of Seventh street a three-car Pacific Electric train bound south and on the south line of the intersection of Seventh street standing on Main street a north-bound Los Angeles car, both waiting for a change in the traffic signals, enabling the former to move in a southerly direction and the latter to move in a northerly course. The plaintiff, accompanied by one Richard Barnes, started across the intersection in an easterly direction along the south line of Seventh street, with the conditions existing as just set forth. Our attention has not been called to anything in the record showing that the plaintiff heard the ringing of the bell preceding a change of the semaphore signals, nor have we found anything in the record, nor has anything been called to our attention, indicating that the plaintiff before starting to cross the intersection waited, paid any attention to, or endeavored to ascertain whether the preliminary warning bell had been sounded. Without any reference to the preliminary warning bell, the plaintiff, walking along the side of Mr. Barnes, proceeded to the center of the street, and upon reaching that location, observed that the semaphores had been changed, giving the "Stop" signal to traffic moving easterly and westerly on Seventh street and the "Go" signal to traffic moving northerly and southerly on Main street. At that instant of time, the Los Angeles car, standing on Main street immediately south of the south line of Seventh street, sounded its gong or bell, indicating that the car was about to be started northerly, and thereupon the plaintiff and Mr. Barnes stopped in the space between the two car lines, that is, between the tracks on which the Los Angeles car was bound north and the tracks on which the Pacific Electric car was bound south. This space was 2 feet in the clear of the overhang of the steps on the respective cars, and 2 feet 8 inches in the clear of all other portions of the overhang of the respective cars.

It appears from the testimony that, after the Los Angeles car had sounded its warning bell, it remained standing for some seconds, giving sufficient time for pedestrians to cross the tracks upon which it was standing, in the event they so elected. The plaintiff and Mr. Barnes stopped and remained at the place stated. The motorman of the Los Angeles car observed where the plaintiff was standing, and moved his car forward very slowly. The motorman of the Pacific Electric train, upon the signal being given to proceed, immediately started, and propelled his train in a southerly direction along Main street past where the plaintiff and Mr. Barnes were standing. As this train was passing the plaintiff, the plaintiff either stepped backwards, or, as stated by Mr. Barnes, swayed backward, and was struck by some part of one of the cars of the Pacific Electric train, and was thrown under one of the wheels of that train. One arm was injured so as to necessitate amputation. Other minor injuries were also sustained. The testimony of the plaintiff touching this particular time is as follows:

> "While I was standing there, I knew that the two cars would pass each other with myself between them. I thought I was perfectly safe. I was standing right in the middle. I had seen one other man standing in the same place. I was dressed in an overcoat and heavy suit. I was in the middle, maybe too far there, but I was in the middle. I thought I was safe."

After the Los Angeles car rang its bell, it did not start immediately, but stood still for two or three seconds.

The testimony of Richard Barnes is to the effect that he stood by the side of the plaintiff 10 or 15 seconds after the warning bell was sounded by the Los Angeles car. This, however, would appear to be too long an estimate of the time. The Los Angeles car had just started when the Pacific Electric train came by. A passenger on an open section of the first car in the Pacific Electric train, looking out of a window, saw the plaintiff standing between the cars. This witness testified that, just as he saw the plaintiff, he seemed to be stepping backward or falling back toward the Pacific Electric train, or, as this witness called it, "the red car," and that the red car struck the plaintiff; that the plaintiff stumbled for three or four steps, and then fell under the car.

The motorman of the Los Angeles car testified that when he arrived at the intersection the semaphores were set against him; that he took on a discharged passenger, and waited for several seconds before the first bell rang indicating a change in traffic, approximately ten seconds, and, when the semaphores changed, he rang his bell, and started slowly; that he noticed the plaintiff standing between the tracks, and was watching him to see that he did not make a movement; that he had his car under control so that he could stop within a foot or so; that, after passing the plaintiff, he paid no further attention to him.

Mr. Barnes, who was standing by the side of the plaintiff, testified that there was plenty of room between the two cars; that he had stood between the cars often, and had never been hurt. It also appears that there is sufficient space between the tracks to accommodate traffic policemen at the intersection of all the tracks on Seventh and Main streets for cars to pass by them safely.

The testimony of the motorman of the Pacific Electric train was that his train was being propelled at a rate of speed of about seven miles per hour. There is also some testimony in the record to the effect that the speed was in excess of that stated by the motorman. We find no ordinances set forth in the record, nor is our attention called to any testimony showing the fact, but it appears to be conceded, and the cause was tried upon the theory, that the ordinances of the city of Los Angeles limited the speed of said cars at the intersection named to 6 miles per hour.

After the entry of judgment, the plaintiff moved for a new trial supporting his motion by an affidavit. The motion for a new trial being denied, the plaintiff appeals and sets forth four grounds for reversal: (1) That the defendants were guilty of negligence as a matter of law; (2) that the verdict is unconscionable, and can only be sustained on the theory that there was an unfair jury, etc.; (3) that the court erred in striking out the whole of an affidavit instead of only the objectionable parts of the affidavit filed by the plaintiff in support of his motion for a new trial; (4) that the court erred in its instructions and in withdrawing the question of the last clear chance from the consideration of the jury, and in the refusal of certain instructions.

It appears to be conceded upon argument that, at the time in question, the ordinances of the city of Los Angeles contained nothing regulating the crossing of intersections by pedestrians; that the traffic signals did not apply to them. Under such circumstances, it is simply a question of whether the jury was justified in concluding that the plaintiff was guilty of contributory negligence in assuming the responsibility of crossing the intersection under the conditions which we have hereinbefore set forth, and then stopping at the place where he did stop, and thereafter in not maintaining a place of safety, which he might have maintained, and which is shown to be possible by the fact that the witness, Mr. Barnes, who accompanied him, remained in a position of safety, and was untouched by the passing cars, and this irrespective of whether one of the defendants was or was not guilty of negligence, unless such defendant had a last clear chance of avoiding injuring the plaintiff, and should have taken a course different from that which was pursued. Our attention has not been called to anything in the record tending to indicate that the motorman of the Los Angeles car had anything to do with the injury of the plaintiff, or that he would not have been injured had the Los Angeles car remained perfectly stationary until after the Pacific Electric train had passed by. It appears that all of the parties knew, and there is sufficient in the testimony to show that the jury were justified in concluding, that all of the parties knew that, if the plaintiff remained in the center between the two tracks, he would not be injured.

[1] The testimony of the motorman of the Pacific Electric train is to the effect that he did not see the plaintiff. Whether he saw the witness Barnes, who was standing between the tracks near the plaintiff, the record does not disclose. This fact, however, does eliminate from the cause of action against the Pacific Electric Company the doctrine of the

last clear chance, and, as we have said, in so far as the Los Angeles Railway Corporation is concerned, the operation of its car does not appear to have had anything to do with the injury sustained by the plaintiff. There seems to be no departure from the doctrine that the principle of the last clear chance is based upon the fact that the defendant actually knew of the danger of the plaintiff; that the plaintiff would not probably be able to extricate himself from such danger; and that the defendant had an opportunity to avoid the accident, and therefore is responsible, if the available opportunity is not accepted and acted upon. Tucker v. United Railroads, 171 Cal. 702, 154 P. 835; Haber et al. v. Pac. Elec. R. R. Co. (Cal. App.) 248 P. 741, and cases there cited. It may be stated that physical possibility of escape is not essential for the application of the doctrine of the last clear chance, but the actual peril of the party injured must be observed, and the peril from which the injured party would not probably be able to escape by the exercise of ordinary care. As we have shown by the facts detailed, the doctrine of last clear chance is not applicable as against either of the defendants, and the case resolves itself into one where the jury was justified in concluding that the plaintiff's negligence contributed to his injury, even though it be admitted that the Pacific Electric Railway Company was guilty of negligence in propelling its train across the intersection at a speed in excess of 6 miles per hour.

[2] In addition to what has been said, the plaintiff testified that he had many times seen said cars passing each other at that intersection, with policemen standing between them, and also that he had many times, or as he used the expression, "lots of times," seen people standing in the space between the tracks as the cars would pass each other. If it be admitted that the motormen were negligent, one seeing him (the plaintiff) and the other one not seeing him, the conclusion cannot reasonably be escaped that the plaintiff was also negligent, as the circumstances show he voluntarily placed himself in the position which he assumed between the two tracks. We are presented with the argument that the plaintiff was hemmed in between the two passing cars. An analysis of the situation, however, demonstrates that this assumption is unfounded. The plaintiff was under as much obligation to safeguard his own welfare as were either of the defendants, and therefore, if the steps or measures reasonably to be taken by the plaintiff were at hand to avoid the peril, if peril there were, it was incumbent upon the plaintiff to avail himself of such means of escape. The testimony to which we have referred, and the maps introduced in evidence, show that the Los Angeles car, before the change in the position of the semaphores permitting progress, was stopped on Main street south of the south sidewalk line of Seventh street, and that the front of the Pacific Electric train was north of the north line of Seventh street. The clear distance between the two trains was between 80 and 90 feet; the Los Angeles car was 50 feet in length. The plaintiff was standing to the right of the witness Barnes. There was nothing between the plaintiff and the south end of the Los Angeles car. The testimony shows that the plaintiff was where he could observe the movements of both cars; that he saw the change in the semaphore signals, and, if he did not care to elect to remain in the space between the two tracks, he had but to go to the southward 50 feet to enable him to step to the rear of the Los Angeles car. His own testimony is that he remained there several seconds before the Los Angeles car started, long enough to have permitted him to have walked the 50 feet. Again, after the starting of both trains, the respective distances over which the Pacific Electric train had to move and the distance to be covered by the plaintiff show that the plaintiff might have escaped by walking southward and stepping behind the Los Angeles car, which was moving northward. In doing this, even though the Los Angeles car had been standing still, assuming that he moved only at the rate of 5 miles an hour, which any ordinary pedestrian can do without special effort for a few seconds, and which the testimony in this case as to the physical condition of the plaintiff, which we have hereinbefore set forth, leads to the conclusion that he was amply able to do, the plaintiff had an opportunity to remove himself from the space between the tracks before the arrival of the Pacific Electric train. The electric train to overtake him would have had to travel at least 130 feet while the plaintiff was covering a distance of 50 feet. Had the plaintiff moved at the rate of only 5 miles an hour, to overtake him, with the Los Angeles car standing still, the Pacific Electric train would necessarily have had to move at the rate of a trifle over 13 miles per hour.

[3, 4] The testimony of the motorman on the electric train was that he was running at 7 miles per hour. Other witnesses testified to a higher rate of speed. The jury had a right to accept the testimony of the motorman, and had a right also to take into consideration the various statements of the speed of the electric trains given by the different witnesses, and to conclude that the Pacific Electric train was not running at such a rate of speed as to preclude the reasonable opportunity to the plaintiff to walk to the south end of the Los Angeles car and to step further away from the moving Pacific Electric train, if he so desired. In estimating and determining the speed of the electric train, the jury had a right to take into consideration the fact that the noise and rumble of the moving of a three-car train does to a certain extent accentuate the idea of speed en-

tertained by many people, and that the testimony of such witnesses may not be so reliable as the testimony of a motorman, who is accustomed to study speed in order to make the schedule upon which his train is being operated, and this notwithstanding the fact that the motorman may be classed as an interested witness. In view of all these matters, we think the jury was justified in coming to the conclusion at which it must have arrived in finding a verdict for the defendants; that, if negligence existed, the plaintiff himself was chargeable with contributory negligence, which proximately led to his injury, and also the jury was justified in coming to the conclusion from all the facts which we have narrated that the plaintiff was solely responsible for his injury. We do not need to cite authorities that one cannot venture across the street at an intersection carrying such a large volume of traffic as the one in question without taking reasonable precautions for his own safety, both as to the time of leaving the sidewalk line and during the entire period that he is upon the intersection. The coming of the automobile has added to the dangers incident to the use of city streets, and these dangers, coupled with the ordinary street car traffic, leads to the conclusion, irrespective of any street ordinances regulating the crossing of streets by pedestrians, that pedestrians are not taking the reasonable precautions to insure their own personal safety, when they do not pay attention to the preliminary gongs or bells warning all users of the streets that the course of the traffic is about to be changed, and that the semaphores permitting the change in the direction of the traffic are about to be reset. If all these precautions to safeguard intersections are not observed, especially by one in possession of all his normal faculties of sight, hearing, and locomotion, it cannot be said that the finding of the jury, which implies the negligence of such a one, is against the evidence.

[5] The duty of the motorman to protect the plaintiff, and the duty of the plaintiff to protect himself, are reciprocal; that is, it is as much the duty of the plaintiff to protect himself as it was the duty of either of the motormen involved in this case. Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493, and cases there cited. In the case of Bailey v. Market Street Railway Co., 110 Cal. 320, 42 P. 914, a case involving injuries by passing cars, the Supreme Court has practically decided the questions we are here considering, in a case involving injuries to a person who was standing in the space between two street car tracks, who stepped backward and was injured. The recital of the facts, so far as necessary to illustrate the point in that case, is as follows:

> "A west-bound Castro street cable car of defendant was approaching, and, as the seats thereof on the northerly side seemed occupied, while the front seat on the southerly side was vacant, they crossed over the north track upon which their car was approaching, and stood in the space between the two tracks, to do which there was sufficient room. Plaintiff's escort faced the east, and signaled the Castro street car to stop, which it did. Plaintiff, in the meantime, intent upon the approaching west-bound car, failed to see an east-bound car upon the other or southern track, and unconsciously, and without looking, stepped back upon that track, and was struck by an east-bound street cable car, knocked down, and severely injured."

It was held that the plaintiff was negligent and not entitled to recover, and the court comments upon the fact that plaintiff was standing between the two tracks where there was room for her so to do, and that her stepping backward was the cause of her injury. This case has been cited a number of times, and always with approval. What we have said demonstrates that consideration of plaintiff's second alleged ground for reversal is unnecessary.

[6] The affidavit, the striking out of which is alleged to be error, and constituting appellant's third ground alleging cause for reversal, appears to be based wholly upon information and belief. We find nothing therein set forth as facts founded upon the knowledge of the affiant. The affidavit used on motion for a new trial is too long to be set forth herein, and, as we read it, it does not state sufficient cause for granting a new trial, even though the trial court had allowed it to remain as a part of the record. Being all based upon information and belief, the discretion of the trial court in refusing to set aside the verdict of the jury upon such an affidavit would not be disturbed upon appeal. Gay v. Torrance, 145 Cal. 144, 78 P. 540; Lamberson v. Superior Court, 151 Cal. 458, 91 P. 100, 11 L. R. A. (N. S.) 619. Other cases might be cited, but these cases set forth the rule concerning affidavits setting forth only information and belief. It may be here stated that the appellant has presented neither argument nor any authorities in support of his allegation that the court erred in striking out the objectionable affidavit.

[7] Appellant also urges that the court erred in limiting his voir dire examination of jurors. The transcript, however, shows that the examinations and questions asked the prospective jurors, in sustaining objections to which it is alleged the court erred, reveals the fact that the questions were not propounded for the purpose of laying the foundation for a challenge for cause, but were asked simply for the purpose of enabling the plaintiff to determine whether he would or would not desire to exercise peremptory challenges. That such an examination is not permissible is definitely settled by the case of People v. Edwards, 163 Cal. 752, 127 P. 58. See, also, 15 Cal. Jur. p. 433.

[8] None of the instructions asked for by the appellant and refused by the court are

set forth in the transcript, which fact, of course, eliminates this portion of appellant's fourth alleged reason for reversal. As to the instructions given, the appellant alleges the court instructed the jury that "pedestrians must yield right to street cars, and this regardless of plaintiff's inability to do so because of being hemmed in between two cars." We have read every word of the instructions given by the court, and there is absolutely nothing in the record justifying such assertion. If made through proper motives, we can only attribute the appearance of the statement in appellant's brief to a failure on the part of counsel to correctly read or interpret the instructions given by the trial court to the jury. If made from any other motives, we may here state that such a course is useless, as we are accustomed to read the instructions given to the jury by trial courts in order to ascertain for ourselves just what has been set forth as the law applicable in the case being considered.

At the request of one of the defendants, the court gave to the jury the following instruction:

> "If you find that the car of either defendant was managed by the motorman in charge of it in the same manner as an ordinarily prudent man, under the same circumstances as was the said motorman, would have managed said car, then I charge you that your verdict must be for that defendant."

And, at the request of the plaintiff, the following instruction was given:

> "If the plaintiff was standing in the space between the tracks in front of the street cars, the motorman in charge of each car was in duty bound to see him, if, in the exercise of ordinary care, he could see him, and, if he did not see him when in the exercise of ordinary care he could have seen him, then that motorman was guilty of negligence."

It is urged that the latter instruction is inconsistent with the former, and therefore that the jury necessarily was misled. No objection to the first instruction herein set forth is pointed out, and we do not perceive any. As to the latter instruction, we doubt its applicability under the facts as disclosed by the record. It is more favorable to the plaintiff than he was entitled to. It would convey to the jury the idea that the plaintiff was in front of the said cars in question, which is not the case. He was in the space between the tracks, and in a space over which neither car ran, and could not be said to be in front of either car, in the sense of being where he would be necessarily run over by a car running either north or south.

[9] Appellant cannot complain where the instructions are more favorable than the facts warrant. Wood v. Moulton, 146 Cal. 317, 80 P. 92; Byrne v. Western Pipe & Steel Co., etc. (Cal. App.) 253 P. 776. No other objections are specifically pointed out, but we may state that a study of the instructions reveals that the trial court gave a very clear and comprehensive statement of the law applicable to all the facts involved in this case.

[10] The jury in this case returned a sealed verdict, and then was allowed to separate. Upon the reconvening of court, and before the verdict was opened, the foreman of the jury asked permission for the jury to retire for five minutes before the verdict was rendered. This, however, the jury was not permitted to do. The verdict was then rendered by the jury in favor of both defendants. Upon the jury being polled, all of the jurors answered that such was their verdict. The foreman then handed to the court a letter signed by himself setting forth that the jury considered the accident unavoidable, and contained a request that the defendants should recognize a moral obligation to compensate the plaintiff. This letter, of course, signed by the foreman, and which he wished to present to the other jurors before the verdict was read, furnished nothing upon which the trial court could take any action further than to disregard the same, and does not constitute any basis for a reversal of the judgment entered in this case.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

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82 Cal. App. 16

In re RHEINSCHILD. (Civ. 5567.)

(District Court of Appeal, Second District, Division 2, California. March 23, 1927.)

Attorney and client ⚷61—Disbarred attorney held entitled to reinstatement on showing upright conduct for nearly eight years and constant study of law since disbarment.

Applicant for reinstatement as attorney at law after disbarment *held* entitled to reinstatement on showing that he had conducted himself with highest degree of honesty and integrity for nearly eight years, and that he had kept up a practically constant study of the law since his disbarment.

Original application by Walter M. Rheinschild for reinstatement as an attorney at law after disbarment. Petition granted.

W. A. Alderson and Davis & Thorne, all of Los Angeles, for petitioner.

Chas. L. Nichols, of Los Angeles, for respondent Los Angeles Bar Ass'n.

WORKS, P. J. Petitioner was admitted to the bar in 1909, and he was disbarred in 1919. He petitions for a reinstatement in the ranks of the profession.

Petitioner has produced satisfactory and convincing evidence that he has conducted himself with the highest degree of honesty and integrity during the nearly eight years that have elapsed since he was deprived of his license to practice. Upon the score of his mental qualifications, we are satisfied from the evidence that he has kept up a practically constant study of the law since his disbarment and that he is possessed of the necessary qualifications to entitle him to a reinstatement. These conclusions bring him within the rules stated in the opinions In re Stevens, 197 Cal. 408, 241 P. 88, and In re Cate (Cal. App.) 247 P. 231.

Petition granted.

We concur: CRAIG, J.; THOMPSON, J.

PEOPLE v. MAHONEY. (Cr. 1392.)★

(District Court of Appeal, Second District, Division 2, California. March 25, 1927. Hearing Granted by Supreme Court May 23, 1927.)

1. Criminal law 🔑368(1)—Testimony relative to injuries to others, in collapse of grand stand, at time deceased was killed, held erroneously admitted as res gestæ.

In prosecution for manslaughter, testimony relative to injuries and cries of other persons occupying grand stand constructed by defendant, whose negligence therein was alleged to have caused death, *held* erroneously admitted as part of res gestæ.

2. Criminal law 🔑656(1)—Trial judge's conduct, in manslaughter prosecution, in espousing cause of prosecution held improper.

Trial judge's conduct, in manslaughter prosecution, in questioning witnesses and commenting on evidence in espousing cause of prosecution *held* improper.

3. Criminal law 🔑633(1)—Every defendant in criminal case is entitled to fair trial on facts.

Every defendant in a criminal case is entitled to a fair trial on facts, and not trial on temper or whimseys of judge who sits in his case.

4. Criminal law 🔑1186(4)—Admission of incompetent evidence and misconduct of trial judge in manslaughter prosecution held not to require reversal, under evidence (Const. art. 6, § 4½).

Admission of incompetent evidence and misconduct of trial judge *held* not to require reversal of conviction for manslaughter, in view of evidence establishing guilt with no evidence of a miscarriage of justice, as required by Const. art. 6, § 4½.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Paul F. Mahoney was convicted of manslaughter, and he appeals. Affirmed.

Le Compte Davis and William B. Beirne, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for the People.

THOMPSON, J. The appellant and C. B. Bucknall were charged by indictment with manslaughter. The jury were unable to agree upon a verdict respecting the charges against Bucknall, but did return a verdict of guilty against the appellant. He appeals from the judgment pronounced upon the verdict and from an order denying his motion for a new trial. The charge against the defendant Bucknall was dismissed by the court upon motion of the district attorney.

It has become the custom on New Year's day of each year to hold a festival of flowers in the city of Pasadena, known as the Tournament of Roses. It is viewed by thousands, many of whom are willing and anxious to pay for seats from which to watch the parade. In the early part of December, 1925, the appellant here secured from the building department of the city of Pasadena four permits to erect four grand stands for the accommodation of these spectators. All of them were constructed along similar lines. The one erected at Colorado and Madison avenues collapsed. Many people were injured; some were killed, including one Mrs. Bessie Borich, for whose death the jury held the appellant responsible. The type of construction used may be stated to have been of the stepladder type—the seats and seat stringers corresponding to the steps and their supports, and the underpinning or columns corresponding to the rear braces of the ladder—in other words, the columns consisting of 4 x 4 timbers ranging from a few feet in length to approximately 20 feet were inclined forward from the perpendicular at an angle of about 2 feet in 18. They were not all inclined at exactly the same angle, and this difference in inclination tended to throw unusual stresses upon some of them. It is not questioned but that sufficient uprights were used (they were set approximately 4 feet on center in each direction), had they been properly placed and braced. It is made to appear that the transverse bracing consisted of one 1 x 6 board nailed to the sides of the uprights and resting upon the mudsills, which mudsills were not continuous, but consisted of various lengths—some of them carrying one post only, some carrying 2 or 3 posts. The longitudinal bracing, principally upon the rear, consisted of 1 x 6 material nailed in the shape of an X from top to bottom, the X covering 4 or 5 posts. Sporadic longitudinal bracing was also used on some of the inside uprights. The uprights were beveled where they were toenailed to the bottom of the seat stringers, but were not beveled to rest upon the mudsills—the edge of the upright only bearing thereon. Much of the lumber had been used

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★Superseded by opinion of Supreme Court, 258 P. 607.

before, some of it in grand stands in previous years, some of it had been purchased from a contracting firm which had used it as form material to set concrete. The testimony established the fact that many of the nails were not driven home, but were left to protrude from one-eighth to more than one-quarter of an inch. Defendant contended that these were superfluous nails put in after sufficient had been driven home. The testimony also showed that many box nails or nails smaller in diameter than the common nails had been used even in places where strain would be applied. There was a mudsill in front of the stand upon which, without beveling, rested the seat stringers. In front of the seat stringers there was nailed to the mudsill a 1 x 3 strip—and then in front of the mudsill were driven 2 x 2, 2 x 3, and some 2 x 4 posts, placed about 3 or 4 feet apart and driven into the ground somewhere about 14 inches. The 1 x 3 strip on the mudsill and the stakes in front were, according to the defendant, intended to carry the forward thrust of the stand caused by the inclination forward of the upright posts. Some of the testimony shows that the forward thrust per seat stringer, if loaded with 1,000 people (and it was actually loaded to capacity with 975 at the time of the accident), would be about 800 pounds, and that the resistance of the stakes in soft ground such as this ground was testified to be, would be less than half that force. The ordinance of Pasadena respecting grand stands calls for construction capable of sustaining a live load of 125 pounds to the square foot, with a safety factor of 4, or a load of 500 pounds. Had the safety factor of 4 been used in computing the forward thrust per seat stringer, it would be in the neighborhood of 3,200 pounds per seat stringer. The test employed in this instance was to load one section (4 feet by 4 feet in area) of the stand with sacks of cement, which would place upon this particular section a load somewhere between 250 and 300 pounds per square foot. The stand collapsed with a load of approximately 50 pounds per square foot. This test was conducted under the supervision of the defendant Bucknall, against whom the charges were dismissed.

Many expert witnesses called by the plaintiff and several occupants of the stand testified that the stand slid forward, tearing out some of the stakes and ripping off the 1 x 3 strip on the mudsill, and after it had slid a distance of 8 or 10 feet, buckled or jacknifed, throwing the occupants to the bottom in the mass of broken timber. The defendant contended and he had one occupant testify that he heard a cracking and noticed that the stand sank down in one place until the ends of the seat stringers kicked over the 1 x 3 strip on the mudsill and slid forward. From this the defendant argues that there was a soft spot in the earth, made by filled ground in an old cellar which had been under a residence formerly upon the property, the recital of which causes us to add to the facts already recited the fact that defendant did not make an investigation into the character and firmness of the soil before building, nor make any excavations for the mudsills other than sufficient to permit them to rest flat upon the ground. Other facts will develop as we proceed, but the foregoing is sufficient for a proper understanding of the points raised by this appeal.

[1] The appellant first complains of the admission in evidence, over defendant's objection, of testimony showing injuries to persons other than the deceased, Mrs. Borich, and of the cries, shrieks, and groans of the people in the stand immediately after its collapse. This testimony was admitted by the trial court on the theory that it constituted a part of the res gestæ. The offense charged is what has generally been known as "involuntary manslaughter" or a case—

> "where death results unintentionally, so far as defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed." 1 Whart. Crim. Law (8th Ed.) § 305.

The principal questions in determining the guilt or innocence of the defendant were, first, Was the stand negligently constructed or was it constructed unlawfully or in violation of the ordinance? Second, Did death result from the unlawful or negligent act? It is important to have these main questions, which may be denominated the main transaction, in mind in determining whether the testimony admitted was part of the res gestæ because we find that declarations which would otherwise be hearsay, or evidence of another offense which would not otherwise be admissible under any other exception, would be competent, if constituting a part of the res gestæ. In order, however, that they may come within the rule, it is necessary that they possess the following characteristics:

> "First, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; second, they must qualify, illustrate, explain, or unfold its character or significance, so as, third, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction." Underhill's Crim. Evidence (2d Ed.) § 93.

It will be observed, therefore, that the acts and declarations admissible as a part of the res gestæ depend largely upon the character of the crime, or, as said by the same author, section 95:

> "The main question is, Are they relevant to, and do they explain and illustrate the facts of

the transaction in issue? In other words, can we learn from them something of the motives or intention present in a relevant act."

Tested by these questions it is apparent that injuries or the extent of injuries suffered by other parties who were present in the grand stand could throw no light either upon the character of the construction, or upon the question as to whether faulty construction was responsible for the death of Mrs. Borich. If the stand were negligently or unlawfully constructed, the defendant would have been guilty of the offense charged if such construction resulted in her death, regardless of injuries to other persons and regardless of their spontaneous utterances of pain. Undoubtedly, such testimony would have great effect upon the sentiments and would tend to arouse the indignation of the jury. We conclude therefore, that the testimony admitted was not to be considered a part of the res gestæ, and it was error to admit it as such.

[2] The remaining two points urged by appellant as reasons for the reversal of the judgment may properly be considered under one head. They consist of 23 utterances by the trial judge and numerous instances where he took to himself the task of examining witnesses, which, appellant says, conveyed to the mind of the jury the impression that the judge was convinced of the guilt of the defendant and that his sympathy was wholly with the prosecution. No assignments of error were made at the time of the occurrences by defendant's counsel, and no opportunity given to the court to right the wrong done, if such it was. We are not unmindful of the rule which requires some effort to be made in the trial court to prevent and to correct such errors when they occur. But there may be instances, and this is one of them, where such effort would be entirely fruitless; no retraction sufficient to undo the harm; and the effort made might result in further error. Further, it is evident from the attitude of the trial judge, as shown by the record, that any assignment of misconduct would have been disregarded. Counsel for the appellant, by making an assignment, would have brought upon himself further attack. People v. MacDonald, 167 Cal. 545, 140 P. 256; People v. Derwae, 155 Cal. 593, 102 P. 266; People v. Frank, 71 Cal. App. 575, 236 P. 189. It would extend this opinion beyond any reasonable bounds to treat each assignment separately, many of which, while perhaps not strictly in keeping with judicial language and discretion, were not of that irremediable nature except when considered as a part of the whole, and therefore we shall consider only a few instances. D. Z. Gardner, a member of bar, was permitted to testify on behalf of defendant as an expert on construction. During the examination of Mr. Gardner the following occurred:

"A. By the court: Let's put it this way, Mr. Gardner: From your experience as a builder and contractor of about 8 years, obtained 34 years ago, would you say that the stand in question was constructed in a safe and workmanlike manner? A. Absolutely so.

"Q. What happened to it, do you know? A. I know it fell down. But—

"Q. That is all. You have answered the question. A. Yes. I don't think it is hardly fair when the question has been—

"Q. Now, you are not here to say whether a question that is asked is fair or not, and—A. I understand, your honor.

"Q. * * * The fact that you are an attorney of the court and an officer of the court makes it all the more wrong for you to attempt to make such a statement as that, and if it occurs again I shall hold it a contempt of court, just as I would do with anybody else who is insulting or doesn't show the proper respect for the court. Now, you are here as a witness to answer questions. A. I understand. I want—

"Q. Never mind what you want. You are here to answer questions, and when you have answered the questions close your face after you have answered the question, and don't let me hear any more remarks of that kind. If you do, you will be up here in a structure that will bear a whole lot more weight than any grand stand is intended to bear."

Shortly after this occurrence and immediately preceding an afternoon recess of the court, the following statement was made by the trial judge:

"Well, I guess we had better take the afternoon recess, ladies and gentlemen; we don't want to tire our noted expert out."

After Mr. Gardner was permitted to testify as an expert, his testimony should have gone to the jury unimpaired by the comment of the court thereon. Realizing the eagerness with which juries grasp the suggestions of the trial judge, we can appreciate the fact that no weight would be attributed by them to his testimony after the remarks just quoted. On more than one occasion the trial judge asked the witness, in referring to the grand stand, "What happened to it?" as though the fact that it had fallen satisfied his mind tht it had fallen by reason of negligent construction, eliminating the possibility of a latent defect, which due care and circumspection may not always guard against. And to further accentuate his belief, when questioning one witness regarding the three stands which did not fall, asked the following question:

"You think the mercy of Providence might have had something to do with it?"

Under our present system, judges are not permitted to comment upon the evidence or its effect. They cannot be too careful or cautious lest they by word, look, or inflection of the voice bring to bear upon the jury an influence not compatible with an unbiased verdict of the jury. People v. Williams, 17 Cal. 142; People v. Matthai, 135 Cal. 442, 67 P.

694, and People v. Frank, supra. In addition to the foregoing misconduct of the trial judge, we deem it proper to instance the following: The counsel for one of the defendants had objected to a question. The witness on the stand had commenced an answer, when counsel for the other defendant interposed an objection also. The record then proceeds:

> "The Court: The witness had not finished her answer, so I could not very well rule on the objection, not knowing what the witness' answer is going to be until she finished. And I will instruct counsel not to interrupt the witness again when she is making an answer. Make your objection when the witness finishes the answer or move to strike it out when she has finished, but don't interrupt the witness. Show the witness the common courtesy of allowing her to finish her answer.
>
> "Mr. ——: Well, but, your honor—
>
> "The Court: Now, that is all I want to hear from you. I expect a witness in my court to be treated with ordinary gentlemanly courtesy, and it is going to be done.
>
> "Mr. ——: I will be very glad to do that, your honor, of course.
>
> "The Court: Very well; see that you do."

Upon a similar occasion, when another witness was on the stand, the judge said to defense counsel:

> "The witness had not finished his answer. He will be allowed to finish his answer, and if there are any more interruptions some one is going to suffer for it."

The record also shows the following, the questioner being the counsel for one of the defendants:

> "Q. * * * Mr. Kelly, as chief of police in Pasadena, are you an insurer against crime?
>
> "The Court: Oh, you don't need to answer that question, Captain. That is too utterly silly to require an answer.
>
> "Q. * * * As head of the department?
>
> "The Court: Now, that question * * * you know is not a proper question. I am willing to allow a lot for ignorance, but some questions pass the bounds, and that is one of them."

The same witness was examined by the counsel of defendant Bucknall as to the latter's reputation. The record shows:

> "Q. He is a man who bears a good reputation in Pasadena? A. Excellent. * * *
>
> "Q. For his truthfulness? A. Yes, sir.
>
> "Q. Honesty? A. Yes, sir.
>
> "Q. Integrity? A. Yes, sir.
>
> "Q. By the Court: And chastity? A. Yes, sir.
>
> "The Court: We might as well get them all in."

While the same witness was on the stand, the prosecution inquired whether the lumber formerly in the wrecked stand had been changed in its condition after removal from the place where it fell. Upon objection being made by both counsel to certain questions, the judge said to one of them:

> "You don't want the officer to testify he slept on it, do you?"

During the direct examination of a witness for the prosecution, one of defense counsel started to say something. Then:

> "The Court: Wait just a minute. I think Mr. —— is laboring with an objection."

A little later the same situation presented itself, when this occurred:

> "The Court: Just a moment. Mr. —— is a little bit slow in getting started, so we will have to give him a little chance to make his objection. Go ahead, Mr. ——, I can always tell from the motions you are making there is an objection about to come forth.
>
> "Mr. ——: Yes, your honor.
>
> "The Court: Now you have passed through the preliminary pain, give birth to it."

On another occasion the judge said of one of the counsel for the defense:

> "The Court: Well, Mr. —— has made that objection so many times that I think he ought to have it sustained at least once. * * * I don't want him to be utterly without hope of having that objection sustained some time during the trial."

One of defense counsel objected to the introduction in evidence of certain photographs. After a colloquy over the question whether it was necessary to call as a witness the photographer who took them, the following occurred:

> "The Court: Well, it seems to me it is an idiotic objection, to be frank about it. All right, bring the photographer here, since they seem to want to make you a little more trouble. Do you want them to bring the camera here?
>
> "Mr. ——: No.
>
> "The Court: You want him to bring the same shoes he had on when he took the picture? How about the gum he was chewing? Do you want him to pick that up again? Just about as sensible. I haven't much patience with an objection which is made just for the purpose of making objection, when there doesn't seem to be a scintilla of sense in making them. A proper objection I have absolute respect for, of course. If a witness testifies a picture absolutely delineates that which he is testifying to, that certainly ought to be sufficient without insisting that the man who did the actual act of pressing the bulb be brought in to testify he pressed the bulb to the camera to take the picture."

While a witness for the defense was being cross-examined by the district attorney, this took place:

> "Q. * * * Are you a carpenter or a laborer? A. Why, I am a carpenter.
>
> "Q. By the Court: Belong to the carpenter's union? A. No, sir.
>
> "Q. By a Deputy District Attorney: Well, I thought you said in answer to his question that you had been working either as a laborer or carpenter, or was I mistaken?

"The Court: You are not one of those scabs, then, some of the witnesses have referred to as connected with this work? A. Carpenter. I used to work at labor sometimes when I was a boy."

The owner of the property upon which the collapsed stand was constructed was a witness for the prosecution. After he testified to the consideration paid him for the use of the property and had said that he was on the stand at the time of the collapse:

"Q. By the Court: You had two broken legs of your own in addition to that, didn't you? A. I had two broken legs. Q. That was a premium outside of the other consideration you got?"

One of the counsel for the defense objected at one point:

"These questions are leading.

"The Court: Oh, I don't care if they are. That is an awful trivial objection, unless the question puts the answer directly in the mouth of the witness, but when you are questioning a man who is qualified as an expert I don't see any necessity of consuming about five times the time that is necessary by beating around the bush. You might as well go right at the point and ask about the fact we are interested in."

[3] We have presented sufficient to show a state of affairs which trial judges should not permit, and which may be pointed to as an example of what they should not do in the trial of lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts, and not a trial on the temper or whimseys of the judge who sits in his case. Whatever the degree of guilt of appellant here, those who know the circumstances surrounding his conviction are likely to feel that the verdict resulted from the conduct of the judge and not from the evidence.

[4] We have next to determine whether or not the errors found to exist in the record are of such a character, under the entire evidence, as to demand or warrant a reversal of the judgment. It is with great unwillingness, considering the extreme nature of the misconduct of the trial judge, after a studious scrutiny of the entire transcript that we say that the defendant was undoubtedly guilty, and therefore no miscarriage of justice has resulted from the errors committed by the trial court. Section 4½ of article 6 of the Constitution unquestionably relates to each particular case as it arises, and not to the harm done to the cause of administering justice. We therefore begrudgingly say that the construction of the grand stand was such that even to the nontechnical mind (the mind not trained in the strength and support of materials or the directions of applied force) it is established beyond doubt that, when the stand was filled to capacity, a tremendous load would be thrown in a forward direction by reason of the inclination of the upright supports; that, in order to overcome this forward thrust, it would be necessary to use more than an ordinary amount of transverse bracing in order to tie the parts together; and that this stand was insufficiently and negligently braced. Again, it would seem obvious that the test employed in this instance was no test at all for the reason that the load being applied only to one section would be distributed over the entire structure. There was no substantial evidence of any latent defect, therefore, when the stand fell with one-tenth of the load required by the safety factor of the ordinance, it is obvious that the stand was not completed as required by the ordinance, but in violation thereof. Assuming that it fell by reason of the filled ground testified to by defendant's witnesses, the mudsills were not of the character sufficient to distribute the weight beyond the soft earth, as is required by a circumspect and careful construction, and, furthermore, the defendant freely admitted that he had not made that cautious inspection of the supporting earth required where human beings are to be seated. He, further, freely admitted the fact that he had put up a large sign indicating that any one using the grand stand did so at their own risk. We can hardly imagine why this notice was given unless the defendant had reason to apprehend a catastrophe. The plaintiff called numerous witnesses, who had been technically trained in the stresses and strains involved in construction work and the strength and support of material, all of whom concurred in the opinion that the stand was insufficient to carry a load of 975 people. The witnesses called by the defense in this respect were carpenters who had not received a technical education so far as the record discloses, and the expert witness Gardner, the record discloses, had done some carpenter work about 34 years prior to testifying, therefore we conclude that without the error complained of the jury could have done nothing else than to bring in a verdict of guilty, and that there is no evidence of a miscarriage of justice, as required by section 4½ of article 6 of the California Constitution.

This opinion should not be completed without calling attention to the fact that the error complained of in the admission of testimony respecting the injuries and the extent of injuries of other persons in the stand is largely minimized by the fact that defendant's counsel (and counsel who prosecute this appeal did not represent defendant at the trial) brought out similar evidence in his direct examination of his own witnesses, and that one of his expert witnesses testified that the stand was insufficient to carry the load.

The judgment and order appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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82 Cal. App. 20

BANKS v. PANN et al. (Civ. 5288.)★

(District Court of Appeal, First District, Division 1, California. March 23, 1927. Hearing Denied by Supreme Court May 19, 1927.)

1. Appeal and error 🔑1011(1)—Trial court's finding on conflicting evidence will not be disturbed on appeal.

Finding of trial court, sustained by substantial evidence, will not be disturbed on appeal, where evidence is sharply conflicting and would have sustained contrary finding.

2. Sales 🔑384(7)—Seller's damages on buyer's rejection of oranges held difference between contract price and market price at breach, notwithstanding seller received more than market price; "resale"; "value to seller" (Civ. Code, §§ 3049, 3311).

Where, on buyer's refusal to accept cars of oranges tendered, seller diverted oranges to fill a previous order at a price greatly in excess of the then market value *held* that seller's measure of damages was difference between contract price and market value at time of breach under Civ. Code, § 3311, and not, as contended by buyer, the difference between price actually received and contract price; there being no "resale" within section 3049, "value to seller" within section 3311 meaning market price or market value.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Resale; Selling Value.]

3. Sales 🔑382—Admitting testimony of president of corporate buyer of oranges rejected by buyer as to grades and brands held not error.

In seller's action for buyer's breach in rejecting cars of oranges, reception in evidence of deposition of president of corporation which bought one of cars and who showed familiarity with grades named, and handled the car in question as to grades and brands of oranges, *held* not error as against objections that no foundation was laid, and irrelevancy, incompetency, and immateriality.

4. Appeal and error 🔑1050(1)—Admitting testimony of office manager of wholesale dealer who bought oranges rejected by buyer over objection of lack of foundation held not reversible error.

In seller's action for buyer's breach in rejecting cars of oranges, admission in evidence of testimony, by deposition, of office manager of wholesale fruit dealer who bought several cars from seller, as to grade and quality of cars in dispute, over buyer's objections that no foundation was laid showing his qualifications to testify, *held* not reversible error, notwithstanding failure to clearly show nature of his duties as office manager, where he testified that he knew of particular cars involved.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Llewellyn A. Banks, doing business under the firm name of the Citrus Growers' Cash Association, against W. P. Pann and the Angeles Brokerage Company. Judgment for plaintiff against defendant last named, and defendants appeal. Affirmed.

G. P. Adams and W. W. Orme, both of Los Angeles, for appellants.

L. M. Chapman and Ward Chapman, both of Los Angeles, for respondent.

PARKER, Justice pro tem. Defendant Angeles Brokerage Company, a corporation, appeals from a judgment against it, and brings here for review the judgment and the order of the lower court denying its motion for a new trial.

This is a suit by the seller in a contract of sale of citrus fruit against the buyer for damages growing out of the refusal on the part of the buyer to take and pay for the fruit. The trial court found in favor of plaintiff and against defendant corporation, and assessed damages in the sum of $1,945.05, and thereafter defendant corporation presented its motion for a new trial on all of the statutory grounds, and said motion was denied. It might be here noted that no judgment was given against defendant Pann.

It is admitted (and is indeed the basis of the action) that in March of 1919 plaintiff agreed to sell and defendant agreed to purchase 10 carloads of San Fernando Valencia oranges of specified grades and sizes. As a particular specification, the fruit sold on the contract was to be free from frost. It is further admitted that, in pursuance of the contract, plaintiff did tender to defendant certain cars of fruit, and that defendant refused to accept the same.

On the determination of breach of contract, but one question is presented; namely, was the fruit tendered of quality and grade sufficient to meet the requirements of the contract?

Passing questions that incidentally arise, both plaintiff and defendant agree that, if the fruit tendered was thus sufficient in grade and quality, the refusal of defendant to accept constituted an actionable breach of the contract.

Plaintiff presented evidence that the fruit tendered met in all respects the requirements of his obligation, and that it was delivered at a time and place conformable to the contract and to the orders of defendant. Defendant, on the other hand, offered evidence to the contrary, tending to show that in no manner, either as to grade or sizes or freedom from frost, did the fruit measure up to the contracted specifications. On this issue the trial court found in favor of the plaintiff.

★Hearing denied by Supreme Court.

Appellant argues, somewhat convincingly, that this finding is against the evidence, and lacks facts sufficient to sustain it.

[1] After a careful analysis of the evidence, we feel that the record presents a sharp conflict and that the findings of the trial court on the fact of breach of contract should not be disturbed. The conflict of evidence is indeed sharp, and it presents a case where, had the trial court determined the fact in favor of defendant, there would have been abundant foundation for the finding. This, however, does not justify any interference by this court, much less demand it. It would seriously disturb our entire judicial system if appellate courts were to become triers of fact and attempt to make nice distinctions as to credibility of witnesses and the weight of testimony. It needs no authority to support the rule that this court will not disturb a finding of fact by the trial court where there is substantial evidence to support it. A recent example is the case of Johnston et al. v. Field et al., 254 P. 269, decided by the Supreme Court in bank March 10, 1927.

[2] The next question, however, is not so easily disposed of. Appellant contends that, even if it did breach the contract, the trial court's finding as to damage is not supported by the facts, and that the method of assessing the damage to plaintiff was erroneous.

Here it becomes necessary to briefly outline the facts forming the basis of the trial court's conclusion. Plaintiff is engaged in the business of packing and shipping oranges. The record discloses that in March of 1919 he had secured orders for cars of fruit to be shipped to Eastern points, and the prices to be obtained therefor were as of the March market. From March or thereabouts the market began to weaken, which tendency continued until in August of the same year the market price of oranges had declined at least $1 a box. The plaintiff had procured fruit sufficient to fill all of his orders, including the order on the contract here involved. When the oranges were tendered to appellant and by it refused, without reason (as herein determined), the respondent diverted the fruit to fill one of these previous orders receiving therefor the contract price, which was greatly in excess of the then market value or market price. Appellant strenuously urges that the measure of his liability should be the difference between the price actually received on these shipments as made and the price which appellant had agreed to pay. Respondent, in turn, as strenuously argues that the measure of his damage is the difference between the contract price and the market value at the time of breach.

It is conceded, as indeed it must be, that, in ordinary cases when the buyer refuses to proceed with performance, and when the title has not passed and the property has not been resold pursuant to section 3049 of the Civil Code, the measure of damages is the excess of the amount due from buyer under the contract over the value to the seller, together with excess expense of marketing. Section 3311, Civ. Code. The term "value to seller" is construed as meaning market price or market value. Hill v. McKay, 94 Cal., at page 18, 29 P. 406, 409. It is further conceded in this case that title remained in the seller.

A mere reading of the facts as hereinbefore detailed will suffice to indicate that there was no resale of the goods pursuant to section 3049. Whatever may be contended with reference to the general rule that one is bound to use all reasonable means at hand to minimize his damage, it is rarely applied in cases of this sort where the measure of damages is provided by statute. Here the seller's damage was determined at the time of breach. The mere fact that he was able to exchange the fruit and ship the same in place and stead of other fruit at a price contracted for months before and at a then more advantageous market does not inure to the benefit of defendant. As far as defendant is concerned, what difference can it make to him whether the damages are predicated upon any particular car of oranges in the absence of a showing of a market affected by the difference? We are dealing here with goods of a perishable nature, and the record discloses that respondent had ample fruit other than that tendered appellant to fill all of its orders. To accept appellant's theory would be to hold that the respondent packing company should have taken the fruit offered, and at the risk of deterioration and loss sought a market and held back the other fruit belonging to it, and eventually end up with a surplus on hand undisposed of and a cause of action against no one for the loss occasioned by appellant's breach. We are of the opinion that the trial court properly accepted section 3311 as determining the measure of damage and properly applied said section to the facts before it. See, also, Gopcevic v. Cal. Packing Co., 64 Cal. App. 132, 220 P. 1078.

Appellant further presents as ground of appeal the alleged error of the trial court in denying its motion for a new trial.

[3] Aside from urging the grounds hereinbefore disposed of appellant cites certain errors in the admission of testimony.

Respondent, on the question of the quality of the fruit, presented, in the form of depositions, the testimony of two witnesses. The first witness, whose deposition was read, was one William C. Edwards, a resident of New Jersey. He testified:

> "I am president of W. T. Mullikin Company, a corporation, of Philadelphia. That I purchased oranges from respondent. I know of a car shipped said corporation in September, 1919. We handled that car. We bought the car."

He was then asked to state the brand and grade under which said oranges were packed; whereupon appellant objected on the ground that no foundation had been laid and on the grounds of irrelevancy, incompetency, and immateriality, which objection was overruled. Witness was then asked if the quality was up to the brand and grade. The same objection was interposed with the same ruling. However, before ruling, evidence was offered by another witness to show that the firm of Mullikin & Co. had purchased hundreds of cars of oranges from respondent in the 6 years preceding, almost always shipped under same brands.

Appellant urges the further objection that the testimony of the witness that he was president of the corporation at the time of deposition did not indicate that he had any connection with the company prior to the time of deposition.

We see no serious error in the ruling of the trial court. The witness showed a familiarity with the grades named and handled the car in question. The effect of his testimony was that the car in question measured up to the brands and that the brands indicated a certain quality. It was apparent from the record that the firm had been familiar for years with these brands and quality, and received and handled the car in question in the regular course of business.

[4] The next witness was one named F. F. Buckmaster. He was office manager of John Amecin Bros. Company of Columbus, Ohio. John Amecin Bros. Company bought several carloads of oranges from the respondent. This witness was called upon to testify as to the grade and quality of some of the cars in dispute. The appellant objected on the ground that no foundation was laid showing the qualifications of the witness, and particularly in view of no showing that he had ever seen the fruit. Here it was shown that Amecin Bros. Company had been customers of respondent for 12 years. The court permitted the witness to testify over the objections of appellant as to the grades and brand of the fruit, and also that the fruit was of a quality up to the grade indicated by the brand and was free from frost.

The witness testified with reference to each car that he *knew of* that particular car. Appellant claims that this indicated only that he might have heard of the car and never had any connection therewith. We are satisfied, however, that he was understood to mean that he knew the car referred to in the course of his business. Just what might have been his duties as office manager should have been more clearly set forth. It is probable that an office manager might be, and usually is, removed entirely from the actual handling of the fruit or other goods sold. However, it is easy of presumption that his duties involved the general business of his firm and that he would be intimate with their business affairs. He would presumptively know if fruit was handled by his firm under certain brands or grades and as of a certain quality and whether or not difficulty had been encountered.

However, conceding that the foundation for his opinion was not sufficiently laid, we do not deem the error in the instant case of such a serious nature as to compel a new trial even in the face of the sharp conflict in the evidence. Moreover, the witness did qualify to a certain extent by showing that his business was a wholesaler of fruits and produce. That naturally would give him some knowledge of the subject of his testimony. The case was tried without a jury, and the testimony objected to came in by deposition. The record does not disclose in what manner the depositions were taken, but in the briefs of counsel it seems to be conceded that they were taken upon interrogatories submitted to the adverse party. While it may be true that, as in this case, the adverse party is under no legal obligation to cross-interrogate to determine the competency of a witness or to cross-interrogate at all, nevertheless we come back to the main function of counsel, namely, to aid and enlighten the court. Incidentally, in reviewing an appellant's claim of wrong, we look at the wrong done him as well as a contended deviation from rule.

The judgment is affirmed.

We concur: TYLER P. J; CASHIN J.

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81 Cal. App. 742

ARCHER v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5771.)

(District Court of Appeal, First District, Division 2, California. March 16, 1927.)

1. Mandamus ⚷172—In considering judicial order, appellate court is not bound by phraseology of order as written, but may consider all facts (Code Civ. Proc. § 1909).

Under Code Civ. Proc. § 1909, relating to effect of judicial orders in proceedings for writ of mandate to compel court to hear motion, in considering court's order denying hearing appellate court was not bound by phraseology of order as written, but could consider all the facts.

2. Divorce ⚷165(1)—Where petitioner moved to vacate interlocutory decree for divorce, if no legal objection existed, court's duty was to take and exercise jurisdiction.

Where petitioner presented motion to vacate and set aside interlocutory decree of divorce, if no legal objection existed, it became trial court's duty to take and exercise jurisdiction by hearing and determining.

3. Courts 🔑1—"Jurisdiction" of court is power to hear and determine.

"Jurisdiction" of a court is power to hear and determine.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Jurisdiction (of Courts).]

4. Mandamus 🔑4(1)—That order was appealable did not prevent petitioner from maintaining proceeding for writ of mandate, where remedy by appeal was inadequate (Code Civ. Proc. § 963, subd. 2).

That order denying hearing on motion to vacate interlocutory divorce decree was made after petitioner could have appealed from decree, and as such the order was appealable, under Code Civ. Proc. § 963, subd. 2, relating to orders which are appealable, did not prevent petitioner from maintaining writ of mandate to compel court to hear motion, where remedy by appeal was inadequate.

5. Divorce 🔑262—Court could not deny hearing on motion to vacate divorce decree because movant was in contempt.

Court could not decline to hear motion to vacate and set aside interlocutory divorce decree on ground that movant was in contempt for failure to pay maintenance theretofore ordered.

6. Mandamus 🔑31—Where court denied hearing on motion to vacate divorce decree because movant was in contempt, movant held entitled to writ of mandate compelling hearing.

Where court declined to hear motions to vacate and set aside interlocutory divorce decree because movant was in contempt for failure to pay maintenance theretofore ordered, movant *held* entitled to writ of mandate to compel court to hear motion.

Application by Clayton Archer for writ of mandate to be directed to the Superior Court of the State of California in and for the City and County of San Francisco, T. I. Fitzpatrick, Judge, to require respondent to hear motion to modify interlocutory decree of divorce. Writ granted.

Willis C. White and Russell W. Cantrell, both of San Francisco, for petitioner.

Peter tum Suden and Richard tum Suden, both of San Francisco, for respondent.

STURTEVANT, J. This is an application for a writ of mandamus directed against the superior court requiring it to hear a motion modifying an interlocutory decree of divorce. The respondents were served with an alternative writ, and they appeared and filed a general demurrer. From the petition it appears that Adelphia Archer commenced an action against this petitioner, Clayton Archer, to obtain a divorce. The husband was served with summons and complaint, but did not appear and answer. Thereafter, on the 7th day of June, 1926, an interlocutory decree of divorce was granted to the plaintiff. By the terms of that decree it was held that the wife was entitled to a decree of divorce on the ground of the husband's intemperance; that the wife should have the custody of the minor children; that the wife is entitled to $200 per month maintenance; that she is also entitled to one-half of the household furniture and to an undivided one-half interest in certain real and personal property, and to $250 counsel fees and $25 for costs; that on the 10th day of September, 1926, on the application of plaintiff, an order to show cause was issued directing the husband to appear and show cause why he should not be punished for contempt; that the hearing on said order was continued from time to time until the 6th day of December, 1926; that on the 17th day of November, 1926, this petitioner served and filed papers to the effect that on the return day of the order to show cause the petitioner would move the trial court that the interlocutory decree of divorce should be vacated and set aside, because at the time the plaintiff filed her complaint in divorce she had not acquired a statutory residence in San Francisco of three months immediately preceding the commencement of the divorce action; that the hearings of petitioner's motion were regularly continued, and the hearing of said motions and of the order to show cause both came on for hearing on the 6th day of December, 1926; that, when the case of Archer v. Archer was called, the attorney of the petitioner arose and addressed the court regarding the motions which the petitioner had noticed for that day and hour; that the attorney for the plaintiff arose and interrupted his opponent, and proceeded to state the facts regarding the order to show cause which he was ready to present, and also interposed the objection that the defendant should not be heard, as he was in contempt; that the judge of the trial court and the respective attorneys carried on a short conversation regarding the facts; that in that conversation it transpired that all of the moneys had not been paid, and then the trial court, among other things, announced: "Until he (defendant) does show some evidence of good faith, I will not listen to his motions, and you may consider them as denied at this time. I will continue the hearing of the order to show cause until December 8, 1926, at 11:45 o'clock a. m., and, unless the defendant at that time is in a position to make a substantial payment, I will send him to jail"; that thereupon the courtroom clerk entered a minute order: "Motion to be relieved under section 473, C. C. P., denied; order to show cause continued to December 8, 11:45 a. m."; that on the 8th day of December, 1926, the order to show cause came on for hearing, and the defendant was adjudged guilty of contempt; that execution was stayed five days; that thereafter, on the 14th day of December, 1926, the petitioner appeared and paid the attorney for the plaintiff $200, and the trial court discharged the petitioner in the contempt proceedings; that thereupon the petitioner again moved the trial court to hear his motions; and that the trial court refused to hear the same, and continued the order to show cause until the 14th day of January, 1927; that thereafter the petitioner applied to this court for the writ of mandamus.

[1-3] The respondents quote passages from the petition to the effect that when the application of the petitioner was called for hearing that the trial court denied it. They then argue that there is nothing undone the performance of which could be directed by a writ of mandamus. As we are considering an order as distinguished from a judgment, we are entitled to take into consideration all the facts, and are not bound by the phraseology of the order as written. Code Civ. Proc. § 1909; Cahill v. Superior Court, 145 Cal. 42, 44, 78 P. 467; De La Beckwith v. Superior Court, 146 Cal. 496, 498, 80 P. 717; Herd v. Tuohy, 133 Cal. 55, 63, 65 P. 139. Having done so, it is clear that the trial court refused to act on the motions of the petitioner. When the petitioner offered to present his motions, if no legal objection existed, it became the duty of the trial court to take and exercise its jurisdiction. The jurisdiction of a court is power to hear and determine. In this case the utmost that can be said is that the trial court determined. The uncontradicted facts are that it did not hear.

[4] In the next place, the respondents argue that the order complained of was made after the defendant could have appealed from an interlocutory judgment, and as such the order was an appealable order, and that, as long as the petitioner had a remedy by appeal he was not entitled to maintain this proceeding. Code Civ. Proc. § 963, subd. 2; Lindley v. Superior Court, 141 Cal. 220, 74 P. 765. If the point is good, it would apply with equal force in an application for a writ of review, or an application for a writ of prohibition, as well as an application for a writ of mandamus. Compare sections 1068, 1086 and 1103, Code Civ. Proc. In this connection it should be noted that, although the point was not raised that the petitioner's remedy was an appeal, a petition was entertained by the Supreme Court in an application for a writ of review (Suttman v. Superior Court, 174 Cal. 243, 162 P. 1032), and in a prohibition proceeding (McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110). Moreover, in Dell v. Superior Court, 53 Cal. App. 436, 200 P. 85, the identical point was presented to the court, and on page 439 (200 P. 86) the court said that the remedy by appeal was inadequate, and then added:

"While petitioner would upon an appeal be entitled to a reversal of the order, he could, by order of court, be compelled to supply his wife with the necessary means to enable her to resist the appeal, and likewise, under an order of court, compelled to pay his wife suit money and costs asked for in a futile prosecution of the second action instituted by her for divorce, as to all of which the law makes no provision for reimbursement."

See, also, Ophir Silver Min. Co. v. Superior Court, 147 Cal. 467, 479, 82 P. 70, 3 Ann. Cas. 340. The reasoning in the case of Dell v. Superior Court is directly applicable to the facts before us.

[5, 6] The respondents also contended that, when the trial court declined to hear the application of this petitioner because the petitioner stood in contempt, the ruling of the trial court and the reason assigned is supported by authority. 13 C. J. 91, § 139. The authority so relied on does not include any ruling by the Supreme Court of this state. The exact point has not been decided by that court.

However, questions similar to the one presented in the instant case have heretofore been presented to the Supreme Court. Its decisions thereon are of no help to the respondents, but are of help to the petitioner. Galland v. Galland, 44 Cal. 475; Johnson v. Superior Court, 63 Cal. 578; Winter v. Superior Court, 70 Cal. 295, 11 P. 633; Foley v. Foley, 120 Cal. 33, 39, 52 P. 122, 65 Am. St. Rep. 147; Manriquez v. Superior Court (Cal. Sup.) 251 P. 1118. The case last cited grew out of an action for divorce. The wife commenced the action and was awarded an interlocutory decree. The defendant attempted to move for a new trial. At that time he was in default in not having paid certain moneys due to his wife under and pursuant to an order theretofore made by the trial court. When the motion for a new trial was called for hearing, the trial court recited the fact that the husband was in contempt for having failed to pay the maintenance theretofore ordered, and thereupon the trial court ordered the motion for a new trial to be dismissed. The husband applied for, and was granted, a writ of mandamus requiring the trial court to restore the motion for a new trial to its calendar and to proceed to dispose of the same on its merits. See, also, State v. Clancy, 24 Mont. 359, 61 P. 987, 990.

The respondents cite and rely on Monterey Coal Co. v. Superior Court, 11 Cal. App. 207, 104 P. 585. We have carefully examined the citation and the authorities therein referred to. Comparing it with the cases cited above, and especially with the reasoning in Foley v. Foley, we do not find Monterey Coal Co. v. Superior Court to be controlling in the instant case.

For the reasons herein stated, we think that the writ should issue. It is so ordered.

We concur: KOFORD, P. J.; NOURSE, J.

82 Cal. App. 83

OTTEN v. RIESENER CHOCOLATE CO.★

(Civ. 5713.)

(District Court of Appeal, First District, Division 1, California. March 26, 1927. Hearing Denied by Supreme Court May 23, 1927.)

1. **Contracts ⚷107—Contract founded on an act penalized by statute is void, whether statute so provides or not.**

Where statute imposes a penalty for doing of an act, contract founded on such act is void, whether the statute expressly so provides or not.

2. **Licenses ⚷39—Sale of corporate stock, violating conditions of corporation commissioner's permit, is void, and buyer may recover price (Corporate Securities Act, §§ 4, 14).**

Where corporate stock was sold in violation of conditions of permit issued by commissioner of corporations, such sale being public offense, under Corporate Securities Act, §§ 4, 14 (St. 1917, pp. 676, 680), and impliedly prohibited, sale *held* illegal and void, and buyer may recover price on tendering return of stock.

3. **Licenses ⚷39—Evidence held to warrant rescission of stock sale for violating condition of corporation commissioner's permit.**

In action for rescission of sale of corporate stock and to recover price, evidence *held* sufficient to support finding that copy of sale permit issued by corporation commissioner was not exhibited to buyer as required by condition in permit.

4. **Appeal and error ⚷994(3)—Acceptance by trial court of testimony not inherently impossible of belief held controlling on appeal.**

Matters going to credibility of witness or apparent inconsistencies in his testimony are for trial court, and, where testimony is not inherently impossible of belief, its acceptance by trial court is controlling on appeal.

5. **Licenses ⚷39—Notice of rescission of void stock sale held sufficient.**

In an action for rescission of sale of corporate stock, void because of noncompliance with condition in commissioner's permit, notice of rescission, based on fraud and failure of consideration, *held* sufficient.

6. **Licenses ⚷25—Corporation commissioner may require, as condition in stock sale permit, exhibition and delivery of copy of permit to each prospective subscriber (Corporate Securities Act, § 4).**

Under Corporate Securities Act, § 4 (St. 1917, p. 676), authorizing issuance of permits for sale of corporate stock, corporation commissioner *held* to have power to impose, as condition of permit, that copy thereof be exhibited and delivered to each prospective subscriber.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by G. J. Otten against the Riesener Chocolate Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hankins & Hankins and O. F. Nuckolls, all of San Francisco, for appellant.

Frederick Olds and Werner Olds, both of San Francisco, for respondent.

KNIGHT, J. The defendant corporation has appealed from an adverse judgment in an action for the rescission of a sale of corporate stock and for the recovery of the purchase price paid therefor. The complaint contained two causes of action, the first based upon alleged fraud and the second upon a void sale; it being alleged with reference to the latter that the sale was not made in conformity with the terms of the permit issued by the commissioner of corporations. The action was tried without a jury, the trial court finding that the sale was free from fraud, but was made contrary to the terms of the corporation commissioner's permit and was therefore illegal. Judgment in plaintiff's favor was thereupon entered for the repayment to him of the amount of purchase price, with interest.

The record discloses the following facts: Appellant was incorporated under the laws of this state in January, 1919, with a capital stock of 5,000 shares of the par value of $100 each, and on February 17, 1919, was granted a permit by the commissioner of corporations to sell 4,000 shares of its stock at par for cash, upon certain conditions specified in said permit and hereinafter referred to. About April 5, 1920, respondent, G. J. Otten, purchased 15 shares of said stock, paying therefor $1,500. At that time he was employed by appellant at its plant as temporary night watchman and continued in that employment for approximately six weeks. On November 18, 1920, he served notice of rescission of the sale and offered to return the stock upon the grounds of fraud and misrepresentation, and failure of consideration, and made demand for the return of the purchase price paid. Appellant refused to accept the return of the stock or to refund the purchase price, and as a result respondent, on April 5, 1921, commenced this action.

Among the other facts found by the trial court were the following: That the permit for the sale of said stock "had incorporated therein the following condition: 'This permit is issued upon the condition that a true copy thereof be exhibited and delivered to each prospective subscriber for, or purchaser of, said securities, before his subscription therefor shall be taken or any sale thereof made to him'—and that, at the time of the sale of said stock by the defendant and its officers and agents to the plaintiff, the said condition was not observed; * * * that a copy of this permit was never shown nor exhibited to the plaintiff by the defendant or its officers or agents, or any one else, nor a copy thereof given to plaintiff, either before or at

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★Hearing denied by Supreme Court.

the time of purchase of said stock or at any time thereafter."

[1, 2] Section 4 of the Corporate Securities Act of this state provides, in part, that if an application for the sale of stock is granted "the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this state, in such amounts and for such considerations and upon such terms and conditions as the commissioner may in said permit provide * * *"; and section 14 of said act declares that "every officer, agent, or employee of any company, and every other person, who knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this act, or of the Constitution of this state, * * * is guilty of a public offense and shall be punished by imprisonment" or by a fine, or by both such fine and imprisonment. Stats. 1917, pp. 676, 680.

In the case of Smith v. Bach, 183 Cal. 259, 191 P. 14, it is held:

> "That where a statute prohibits or attaches a penalty to the doing of an act, the act is void, and this, notwithstanding that the statute does not expressly pronounce it so, and it is immaterial whether the thing forbidden is malum in se or merely malum prohibitum. A statute of this character prohibiting the making of contracts, except in a certain manner, ipso facto makes them void if made in any other way. 13 Cyc. 351; 13 Corpus Juris, p. 410. The imposition by statute of a penalty implies a prohibition of the act to which the penalty is attached, and a contract founded upon such act is void. This general rule finds support in the decisions of this state. Berka v. Woodward, 125 Cal. 127, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31, and cases cited; Bentley v. Hurlburt [153 Cal. 796, 96 P. 890] supra."

In the instant case, the trial court having found that the sale of said stock to respondent was made in violation of the terms of said permit, the act of selling constituted a public offense, as such offense is defined by section 14 of said act; and it follows under the authorities above cited that the sale was illegal and void, which entitled respondent to recover the purchase price paid upon tendering the return of the stock.

Appellant has presented considerable argument in its brief and cited a number of authorities in support of the contention it makes that under the provisions of the Corporate Securities Act "a failure to exhibit the permit (in violation of the terms thereof) does not make the issuance of the stock void." We think that question is not involved, it being the illegality of the sale of the stock and not the illegality of the issuance of the stock which justifies the judgment in respondent's favor for the return of the purchase price paid.

[3, 4] It is also urged that the evidence is insufficient to support the finding that a copy of said permit was not exhibited or delivered to respondent. With respect thereto the record shows that the finding mentioned is based upon respondent's testimony alone, the treasurer of said corporation, who negotiated the sale, having died about two years prior to the trial of the action; and appellant claims that respondent's testimony is "so contradictory, uncertain, evasive, and hazy to be unworthy of belief," and is therefore insufficient to overcome the presumptions of law that a person is innocent of a crime or wrong, and that the law has been obeyed. Subdivisions 1 and 33, § 1963, Code Civ. Proc. Matters going to the credibility of a witness, however, and to apparent inconsistencies in his testimony, are for the consideration and determination of the trial court, and, since the testimony of respondent cannot be said to be inherently improbable or impossible of belief, the acceptance thereof by the trial court is controlling on appeal.

[5] We find no merit in appellant's point relating to the asserted insufficiency of the notice of rescission, for, assuming that under the circumstances of a void sale the service of a notice of rescission is essential, the form and substance of the one served by respondent met all legal requirements, the rescission being placed upon the two distinct grounds of fraud and total failure of consideration.

[6] Nor can we sustain appellant's contention that it was beyond the right of the corporation commissioner to impose as a condition for the sale of the stock that a copy of the permit should be exhibited and delivered to each prospective subscriber, for there is no express limitation in the statute placed upon his power relating to the conditions he may impose; and he may in fact, under section 4 of said act, even deny the issuance of a permit in any form, if in his judgment the plan of business disclosed by the application does not meet the demands of the statute.

For the reason above stated, the judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

81 Cal. App. 720

McKEON v. SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO et al.

(Civ. 5766.)

(District Court of Appeal, First District, Division 1, California. March 14, 1927.)

Divorce ⚷79—Jurisdiction held not obtained of defendant in divorce by publication of summons, in absence of order therefor.

No order for publication of summons in divorce action having been made, and no personal service having been made on defendant, and he not having appeared, though summons was published, jurisdiction of him was not acquired, and the judgments for plaintiff were void.

Certiorari by Michael T. McKeon against the Superior Court, City and County of San Francisco, and Thomas F. Graham, Judge thereof, to review judgment rendered in divorce action against petitioner. Judgments ordered annulled and set aside.

Herbert C. Kaufman and James A. Ballentine, both of San Francisco, for petitioner.

Gavin McNab, Nat Schmulowitz, and A. D. Duncan, all of San Francisco, amici curiæ.

E. B. Taugher, of Oakland, for respondents.

TYLER, P. J. Certiorari to review certain judgments of the superior court for lack of jurisdiction. It appears from the record that petitioner was a defendant in an action brought against him by his wife for divorce; that said action was filed on the 23d day of August, 1923; that an affidavit for publication of summons was made by plaintiff and that such summons was published; that the cause came on for hearing in July, 1924, in the absence of defendant, and that he was not represented by counsel; that on the 18th day of August, 1924, the superior court rendered an interlocutory decree of divorce severing the marital bonds uniting plaintiff and defendant, and awarded plaintiff the sum of $50 per month as alimony and certain real property situated in the county of Alameda. It further appears that on the 5th day of December, 1925, the superior court rendered a final decree embodying the same terms and provisions of the interlocutory decree, and this notwithstanding that no order for publication of summons was ever made by such superior court; that no personal service was made upon the defendant nor did he ever appear in the suit; that defendant was at the time of the commencement of the action a nonresident of the state of California; that the real property mentioned was never brought under the control of said court by any process; that petitioner first learned of the existence of the action on November 10, 1926.

Under these facts it is here claimed that the superior court never acquired jurisdiction of petitioner in the action of McKeown v. McKeown, and that it acted without and in excess of its jurisdiction in rendering the interlocutory and final decrees, and that the provisions of said decrees awarding plaintiff $50 per month alimony and the real property mentioned were void and without effect. It appears from the judgment roll in the action of McKeown v. McKeown that, while a summons was published, no order was ever made by the court directing such publication. It is true that a form of order appears in the judgment roll, but it was never signed by the judge. At the first hearing of this petition it was claimed by the attorney for respondent that the order for publication had in fact been signed. Time was given to respondent to correct the record in this respect, but he has failed to do so, probably due to the fact that the order was never signed.

Under the record, therefore, as it appears before us, it is manifest that respondent court had no jurisdiction to render the judgments here in question. As no order for the publication of summons was ever made, defendant in the action had never been served with process, constructive or otherwise. This being so, the judgments were rendered without jurisdiction, and they are therefore mere nullities, and they should be annulled and set aside.

It is so ordered.

We concur: KNIGHT, J.; CASHIN, J.

200 Cal. 721

VAN DER VLIET v. VAN DER VLIET.
(L. A. 8375.)

(Supreme Court of California. March 28, 1927.)

1. Divorce 🔑303(1)—Modification of divorce decree allowing wife part-time custody of minor children held not abuse of discretion, notwithstanding wife's prior agreement relinquishing custody (Civ. Code, § 138).

Modification of final decree of divorce to give wife custody of two minor children at specified intervals *held* not abuse of discretion, in view of court's power to modify decree relating to custody of children under Civ. Code, § 138, despite previous agreement of parties that children should be in exclusive custody of husband's mother.

2. Divorce 🔑296, 312—Modification of decree relating to childrens' custody is within trial court's discretion, and decision is disturbed only for clear abuse.

Applications for modification of divorce decree relating to custody of children are addressed to sound discretion of lower court, decision of which will not be disturbed unless clear abuse of discretion is shown.

3. Divorce 🔑297—Court need not award custody of children in conformity with agreement of divorced parents (Civ. Code, § 138).

Under Civ. Code, § 138, giving court power to modify its divorce decree relating to childrens' custody whenever it may seem necessary and proper, court is not required to award custody of children in conformity with agreement of parties as to their disposition or custody.

In Bank.

Appeal from Superior Court, Los Angeles County; John W. Summerfield, Judge.

Suit by Eddie Van der Vliet against Georgia Van der Vliet for divorce. From an order modifying a final decree of divorce to give defendant part time custody of the minor children, plaintiff appeals. Affirmed.

Milton K. Young, Lyndol L. Young, and William K. Young, Young & Young, all of Los Angeles, for appellant.

James M. Gammon, of Los Angeles, for respondent.

PER CURIAM. This is an appeal from an order of the superior court of the county of Los Angeles modifying a final decree of divorce. It appears that the parties hereto entered into an agreement on January 23, 1922, at which time they were living separate and apart, wherein and whereby it was agreed that the custody of their two minor children should be relinquished to and vested exclusively in the mother of the appellant herein. Subsequently, and on May 23, 1922, the appellant instituted this action for a divorce, and respondent suffered her default to be taken. The interlocutory decree entered in favor of the appellant was silent as to the custody of said children, the complaint not having requested relief in this respect. On October 31, 1923, a final decree of divorce was granted to the appellant, and thereafter, and on January 29, 1924, the respondent filed an affidavit looking to a modification of said final decree of divorce. After hearing, the trial court made an order modifying said final decree of divorce so as to give to the respondent herein the custody of said minor children on alternate week-ends and during one-half of the regular school vacation. This appeal was thereupon prosecuted and thereafter placed upon a special calendar of this court upon an order to the respondent to show cause why said order modifying the final decree of divorce should not be reversed, or that such order be made as might be meet in the premises. At the time of the placing of said cause upon said calendar, and the entry of said order, it appeared that the appellant's brief had been filed herein, but that no brief on behalf of the respondent had been filed, although the time for the filing of such brief under the rules of this court had long since expired. Upon the calling of said special calendar the order to show cause issued herein was submitted.

[1-3] The order of the lower court modifying the final decree of divorce so as to give the custody of the two minor children to the respondent at specified intervals of time finds support in the provisions of section 138 of the Civil Code. Applications for such modication of custody are addressed to the sound discretion of the lower court, and the conclusion it reaches will not be disturbed unless the record presents a clear abuse of that discretion. Black v. Black, 149 Cal. 224, 225, 86 P. 505; Crater v. Crater, 135 Cal. 633, 634, 67 P. 1049; Dickerson v. Dickerson, 108 Cal. 351, 353, 41 P. 475. The power of the trial court to vary or modify its decree in divorce proceedings as to the custody, care, and education of the minor children whenever it may seem to it necessary or proper is provided for by section 138 of the Civil Code, and the court is not required to award the custody of the children in conformity with an agreement of the parties as to the disposition to be made of said children. Black v. Black, supra; Anderson v. Anderson, 56 Cal. App. 87, 89, 206 P. 426. The children are not parties to the action for divorce, and the jurisdiction which the statute confers on the court to be exercised from time to time as changed conditions or circumstances may require, in protecting their interests, cannot be limited or abridged by the contract of the parties. Moreover, in her affidavit filed in the court below the respondent herein asserts that she did not understand the nature and effect of the

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

agreement placing the custody of the children in their paternal grandmother. We are unable to say that the trial court abused its discretion in awarding the custody of the minor children of the parties to the respondent on alternate week-ends and during one-half of the regular school vacation.

The case of Sargent v. Sargent, 106 Cal. 541, 39 P. 931, cited by the appellant, is not in point. That case is properly distinguished in Black v. Black, supra, where it is said that—

> "The contract there under consideration was one relative to the custody of the minor child provided for in the articles of separation executed by the parents pursuant to section 159 of the Civil Code, which contract the court held binding and obligatory until avoided by the mutual resumption of marital duties, or the divorce of the parties, the court further declaring, however, that 'in the event of a divorce being granted * * * the question of the custody of the minor would be left at large for the disposition of the court, the same as if the contract had not existed.'"

For the foregoing reasons the order appealed from is affirmed.

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200 Cal. 585

WALLACE v. ZINMAN et al. (S. F. 12058.)

(Supreme Court of California. March 4, 1927.)

1. Brokers 🔑54—Provision for commission on loan when consummated does not make consummation condition precedent to recovery of commission if lender able and willing was procured.

Agreement to pay commission for obtaining loan when loan is consummated does not make consummation of loan condition precedent to recovery of commission, but commission is earned when lender able and willing to loan money is produced.

2. Statutes 🔑114(1)—Provision of Usury Law relating to charges and expenses of loan brokers held invalid as not embraced within title (Usury Law, § 3; Deering's Gen. Laws 1923, Act 112, and St. 1925, p. 600; Const. art. 4, § 24).

Provision of Usury Law (St. 1919, p. lxxxiii, § 3) that one charging commission of over 5 per cent. on secured loans of $1,000 or less, or over 3 per cent. on loans over $1,000, shall be guilty of misdemeanor, *held* invalid as violating Const. art. 4, § 24, requiring act to embrace but one subject to be expressed in title, where title was "act * * * relating to the rate of interest which may be charged" for loans, since such provision of statute relates to charges and expenses of loan brokers not included in title, especially in view of Deering's Gen. Laws 1923, Act 112 and St. 1925, p. 600.

3. Usury 🔑111(2)—Court must sua sponte deny all relief to plaintiff suing under usurious contract (Usury Law).

Where it appeared that plaintiff's contract was illegal under Usury Law (St. 1919, p. lxxxiii), it is duty of court sua sponte to deny all relief, though such defense was not presented by answer or other pleading.

4. Statutes 🔑106(1)—Usury Law adopted by initiative method must embrace but one subject, which must be expressed in title (St. 1919, p. lxxxiii; Const. art. 1, § 22, and art. 4, §§ 1, 24).

Const. art. 4, § 24, requiring act to embrace but one subject to be expressed in title, is applicable to Usury Law (St. 1919, p. lxxxiii), notwithstanding that such statutes were adopted by initiative method under Const. art. 4, § 1, in view of article 1, § 22, providing that constitutional provisions are mandatory and prohibitory unless expressly declared to be otherwise.

5. Evidence 🔑5(2)—It is common knowledge that large number rely solely on title of initiative measure as guide to intelligent voting thereon.

It is common knowledge that initiative measure is originated by small group who circulate petition requiring signatures of only 8 per cent. of voters, that measure is then placed on ballot, and large number of population rely solely on title as guide to intelligent voting thereon.

6. Constitutional law 🔑5—Initiative measure is not in effect constitutional amendment.

Initiative measure is not in effect constitutional amendment and has no greater strength or dignity than attaches to any other legislation.

7. Constitutional law 🔑242—Usury 🔑5—Provision of Usury Law held invalid as discriminating between brokers' charges for secured and unsecured loans and discriminating with reference to loan for less than six months (Usury Law, § 3; Const. Cal. art. 1, §§ 11, 21; Const. U. S. Amend. 14).

Provision of Usury Law (St. 1919, p. lxxxiii, § 3) *held* invalid under Const. Cal. art. 1, §§ 11, 21, and Const. U. S. Amend. 14, as discriminating between charges of broker negotiating secured loans and same character of charges in negotiating unsecured loans, and as discriminating with reference to loans for less than six months.

8. Usury 🔑55—Transaction is usurious if lender secures greater than legal benefit, though such benefit be cloaked under guise of commission, bonus, or other name.

Where usury is pleaded, court will look to substance of transaction, and, if lender by any kind of device is securing greater benefit than that provided in law, contract will be *held* usurious, even though payment be cloaked under guise of commission, bonus or any other name.

9. Statutes 🔑64(2)—Invalid provision of Usury Law relating to charges and expenses of loan brokers held clearly severable (Usury Law, § 3).

Invalid provision of Usury Law (St. 1919, p. lxxxiii, § 3), providing that one charging commission of over 5 per cent. on secured loans of $1,000 or less, or over 3 per cent. on loans over $1,000, shall be guilty of misdemeanor, *held* clearly severable from the other portions of the act.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by R. Arthur Wallace against Oscar Zinman and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Leo H. Shapiro, George F. Snyder and Homer Lingenfelter, all of San Francisco, for appellants.

George L. Sanders, of Los Angeles, A. Ohanneson, of Fresno, and James M. Jefferson, amici curiæ.

Russell P. Tyler, of San Francisco, for respondent.

James S. Bennett and Emmet H. Wilson, both of Los Angeles, amici curiæ.

PRESTON, J. Plaintiff and defendants entered into the following written contract:

> "In consideration of you securing a loan for $7,500 subject to a bank loan of $13,000, interest 6%, on property situated on the northwest corner 5th Ave. and Fulton Sts., interest on $7,500 to be 10% per annum, loan to be paid on or before two years from date. Said loan to be flat ($7,500).
>
> "I agree to give you the sum of five hundred and sixty ($560) dollars and authorize Title Ins. Co. to pay said sum to you on deposit of said money on July 23, 1924, with the said Title Ins. Co., when said transaction is consummated on or before July 27, 1924.
>
> "Oscar Zinman,
> "S. A. Herzberg."

Plaintiff secured the loan and had the money deposited with the title company within the required time. He sued to recover for his services, and judgment in his favor was rendered by the lower court, from which judgment defendants have appealed.

The last clause of the contract, "when said transaction is consummated on or before July 27, 1924," was considered ambiguous by the trial court, and inquiry was made into the surrounding circumstances and understanding of the parties. It was agreed that this clause was added at the request of defendants when the paper was presented to them for their signatures.

Defendants testified its purpose was to negative any liability on their part in the event they should not consummate purchase of the property upon which the loan was to be a lien. Plaintiff testified that there was no such understanding, but that its purpose was merely to delay payment of his fee until consummation of the sale and not to make payment contingent upon that event. The sale was not consummated.

[1] In this conflict the trial court accepted plaintiff's testimony, relying upon the authority of Purcell v. Firth, 175 Cal. 746, 167 P. 379. In that case it was held that an agreement to pay a commission on a sale "when the sale is consummated" did not make consummation of the sale a condition precedent to recovery of the commission, but that the commission was earned when a purchaser able and willing to buy was produced regardless of whether or not the sale was ever consummated. We hold that the facts in the present case bring it within the rule announced in Purcell v. Firth, supra.

[2] Appellants, however, unyielding, have sought refuge in the initiative measure, commonly known as the "Usury Law," approved at the general election November 5, 1918 (Stats. 1919, p. lxxxiii); the provision thereof relied upon being as follows:

> "* * * Any person, company, association or corporation, who shall * * * ask, demand, receive, take, accept or charge more than an amount equal to 5% so actually loaned and secured in all sums of $1,000 or less, and 3% on all sums over $1,000 in full for all examinations, views, fees, appraisals, commissions, renewals made within one year from date of loan and charges of any kind or description whatsoever, except abstracts or certificates of title charges made under the Torrens Land Law or otherwise, in the procuring, making and transacting of the business connected with such loans, * * * shall be guilty of a misdemeanor and upon conviction thereof shall be punished," etc. Section 3.

It must be admitted that the provision, if valid, was directly violated by the respondent's commission contract, in that it exceeded the maximum commission allowed on a loan of that character, and in such case the contract would be unenforceable and void. See Berka v. Woodward, 125 Cal. 119, 127, 57 P. 777, 45 L. R. A. 420, 73 Am. St. Rep. 31; Levinson v. Boas, 150 Cal. 185, 193, 88 P. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; Smith v. Bach, 183 Cal. 259, 262, 191 P. 14; Firpo v. Murphy, 72 Cal. App. 249, 236 P. 968.

[3] And likewise in such case it would not be necessary to present such defense by answer or other pleading, but when the illegality of plaintiff's contract appeared, it would be the duty of the court sua sponte to deny all relief. Pacific Wharf, etc., Co. v. Dredging Co., 184 Cal. 21, 192 P. 847; Morey v. Paladini, 187 Cal. 727, 203 P. 760; Wise v. Radis (Cal. App.) 242 P. 90.

But respondent meets this claim of illegality by the countercontention that the said provision of the so-called Usury Law is unconstitutional and void in this:

That it is in direct violation of section 24 of article 4 of the Constitution, which provides:

> "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. * * *"

Also, that it violates section 11 of article 1, which provides:

> "All laws of a general nature shall have a uniform operation."

Likewise section 21 of article 1, which provides:

> "* * * Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

And likewise is a violation of the Fourteenth Amendment to the Constitution of the United States, in that it denies to certain citizens the equal protection of the law.

We shall now discuss these various contentions. The title of the act is as follows:

> "An act, to be known as the usury law, relating to the rate of interest which may be charged for the loan or forbearance of money, goods or things in action, or on accounts after demand, or on judgments, providing penalties for the violation of the provisions hereof, and repealing sections one thousand nine hundred seventeen, one thousand nine hundred eighteen, one thousand nine hundred nineteen, and one thousand nine hundred twenty of the Civil Code and all acts and parts of acts in conflict with this act."

We are convinced that the intent of the act is not to limit the charge for "examinations, views, fees, appraisals, commissions, * * *" etc., made by the lender himself, but on the contrary the lender is to be denied all compensation or emoluments of every kind which will enlarge his return or profit on the loan beyond the maximum amount allowed by the act. The provision is intended to regulate the charges as to examinations, views, fees, appraisals, and commissions when made by a third person or persons as part of the expense in connection with a loan. In practically every loan there will be legal expenses for some one or more of the above enumerated items and, if reasonable, they, of course, will be allowed without tainting the transaction as usurious. But the plain intent of the act is to forbid to the lender any sum or sums whatsoever which might reach his pocket and thereby exceed the interest rate allowed by the act. In other words, it was intended by this act to deal solely with this class of charges when made by persons acting independent of the lender. In short, it is a provision to curtail the charges and expenses of loan brokers. This intent is made clearer by an examination of section 1691 of the Wisconsin Statutes of 1917, from which doubtless the draftsman of this provision gained his inspiration. The Wisconsin section contains language dealing exclusively with personal property loan brokers, which language is identical in many respects with the language employed in the act under consideration except that the draftsman of the act here before us omitted the very language necessary to make the provision applicable to the lender himself. In other words, the Wisconsin law provides:

> "Any person who, * * * shall ask, * * * in addition to the interest aforesaid * * * shall be guilty. * * *" Section 1691, subd. 3.

The omission of this language clearly evinces the intention to exclude the lender from any benefits whatsoever in connection with the loan, save and alone the maximum rate of interest allowed. Ornstine v. Cary, 126 Wis. 135, 105 N. W. 792, 11 L. R. A. (N. S.) 174, cited by counsel, upholds the validity of the Wisconsin act as it there reads, but, as we have noted above, our statute does not adhere to the language of the Wisconsin act.

When thus interpreted it is too clear for controversy that the subject-matter of the provision of the act here under consideration is nowhere referred to directly or indirectly in the title to said statute. The subject covered by the title is exclusively "usury." The subject covered by the provisions under consideration is charges and expenses of loan brokers. It will be noted that the regulation of the business of real estate brokers, which also covers loan brokerage contracts where real estate is given as security, is controlled by an act approved June 1, 1917, and amended May 27, 1919, and May 23, 1925 (Deering's Gen. Laws, 1923, part 1, p. 25; St. 1925, p. 600), which act has been declared constitutional and valid. Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418. In short, the subject referred to in this provision is so widely separated in meaning from the provision referred to in the title of this act that it has already become the subject of existing independent legislation.

[4] It may, however, be contended that inasmuch as this is a statute which was adopted by the initiative method provided for in section 1 of article 4 of the Constitution, said article 4, section 24, of the Constitution, relating to titles of statutes, is for that reason inapplicable thereto. We cannot, however, concede the efficacy of any such contention. Section 22 of article 1 of the Constitution reads:

> "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

The purpose of this provision was before this court in Ex parte Liddell, 93 Cal. 633, 636, 29 P. 251. In that case, after giving a brief outline of the history of this character of legislation, the court said:

> "At the present time, however, the Constitutions of many states contain provisions similar to that quoted above. The object of the provision is to prevent legislative abuse—to prevent the passage of acts bearing deceitful and misleading titles. It is intended to protect the members of the Legislature, as well as the public, against fraud; to guard against the passage of bills the titles of which give no intimation to the members of the Legislature or to the people of the matters contained therein. Cooley's Constitutional Limitations (6th Ed.) 169."

The holding of this court as thus stated has not been departed from to any extent. Estate of Elliott, 165 Cal. 339, 344, 132 P.

439. See, also, People v. Y. Wong, 61 Cal. App. 497, 503, 215 P. 409; Watson v. Greely, 67 Cal. App. 328, 342, 227 P. 664.

[5] There can be no just reason assigned for holding that this provision is mandatory when applied to statutes passed regularly by the Legislature and at the same time inapplicable to statutes initiated by petition and passed by direct vote of the people. Every reason going to protect the public from imposition by undesignated matter in the title of an act of the Legislature obtains with like if not greater force to a measure that is to be voted upon by the people. It is common knowledge that an initiative measure is originated by some organization or a small group of people and they circulate a petition requiring the signatures of only 8 per cent. of the voters; that the measure is then placed upon the ballot and a large number of the population, not knowing what the context of the act is, rely solely upon its title as a guide to intelligent voting thereon. Speaking of the identical question before us, the Supreme Court of Oregon, in State v. Richardson, 48 Or. 309, 319, 85 P. 225, 229 (8 L. R. A. [N. S.] 362), said:

> "The validity of laws adopted at the polls must be determined like enactments by the legislative assembly, by the test of the Constitution as modified by the amendment thereto. Though the argument that a proposed measure must depend upon its own merits may not apply to acts initiated by petitions, a valid reason for requiring that the subject-matter of laws to be adopted or rejected at the polls should be stated in the title nevertheless exists. The majority of qualified electors are so much interested in managing their own affairs that they have no time carefully to consider measures affecting the general public. A great number of voters undoubtedly have a superficial knowledge of proposed laws to be voted upon, which is derived from newspaper comments or from conversation with their associates. We think the assertion may safely be ventured that it is only the few persons who earnestly favor or zealously oppose the passage of a proposed law, initiated by petition, who have attentively studied its contents and know how it will probably affect their private interests. The greater number of voters do not possess this information and usually derive their knowledge of the contents of a proposed law from an inspection of the title thereof, which is sometimes secured only from the very meager details afforded by a ballot which is examined in an election booth preparatory to exercising the right of suffrage. It is important, therefore, that the title to laws proposed in the manner indicated should strictly comply with the constitutional requirement."

[6] It has been urged, however, that an initiative measure in its effect is a constitutional amendment, and as constitutional amendments need not conform to the provision of the Constitution quoted above, this statute need not so conform to it. We are unable to accord any weight whatsoever to this contention. We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation. Throughout section 1 of article 4 of the Constitution a distinct line of demarcation is kept between a law or an act and a constitutional amendment. It is only another system added to our plan of state government by a permissive amendment to the Constitution, but it was at no time intended that such permissive legislation by direct vote should override the other safeguards of the Constitution. If an amendment of the Constitution were intended, the provision requires steps to be taken that will apprise the voters thereof so that they may intelligently judge of the fitness of such measure as a constituent part of the organic law. We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to permit an initiative act of any type to throw out of gear our entire legal mechanism. Our common sense makes us rebel at the suggestion. This question has been before the courts of other states and the holding we here announce has been the holding there without exception.

People v. Prevost, 55 Colo. 199, 134 P. 129, was an action for mandamus, relator claiming that an initiative statute adopted by the people at the same election at which they adopted a constitutional amendment must itself be considered as a constitutional amendment and as such modify the amendment adopted by the people. In answer to this contention the Supreme Court of the state said:

> "In order to arrive at that conclusion, he contends that a statute relating to the publication of initiated laws, which was itself initiated and voted upon at the election in November, 1912, was a constitutional amendment, tho in form a statute. This measure was initiated as a statute, and submitted and voted upon as such. There was nothing in or about it that in any manner indicated that those who had initiated it, or the people who voted upon it, had a thought or a suspicion that it was a constitutional amendment or intended for one. * * * After claiming that the statute would have been unconstitutional if adopted, he contends that the measure, tho to all other appearances and indications a statute, was in fact a constitutional amendment. Reduced to its last analysis, the argument is this: If an initiated measure contravenes the Constitution, tho it is in form a statute, professedly intended as such, with nothing about it to indicate that it was intended for a constitutional amendment, nevertheless it is a constitutional amendment. Such a position cannot be maintained in reason or logic. To say that the people could thus, without intending to do so, and unwittingly, amend their Constitution is a proposition that carries with itself its own refutation. The only reasonable thing that can be said of a measure that in form and to all indicated intents and purposes is a statute which contravenes the Constitution is, not that it is a constitutional amendment, but that it is itself unconstitutional."

To the same effect, see State v. Becker, 290 Mo. 560, 235 S. W. 1017, 1021.

And in Galvin v. Board of Supervisors, 195 Cal. 686, 692, 693, 235 P. 450, our own court in principle disposes of this question, holding as follows:

> "The initiative amendment to the Constitution itself must be interpreted in harmony with the other provisions of the organic law of this state of which it has become a part. To construe it otherwise would be to break down and destroy the barriers and limitations which the Constitution, read as a whole, has cast about legislation, both state and local. For example, the Constitution provides in section 11 of article 11 thereof, that 'Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.' This provision of the Constitution constitutes an inhibition against the adoption by counties, whether acting by means of the initiative or otherwise, of local laws and ordinances which are in conflict with general laws; and it was clearly not the intendment of the framers of the initiative amendment or of the people who adopted it to wipe out this salutary provision of the Constitution. Again, the Constitution, in sections 4 and 5 of article 11 thereof, provides as follows: * * * This grant of power to the Legislature to enact general and uniform laws relating to the matters referred to in the foregoing clauses of the Constitution constitutes in itself a limitation upon the power of counties, whether acting thru their regularly constituted legislative bodies or attempting to act directly thru initiative legislation, to adopt ordinances or regulations which would have the effect of destroying the uniformity in regard to such matters which the state Legislature by the enactment of general and uniform laws was required to create and maintain."

See, also, State v. Richardson, supra.

It may be said in passing that section 1197a of the Political Code throws no light upon the question before us, as this act could not have been intended to dispense with this requirement as to title.

We must therefore hold that the statute in question is subject to section 24 of article 4 of the Constitution, hereinbefore quoted, and that inasmuch as the provision here under consideration is an independent subject not referred to in the title to said act, so much of said act as comprises this provision is void.

[7] Moreover, this provision contains within itself destructive elements which also compel the conclusion that it is void. It purports to fix a maximum limitation on fees, commissions, and charges with respect to loans negotiated by the broker where such loans are secured within the meaning of that act, with no limitation fixed upon such fees, charges, and commissions when applied to brokers who aid in the negotiation and consummation of unsecured loans except the inhibition against any kind of charges when the loan is not secured by real estate and is to run for a shorter period than six months. In other words, it is plain there is discrimination between charges of brokers negotiating unsecured loans and the same character of charges in negotiating secured loans. There is likewise a discrimination with reference to loans where the period of the loan is less than six months, it being made a criminal offense to charge a commission of any kind on a loan running for a shorter period than six months unless the loan is secured by a mortgage upon real estate. It was for this very reason that the act of March 20, 1905 (Stats. 1905, p. 422), "an act fixing the rates of interest and charges on loans on chattel mortgages," was declared invalid, in that there was a discrimination between individuals in the same business by allowing a certain rate of interest to some and denying it to others. The court, considering said act, in Ex parte Sohncke, 148 Cal. 262, 268, 82 P. 956, 959, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475, said:

> "The business of loaning money is as much a part of domestic trade and commerce as any other legitimate business. There is no substantial reason why those who lend money in sums not exceeding three hundred dollars on chattel mortgages of upholstery, pictures, or works of art, pianos, organs, sewing-machines, safes, professional libraries, or office furniture or fixtures, instruments of surveyors, physicians, or dentists, printing presses, or printing material, should be limited in their charges and the business they do in that respect made less profitable than it otherwise would be, while they or others who lend on chattel mortgages upon instruments of a photographer, livestock, agricultural implements, equipments of livery stables, or other property allowed to be mortgaged by section 2955 of the Civil Code (Stats. 1905, p. 36, c. 40), and not enumerated in the act under consideration, or who lend upon pledges of any kind of personal property, or who lend in sums exceeding three hundred dollars upon any kind of security, should be allowed to exact any rate of interest or other charge which they can obtain from the borrower. It is a part of the same kind of business, and there is no distinction between the particular classes of persons or things affected by the act and those exempted from its provisions that will justify special legislation. It may be that such exorbitant charges should be absolutely prohibited, but, if so, the prohibition should be made general, and should extend to all who engage in the business as lenders on the one hand, and should protect all who are made the victims thereof on the other hand, without discrimination in favor of any."

There is no essential difference between a broker engaged in negotiating secured loans and one engaged in negotiating unsecured loans, and certainly no essential difference between a broker engaged in negotiating loans on real property and one negotiating loans on other classes of security. It may also well be contended that said provision discriminates without intrinsic or constitutional distinction between contenders in other departments of the brokerage business.

These discriminations are so plain that it requires but their statement to demonstrate that said provision is in violation of both sections 11 and 21 of article 1 of the Constitution of California, and also the Fourteenth Amendment to the Constitution of the United States.

These views render it unnecessary to give consideration to the further contention of respondent that the provision is invalid because of the previous decisions of this court in the line of cases known as employment agency cases, to wit: Ex parte Dickey, 144 Cal. 234, 77 P. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428; In re Smith, 193 Cal. 337, 223 P. 971, and In re Boynton, 193 Cal. 782, 223 P. 972.

[8] In holding this provision to be a violation of the Constitution, we are by no means intending to indorse any subterfuge or plan by which the lender could or would secure to himself a greater amount of interest than that provided for by law. We recognize that in every transaction the court will look to the substance thereof and not merely to the form, and if, by any kind of device, the lender is securing a greater benefit than that provided in the law, the contract will be held usurious even though it be cloaked under the guise of a commission, bonus or other name. This has been made clear by our own court in the case of Blodgett v. Rheinschild, 56 Cal. App. 728, 733, 206 P. 674, 676, where the court quotes approvingly this language:

> " 'As a general rule, any benefit or advantage exacted by the lender from the borrower, whatever be its name or form, which, added to the interest taken or reserved, would yield to the lender a greater profit upon his loan than is allowed by law is deemed usury.' (39 Cyc. 971)."

See, also, to the same effect, Niles v. Kavanagh, 179 Cal. 98, 175 P. 462, 1 A. L. R. 831.

In other words, in holding that a legitimate third party broker in a loan transaction is not covered by this statute, we are not intending to in any wise aid or assist or countenance the lender in taking from the borrower any greater interest charge than that provided by law, whatsoever may be his method of so doing.

We concede no weight to the claim urged that this provision of the act was intended exclusively to allow a commission or bonus to the lender and to have no application to the third party, the broker. The views announced above compel a conclusion which is the reverse of this contention, and we hold that the provision was not intended to apply in any wise to increase the profit to the lender beyond the maximum rate of interest specified in the act.

[9] It may be said also in conclusion that the provision of the statute which has been successfully assaulted in this proceeding is clearly severable from the other portions of the act, and whether or not there may be other invalid provisions therein can be of no concern to the parties to this action.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; KOFORD, Justice pro tem.

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200 Cal. 598

Ex parte WASHER. (Cr. 2933.)

(Supreme Court of California. March 4, 1927. Rehearing Denied March 31, 1927.)

1. Constitutional law 🔑242—Usury 🔑5—Usury Law provision held invalid in part as discriminating between loans on ordinary security and those on corporate or municipal bonds (Usury Law, § 3; Const. Cal. art. 1, §§ 11, 21; Const. U. S. Amend. 14).

Usury Law (St. 1919, p. lxxxiii, § 3), providing that one charging more than 12 per cent. on sum loaned when repayment is secured by any evidence of debt except corporation and municipal and other public bonds shall be guilty of misdemeanor, *held* invalid in part as violating Const. Cal. art. 1, §§ 11, 21 and Const. U. S. Amend. 14, by discriminating between loans on ordinary security and those on corporate and municipal and other public bonds.

2. Statutes 🔑181(2)—Absurd or unjust results will not be ascribed to Legislature in construing statutes.

In construing statutes, absurd or unjust results will never be ascribed to Legislature by courts.

3. Constitutional law 🔑48—Legislature will not be presumed to have used inconsistent statutory provisions as to same subject in immediate context.

In construing statutes, Legislature will not be presumed to have used inconsistent provisions as to same subject in immediate context.

4. Statutes 🔑200, 208—In interpreting statutes, courts are not bound by grammatical rules and may ascertain meaning of words by context.

In interpretation of statutes, courts are not bound by grammatical rules and may ascertain meaning of words by context.

5. Usury 🔑6—Any provision in Usury Act referring to sale of corporation and municipal bonds at discount is surplusage (St. 1919, p. lxxxiii; Deering's Gen. Laws 1923; Acts 652, 3814, 6386; Const. art. 12, § 23; "loan."

In Usury Act (St. 1919, p. lxxxiii), provision as to interest rate on secured loans except corporation and municipal and other public bonds, if construed to refer to sale of such bonds at discount, *held* surplusage, since such transaction is not "loan" within meaning of Usury Law, sale of bonds being governed by Corporate Securities Act, as amended (Deering's Gen. Laws 1923, Act 3814), Const. art. 12, § 23, Public Utilities Act as amended (Deering's Gen.

Laws 1923, Act 6386), and Bank Act as amended (Deering's Gen. Laws 1923, Act 652).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Loan.]

6. Statutes 🔑225—Statutes in pari materia should be construed together.

Statutes should be construed in light of other existing legislation touching same subject-matter, and statutes in pari materia are to be construed together.

7. Licenses 🔑8(2)—Existing laws relating to issuance, sale, or negotiation of securities held not repealed by Usury Act (St. 1919, p. lxxxiii; Deering's Gen. Laws 1923, Acts 652, 3814, 6386; Const. art. 12, § 23).

No existing laws relating to issuance, sale, or negotiation of securities now authorized or supervised by Corporate Securities Act, as amended (Deering's Gen. Laws 1923, Act 3814), Const. art. 12, § 23, Public Utilities Act, as amended (Deering's Gen. Laws 1923, Act 6386), and Bank Act, as amended (Deering's Gen. Laws 1923, Act 652), was repealed, modified, or impaired by Usury Act (St. 1919, p. lxxxiii), which provided for express repeal only of Civ. Code, §§ 1917, 1918, 1919, 1920.

8. Usury 🔑83, 84—Corporation, municipal, and other public bonds may be sold at discount greater than legal interest without being usurious.

Corporation bonds and municipal or other public bonds have valid existence and transferable quality in hands of issuing corporation, and are subject to sale at market value, which may be at discount greater than legal interest without making them subject to taint of usury in hands of immediate purchaser.

9. Statutes 🔑64(2)—Invalidity of part of Usury Act as discriminating between loans on ordinary security and those on corporate or municipal bonds held not to invalidate remainder (Usury Law, § 3).

Invalidity of part of Usury Law (St. 1919, p. lxxxiii) § 3, as discriminating between loans on ordinary security and those on corporate or municipal bonds, *held* not to invalidate remainder of statute, since objectionable section is severable.

10. Usury 🔑35—Loan secured by corporate bonds is usurious if interest exceeds legal rate (St. 1919, p. lxxxiii).

Loan on corporate bonds as security calling for interest in excess of legal rate is just as usurious as loan on any other class of security, since provision relative thereto in Usury Act (St. 1919, p. lxxxiii) is unconstitutional.

In Bank.

Application of W. Washer for a writ of habeas corpus prayed to be directed to the Chief of Police of the City of Los Angeles to secure the release of petitioner from custody after conviction of violating the Usury Act. Writ discharged. Petitioner remanded.

Henry Haves, Chas. Greenberg, and Schweitzer & Hutton, all of Los Angeles, for petitioner.

J. M. Friedlander, City Prosecutor, and Vernon S. Gray, Deputy City Prosecutor, both of Los Angeles, for respondent.

Laurance W. Beilenson, and Gibson, Dunn & Crutcher, all of Los Angeles, amici curiæ.

PRESTON, J. Petitioner was convicted and imprisoned for violation of the statute known as the "Usury Act," the complaint alleging that he "did willfully and unlawfully ask, demand, receive, take, accept and charge of and from" certain individuals more than 12 per cent. per annum on a $7,000 loan "for the forbearance, use and loan of said sum of money; payment * * * being secured by an evidence of debt, to wit, a trust deed upon real property * * * and by a promissory note" executed in favor of petitioner.

The District Court of Appeal rendered a decision discharging the writ of habeas corpus and remanding petitioner to custody (In re Washer, 248 P. 1068), whereupon he again petitioned for his release from durance upon the ground, as hereinafter set forth, that the said Usury Law is unconstitutional and void.

[1] This contention requires a consideration of the statute approved by popular vote November 5, 1918 (Stats. 1919, p. lxxxiii), known as the "Usury Law" and particularly that portion of section 3 thereof which reads as follows:

> "And any person, company, association or corporation, who shall ask, demand, receive, take, accept or charge more than twelve per centum per annum upon the sum of money actually loaned for the forbearance, use or loan thereof, when the repayment of the money loaned shall be secured by a mortgage, trust deed, bill of sale, assignment, pledge, receipt or other evidence of debt, except corporation bonds, and municipal and other public bonds, upon property, real or personal * * * shall be guilty of a misdemeanor and upon conviction thereof shall be punished for the first offense by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment not more than six months, or by both such fine and imprisonment, and for each subsequent offense and conviction shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars and by imprisonment not less than six months nor more than one year."

The storm center of attack is the portion thereof which, when paraphrased, reads:

> "And any person * * * who shall * * * charge more than twelve per centum per annum upon the sum * * * loaned * * * when the repayment * * * shall be secured by a mortgage, * * * or other evidence of debt, except corporation bonds, and municipal and other public bonds, * * * shall be guilty of a misdemeanor. * * *"

Petitioner contends that this provision of the statute violates article 1, section 11, of the Constitution of California, also article 1, section 21, thereof, and also the Fourteenth Amendment to the Constitution of the United

States, in that it provides that a criminal penalty shall attach to any person, company, association, or corporation who shall exact more than 12 per cent. per annum upon a sum of money loaned and secured by any other class of security than corporation bonds, municipal or other public bonds, but as to the lender upon such last-mentioned securities no criminal or other penalty attaches for what amounts to the same act. In other words, the contention of petitioner is that there is no economic, intrinsic, constitutional difference between loans secured by corporate bonds or municipal or other public bonds and loans secured by other forms of security or collateral.

Respondent, however, urges that the clause should not be construed to mean that a lender on corporate or other bonds is in any different class from a lender on other security, but that it should be construed to mean that the corporate entities mentioned may negotiate and sell the bonds of their own issuance at any discount or rate of interest they may deem fit without incurring the penalty of the law. In other words, respondent would have us hold that the clause referred to means "evidenced by" and not "secured by" corporation bonds, etc. To be more specific, his contention is that the phrase should be construed as though it read:

> "Except a loan by a borrower upon corporation bonds, municipal bonds and other public bonds."

A careful research of the authorities and the statutes of the various states on usury convinces us that the draftsman of this measure had before him almost exclusively in his work the Wisconsin Usury Act (Wis. Stats. 1917, p. 1346), for we find section 1 of our Usury Act to be almost a perfect reproduction of section 1688 of the Wisconsin statute; also section 2 of our statute is practically a duplicate of section 1689 of the Wisconsin law. Indeed, the first paragraph of section 3 of our law finds its duplicate in the first paragraph of section 1691 of the Wisconsin law, and undoubtedly paragraph 3 of said section 1691 of the Wisconsin law was the inspiration of the draftsman when he produced the provision now under consideration. The Wisconsin law in this behalf provides as follows:

> "Sec. 1691, par. 3. And when the payment of the money loaned shall be secured, or purport to be secured, or claimed by the payee of said loan to be secured, by chattel mortgage, bill of sale, pledge, receipt or other evidence of debt upon chattel goods or property, or by assignment of wages, or by power of attorney to execute any such instrument on behalf of the borrower, whether any such instrument or the power given to execute the same, shall be valid or not, or whether any such instrument or power shall be fully executed or executed partly in blank, any person who, as principal or as agent for another, shall ask, demand, or receive, take, accept or charge, in addition to the interest aforesaid, more than an amount equal to seven per centum per annum of the original sum actually loaned for the time of such loan, on sums of a hundred dollars or less, nor more than four per cent. per annum of the original sum actually loaned for time of such loan, on sums over one hundred dollars, disregarding part payments and the dates thereof, but not to be computed for a period exceeding one year in any event, in full for all examinations, views, fees, appraisals, commissions, renewals and charges of any kind or description whatsoever in the procuring, making and transacting of the business connected with such loan, shall be guilty of a misdemeanor. * * *"

A consideration of this provision shows that it refers to personal property loans and allows the lender on personal property not only the rate of interest provided with respect to other loans but also a further charge by way of commissions, examinations, fees, appraisals, renewals, etc. In other words, this provision of the statute was intended to control loans upon chattels and was not intended to make any distinction between secured and unsecured loans in any other respect. It is an appeal to the police power of the state for the regulation of pawnbrokers and other personal property brokers, a subject to which an appeal to the police power has been made in practically every state of the Union. Indeed, similar legislation is on the statute books in California and has been declared a proper subject for the operation of police power, and therefore valid. See Eaker v. Bryant, 24 Cal. App. 87, 140 P. 310; Levinson v. Boas, 150 Cal. 185, 88 P. 825, 12 L. R. A. (N. S.) 575, 11 Ann. Cas. 661; Ex parte Lichtenstein, 67 Cal. 359, 7 P. 728, 56 Am. Rep. 713.

It would appear, therefore, that the draftsman of the Usury Law statute in California undertook to broaden the provision respecting personal property loans so as to include secured obligations of all kinds on real and personal property except corporate bonds, municipal and other public bonds, without realizing that the preceding sections of the act fully covered secured loans. It should also be noted that the draftsman of our statute did not desire that the lender have any commission or other emolument that would enhance his interest charge and so created an independent provision respecting loan brokers which undertook also to limit their charges. This latter effort was held to have been invalid and abortive in Wallace v. Zinman, 199 Cal. —, 254 P. 946, this day decided. So the language of this exception and the connection in which it is found convinces us that the draftsman of the Usury Law of California, after grappling with his many problems, lost himself and with drawn sword was stabbing at imaginary enemies in the darkness when he inserted the clause now under consideration in the act.

[2-4] However this may be, we cannot es-

cape the conclusion that by use of the phrase "* * * secured by a mortgage * * * or other evidence of debt, except corporation bonds, and municipal and other public bonds, * * *" is meant that no offense could be committed by a loan at any rate of interest, however large, upon such property as security. We find no difficulty in construing the preceding words, such as mortgage, trust deed, bill of sale, assignment, pledge, or receipt, to be in and of themselves evidences of debt in the broader sense of that term. We are mindful of the rules of construction which must bind us, which said rules are as follows:

> "Absurd or unjust results will never be ascribed to the Legislature and it will not be presumed to have used inconsistent provisions as to the same subject in the immediate context. The courts will be astute to avoid such results (Wells Fargo & Co. v. Mayor, etc., of Jersey City [D. C.] 207 F. 871). In the interpretation of statutes courts are not bound by grammatical rules, and may ascertain the meaning of words by the context. Cavender v. Hewitt, 145 Tenn. 471, 239 S. W. 767, 22 A. L. R. 755.
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> " 'The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the Legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. "While the intention of the Legislature must be ascertained from the words used to express it, the manifest reason and the obvious purpose of the law should not be sacrificed to a literal interpretation of such words." Words or clauses may be enlarged or restricted to effectuate the intention or to harmonize them with other expressed provisions. Where general language construed in a broad sense would lead to absurdity it may be restrained. The particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense they were intended to be used as they are found in the act.' Lewis' Sutherland on Statutory Construction (2d Ed.) § 376, p. 721." In re Haines, 195 Cal. 605, 613, 234 P. 883, 886.

But notwithstanding the liberality and flexibility of these rules, we are unable to put any different construction on this clause than the plain meaning afforded by the ordinary import of the words. To give the construction contended for by respondent, it is necessary for the borrower to make a loan to the lender and thus to twist the words out of joint to such length that the borrower while going on must meet himself coming back. We do not feel able to indulge the verbal gymnastics necessary to make the meaning out of this phrase contended for by respondent and therefore conclude that petitioner has properly construed its meaning. It is conceded that no intrinsic, economic, constitutional, or other reason exists for a discrimination between loans on ordinary security and loans upon corporate, municipal or other public bonds, and the provision must therefore be adjudged void as being in contravention of the above specified plain mandates of the Constitution.

[5] But, notwithstanding our view to the effect that the provision is discriminatory and void, we nevertheless would reach the same result for all practical purposes, if we adopted the construction contended for by respondent. In other words, we hold that sections 1 and 2 of the act are intended to cover secured as well as unsecured loans. The clauses are all-comprehensive in their meaning and no reason whatsoever exists for making a special provision respecting unsecured loans; therefore, if the clause in question were given the full meaning contended for by respondent, it would be at most nothing more than surplusage for it would have been previously covered by the provisions of sections 1 and 2. This provision would in that case be surplusage because the sale at a discount by corporate borrowers, such as corporations, municipal and other public corporations, of bonds of their own issue, is not, in our opinion, a loan within the meaning of the Usury Law and was never intended to be subject to the operation of any of the provisions of this statute. The sale of certain classes of corporate bonds is controlled by what is known as the Corporate Securities Act, approved May 18, 1917, together with its amendatory and supplementary provisions since that time (Deering's Gen. Laws, 1923, part 1, p. 1407, Act. 3814).

Municipal bonds and bonds of other public corporations are authorized by special provisions of the statute or Constitution, are first voted by the people, residents of the territory included, and are then placed upon the market by competent boards of directors or trustees elected or appointed for the purpose. Indeed, in the operation of many city governments, they are, by reason of section 6 of article 11 of the Constitution, free from the operation of general laws at all. Civic Center v. R. R. Commission, 175 Cal. 441, 166 P. 351; Morgan v. City of L. A., 182 Cal. 301, 305, 187 P. 1050.

Then, too, we have section 23 of article 12 of the Constitution conferring broad powers upon the railroad commission of the state of California, which amendment has been followed by a comprehensive statute known as the Public Utilities Act (Deering's Gen. Laws, 1923, part 2, Act 6386, p. 2683), which act empowers the railroad commission to supervise the issuance, sale, and disposition of bonds of all public utilities. Likewise certain powers of a similar nature are conferred by what is known as the Bank Act of the State of California (Deering's Gen. Laws, 1923, part 1, Act 652, p. 153).

These, and perhaps many other statutes, are the result of the best wisdom of our state and involve some of its most important and most cherished functions, and it is not for a moment to be held that this system of beneficent laws was to be set awry by a poorly drafted act meant only to protect the individual necessitous borrower from the rapacity of the more fortunate lender.

[6, 7] A statute should be construed in the light of other existing legislation touching the same subject-matter and statutes in pari materia are to be construed together. McGrath v. Kaeline, 66 Cal. App. 41, 44, 225 P. 34. So construing them, we hold that it was not the intent of the act to repeal or modify or impair the integrity of any existing laws relating to the issuance, sale or negotiation of securities now authorized or supervised by any such laws. This act provides for the express repeal of only sections 1917, 1918, 1919, and 1920 of the Civil Code, and the full operation of statutes respecting the control of corporate securities, public or private, will not be deemed hampered in any way by the act in question. We are not here deciding what may be the effect of the act upon existing statutes regulating the business of pawnbrokers and other personal property brokers.

[8] Many states, such as Illinois, Virginia, Wisconsin, New York, Maryland, Delaware, North Carolina, and South Carolina, have met the question by expressly denying to corporations the right to plead usury. But the weight of authority is that, independent of existing regulatory enactments, the sale and negotiation of bonds by corporations, public and private, are not loans within the meaning of the usury laws. 39 Cyc. p. 936, states the rule as follows:

> "But by the weight of authority such bonds are regarded as having a valid existence and transferable quality in the hands of the issuing corporation and thus subject to sale at their market value, which may be at a discount much greater than legal interest, without making them subject to the taint of usury in the hands of an immediate purchaser."

See, also, Griffith v. Burden, 35 Iowa, 138, 143; Kornegay v. City of Goldsboro, 180 N. C. 441, 105 S. E. 187, 193, and cases there cited; Memphis v. Bethel (Tenn.) 17 S. W. 191; Orchard v. School District, 14 Neb. 378, 15 N. W. 730, 731; Armstrong v. Freeman, 9 Neb. 11, 2 N. W. 353; New River Lumber Co. v. Tennessee Ry. Co., 136 Tenn. 661, 191 S. W. 334, 340, and White Water Valley Canal Co. v. Vallette et al., 21 How. [62 U. S.] 414, 425, 16 L. Ed. 154.

Corporations, public and private, are, as we have pointed out, protected and supervised by specific laws applicable alone to them and no reason exists for further regulation. On the contrary, such a law, if applied to them, would have a mistaken effect, for instead of helping them as the design of the usury law implies, the practical effect would be to discourage and hamper the free commerce among our people in this popular class of securities to the detriment of the public welfare. A loss of confidence in these securities would work a positive and widespread injury to our otherwise strong and healthy business fabric.

[9] The inevitable conclusion from these views is that sections 1 and 2 of the act known as the Usury Law are, in all respects, valid and cover both secured and unsecured obligations, and that section 3 of said statute, taken in connection with the decision in Wallace v. Zinman, 199 Cal. —, 254 P. 946, should be construed as though it read as follows:

> "Sec. 3. Every person, company, association or corporation, who for any loan or forbearance of money, goods or things in action shall have paid or delivered any greater sum or value than is allowed to be received under the preceding sections, one and two, may either in person or his or its personal representative, recover in an action at law against the person, company, association or corporation who shall have taken or received the same, or his or its personal representative, treble the amount of the money so paid or value delivered in violation of said sections, providing such action shall be brought within one year after such payment or delivery. And any person, company, association or corporation who shall violate the provisions of sections one and two of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished for the first offense by a fine of not less than twenty-five dollars nor more than three hundred dollars, or by imprisonment not more than six months, or by both such fine and imprisonment, and for each subsequent offense and conviction shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars and by imprisonment not less than six months nor more than one year. The penalties herein provided for the violation of this section and said sections one and two shall apply to and be imposed upon each member of any unincorporated company, association, or of any copartnership and upon each officer and director of a corporation who shall violate either of said sections."

[10] A loan, therefore, upon corporate bonds as security in excess of the legal rate would be just as usurious as a loan on any other class of security.

The above conclusion disposes of the contention of amici curiæ that violence would be done to the legislative intent by striking down the provisions of the second portion of section 3, involved herein, and leaving in operation sections 1 and 2 and the remaining paragraphs of section 3 of said act. The provision is either void or surplusage and, being clearly severable, no violence has been done the legislative intent.

It follows that with this exception the statute as a whole is valid and free from constitutional objection and that specific objections to all provisions thereof affecting petitioner are without merit. The petitioner being charged with a violation of valid provisions of said act, his conviction and imprisonment were proper.

Writ discharged and petitioner remanded to custody.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; RICHARDS, J.; SEAWELL, J.; LANGDON, J.

On Rehearing.

WASTE, C. J. The petition for a rehearing herein is denied. There is no practice here allowing petitions for rehearing in cases of habeas corpus. Ex parte Robinson, 71 Cal. 608–611, 12 P. 794; In re Travers, 48 Cal. App. 764, 771, 192 P. 454.

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200 Cal. 609

HAINES et al. v. COMMERCIAL MORTGAGE CO. et al. (L. A. 9134.) ★

(Supreme Court of California. March 4, 1927. Rehearing Denied March 31, 1927.)

1. Usury 🔑53—Lender may reimburse himself from fund to be loaned for specific services and expenses incidental to loan, but may not exact excessive interest.

Though lender may perform service or incur expenses in connection with loan which would entitle him to reimburse himself from fund about to be loaned, such items must be confined to specific services or expenses incurred in such way as to preclude its being mere device through which additional interest may be exacted.

2. Usury 🔑55—Broker's fee exacted by lender on loan already carrying maximum interest charge held usurious (Usury Law).

Broker's fee of 3 per cent., exacted by lender on loan already loaded with maximum interest charge, *held* additional charge for interest constituting usury, causing lender to forfeit all claim to interest and allowing borrower to recover treble amount of interest paid under Usury Law (St. 1919, p. lxxxiii).

3. Usury 🔑137—Borrower cannot recover treble amount of usurious charge which had not been paid.

Borrower may not recover treble amount of usurious broker's fee, where such charge was not actually paid.

4. Usury 🔑100(1)—In applying Usury Law, court will adopt agreement of parties as to portion of borrower's payments applicable to payment of interest.

Where parties have by special and specific agreement agreed as to what portion of borrower's payments shall be referred to principal and what shall be referred to interest, court will adopt such understanding in applying provisions of Usury Law (St. 1919, p. lxxxiii).

5. Usury 🔑100(1)—Court held to have duty to state account between lender making expenditure to protect security and borrower pleading usury who breached agreement to make monthly payments partially applicable to payment of principal.

Where borrower, having breached agreement to make monthly payment, part of which was to be applied to payment of principal, asked equitable relief pleading usury, and lender had made expenditure to protect security, court had duty to assume full and complete jurisdiction and make and state account between parties.

6. Usury 🔑139—Borrower's action for treble amount of usurious interest paid is subject to defendant's offsets and counterclaims.

Borrower's action for treble the amount of usurious interest paid is subject to offsets and counterclaims by defendants.

7. Usury 🔑142(1)—Borrower, before suing for treble amount of usurious interest paid, need not tender principal and other items due under obligation.

Borrower, before bringing action for treble amount of usurious interest paid, is not required to do equity by tendering principal and such other items, excluding interest, as may be due under obligation.

8. Usury 🔑146—Where lender could declare debt due for nonpayment of installment on either principal or interest, forfeiture of right as to usurious interest will not affect right of acceleration of maturity as to principal (Usury Law).

Where note required borrower to make monthly payments on principal as well as usurious interest, and gave lender right to declare debt due for nonpayment of either principal or interest, forfeiture of right as to interest under Usury Law (St. 1919, p. lxxxiii) will not affect right of acceleration of maturity date as to principal.

In Bank.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Francis S. Haines and others against the Commercial Mortgage Company and another. Judgment for plaintiffs, and defendants appeal. Reversed with directions.

Schweitzer & Hutton and B. R. Ware, all of Los Angeles, for appellants.

Woodruff & Shoemaker and Laurence W. Beilenson, all of Los Angeles, amici curiæ.

George L. Sanders, of Los Angeles, for respondents.

PRESTON, J. Respondents, plaintiffs below, executed to appellant and defendant below, Commercial Mortgage Company, a note as follows:

"$34,000.00. Los Angeles, Cal., July 2, 1924.

"In installments and at the times hereinafter stated, for value received, we, jointly and severally, promise to pay to Commercial Mortgage Company, a corporation, or order, at its offices in Los Angeles, California, the principal sum of thirty-four thousand and no/100 dollars, with interest from date on the amount of principal remaining from time to time unpaid until said principal sum is paid at the rate of twelve per cent. per annum. Principal and interest payable in monthly installments of eight hundred and no/100 ($800) dollars or more each on the first

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🔑For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

★For opinion on petition for rehearing, see 255 P. 805.

day of each and every month, beginning on the 1st day of September, 1924, and continuing until said principal and interest thereon have been fully paid. Each payment shall be credited first, on interest then due; and the remainder on the principal sum, and interest shall thereupon cease upon the amount so credited as the said principal sum. Should default be made in payment of any installment when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States, of the present standard. This note is secured by a certain deed of trust to Title Insurance & Trust Company, a corporation, of Los Angeles, California.

"I. R. Stamps $6.80 affixed and canceled.

"Francis S. Haines,
"Mary Orr Haines,
"H. C. Ketchum,
"Marie C. Ketchum."

A trust deed to secure payment was, as a part of the same transaction, executed to the other defendant and appellant, Title Insurance & Trust Company, as trustee. Eight monthly payments of $800 each were made on the said note at the times called for therein, of which said eight payments $2,953.11 in the aggregate was, by special agreement of the parties, referred to interest, and the remainder, aggregating $3,446.89, referred to payment on the principal. Default then occurred in said payments, and the record discloses no payments thereon since said time. The legal steps necessary to declare the whole principal debt due were taken and foreclosure and sale of the property covered by the trust deed was about to be made when the present action was commenced.

The complaint filed on January 13, 1925, and as later amended, alleges that said transaction was usurious in that the defendant mortgage company exacted a commission of 3 per cent. upon the loan, or $1,020, in addition to the 12 per cent. per annum provided for in the said note. It also alleges the payment of an additional sum of $5 as an appraiser's fee. The prayer was that the loan be declared a transaction in violation of the Usury Act (St. 1919, p. lxxxiii); that the right to future interest be declared forfeited; that no part of the principal be declared payable until the completion of the full period of time contemplated by the note; that plaintiffs recover treble the amount of all interest paid, including treble the amount of said commission of 3 per cent., or $1,020; that a sale of the premises be enjoined and forbidden until the fullness of the period covered by said loan should have elapsed; for costs of suit and for general relief.

The answer admits the execution of the note and trust deed; admits that a charge of 3 per cent. on said principal amount, or $1,020, was charged and made a part of said note, but alleges that said amount was for examinations, views, fees, appraisals, commissions and all charges in transacting the business of the loan as provided for in the so-called Usury Act. It denies specifically that any taint of usury inheres in said transaction and further pleads that defendants had ordered a sale under the trust deed; that the trustee had recorded the declaration of default not only for the whole of the principal and interest and trustee's charges, but also for advances made on account of principal and interest on a prior incumbrance on the property covered by the trust deed.

The court sustained the contentions of plaintiffs and found that although the face of the note was $34,000, plaintiffs received but $32.980, the $1,020, or 3 per cent. of the principal amount, being included in the note; that the plaintiff H. E. Ketchum called at the joint office of the defendant Commercial Mortgage Company, and Commercial Loan Company, and there met in the office of Eugene Webb, Jr., an officer and director of both above-named loan companies, a man by the name of Ellsworth Pexton, who claimed to be acting for said Eugene Webb, Jr.; that said H. E. Ketchum there made and filed an application in writing for a loan of $34,000, agreeing to pay said Webb a 3 per cent. commission on said amount, and to give a note and trust deed by himself and coplaintiffs to secure payment. The court further found that the transaction was carried out in other respects as alleged in the complaint, and in addition thereto found a prior incumbrance of $82,000 existed on the property and that defendant mortgage company, to prevent a foreclosure thereof, had paid on account of principal and interest thereon the sum of $7,974. The further findings material to this decision are found in the opening paragraphs hereof.

The court adjudged the transaction usurious and provided that plaintiffs have judgment for $11,919.33, being treble the item of $1,020 plus treble the aggregate amount of said items of interest, to wit, $2,953.11. The judgment further provided:

> "That defendants are, and each is, hereby restrained and enjoined from foreclosing said trust deed and selling said security for any default in payment of any interest demand on said loan."

Counsel for appellants and also several amici curiæ make spirited and vigorous attacks not only upon the validity of the Usury Act, but, assuming it to be valid, upon the manner in which the court below administered the act in this case. Fortunately for the length of this opinion, all of the points made against the validity of the Usury Act as a whole have been considered in the cases of Wallace v. Zinman (Cal. Sup.) 254 P. 946, this day decided, and In re Washer (Cal. Sup.) 254 P. 951, also this day decided. In the former we held the statute as a whole to be valid and without violence to any provision of the Constitution, except that a certain clause thereof not involved in the case now before us was declared invalid. In the latter we also held abortive the effort found in the act to fix limitations upon the charges of loan brokers and agents. In both cases we held it to be the manifest intent of the act to forbid absolutely to the lender any profit whatever by way of commission, bonus or other kind of charge, if in so doing the maximum rate declared in the act was exceeded.

A further consideration of the question leaves us entirely satisfied with these conclusions. If there is anything that is made clear and plain by the act, it is that the maximum rate of 12 per cent. per annum on the amount loaned is the full measure of all profit to the lender in connection therewith and this, too, without even the right in such case to compound the interest in any computation thereon. Of course, it is competent for the parties to contract in writing for compound interest where in so doing the said maximum rate of 12 per cent. without such compounding would not be exceeded. Language in the act as follows, to wit:

> "No person, company, association or corporation shall directly or indirectly take or receive in money, goods, or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. * * *" Section 2.

—makes these conclusions unavoidable.

[1] Of course, we are by no means intending to hold that the lender may not perform services or incur expenses in connection with a loan which would entitle him to reimburse himself from the fund about to be loaned to the borrower, but we do mean to state that these items must be confined to specific service or expense incidental to the loan incurred in such a way as to absolutely preclude its being merely a device through which additional interest or profit on the loan may be exacted, and in this connection the court will carefully scrutinize the whole transaction and declare its substance regardless of its form.

> "It is true that in determining whether or not the transaction is usurious the court 'will disregard its form and look to the substance, and will condemn it if all of the requisites of usury are found to be present, despite any disguise it may wear.' First National Bank v. Phares, 70 Okl. 255, 174 P. 519, 21 A. L. R. 793. See, also, a great number of cases cited in 21 A. L. R. 808 and 809. * * *" Friedman v. Wisconsin Acceptance Corporation (Wis.) 210 N. W. 831.

Blodgett v. Rheinschild, 56 Cal. App. 728, 732, 206 P. 674, 676, is in point as follows:

> "The $400 actually loaned to defendant was the property of plaintiff; the latter himself negotiated the loan directly with defendant—that is, there was no agent or intermediary in the transaction; there was, therefore, no occasion for the payment of a 'commission' by either the borrower or the lender. Designating the $20 as a 'commission' did not make it such. This word 'commission' was but a euphemism, employed in an attempt to justify the exaction of a greater sum for the loan than at the rate of $12 upon $100 for one year—the maximum amount that a lender is entitled to ask or receive since the present usury law was adopted at the general election held November 5, 1918. The device of a 'commission' has, therefore, the characteristics of a shift to circumvent and avoid the usury law. 'As a general rule, any benefit or advantage exacted by the lender from the borrower, whatever be its name or form, which, added to the interest taken or reserved, would yield to the lender a greater profit upon his loan than is allowed by law is deemed usury.' (39 Cyc. 971)."

[2] The charge of 3 per cent. in this case cannot be allocated to any item of expense or service for which the lender could legitimately make a charge or urge a claim. The court was fully warranted by the evidence in making the finding that it was a fee or bonus exacted in a manner so as to stamp it as an additional charge for interest on the loan. The loan, already loaded with the maximum interest charge, was supplemented by this item of $1,020, which said item was clearly a distinct usurious exaction from the borrower. We have no hesitancy in also holding that in such case the lender forfeits all claim to interest, and the borrower may recover not only treble the excess but treble the entire amount of interest actually paid upon the loan, for the unmistakable declaration of the statute is to this effect. Besides similar statutes have been construed and practically without exception such has been the holding of the several courts. Tayloe v. Parker, 137 N. C. 418, 49 S. E. 921; Sloan v. Piedmont Fire Ins. Co., 189 N. C. 692, 128 S. E. 2; Ardmore St. Bk. v. Thompson, 57 Okl. 521, 164 P. 977; Waldner v. Bowden St. Bk., 13 N. D. 604, 102 N. W. 169, 3 Ann. Cas. 847; First Nat. Bk. of Benton v. Watt, 184 U. S. 151, 22 S. Ct. 457, 46 L. Ed. 475; 27 R. C. L. pp. 274, 275, § 77.

[3] In this connection, however, it should be observed that the 3 per cent. charge, totaling $1,020, was not actually paid, and is therefore not a proper item of said judgment for trebling the amount thereof. The court gave judgment for $11,919.33, which is treble the item of $3,973.11, which latter item is composed of an interest charge of $2,953.11 on the eight installments paid on the notes, plus the commission or bonus charge of $1,020. The only item appearing in the record that should have been trebled is the item of $2,953.11. The item of $1,020 simply becomes surplusage and not only cannot be collected but cannot be the basis of apportionment

for either principal or interest, and the payments on account of principal will serve to reduce the net principal and will not be construed as a payment of said charge of $1,020, either in whole or in part. To authorize the infliction of the penalty the interest must, of course, be paid. Coulter v. Collins, 71 Cal. App. 381, 235 P. 465; 27 R. C. L. p. 275, § 78.

[4] In this connection it is also true that where the parties have by special and specific agreement, as in the case at bar, agreed as to what portion of a given payment shall be referred to principal and what shall be referred to interest, the court will adopt this understanding in applying the provisions of the usury law. 27 R. C. L. p. 275, § 79. The holding, therefore, that plaintiff was entitled to $11,919.33 is not supported by the evidence, and was therefore erroneous.

In this behalf it is contended by appellant that the court precluded it from showing that the 3 per cent. charge was for actual services rendered to the borrower by the lender. There is no substance in this claim. The facts surrounding the charge of 3 per cent. were fully exploited. The only ruling in any way curtailing the defendants was disallowing evidence as to future services that defendants might be called upon to perform in checking the status of the building operations on the property. While it is conceivable that a charge of some kind might be proper under certain circumstances, there is nothing to show nor is it claimed that the $1,020 was exacted to cover this possible future service.

[5] However, as we have noted above, the judgment pronounced by the court in this case restrains and enjoins the defendants from selling said security for any default in payment of interest on said loan. And the court found said promissory note provided for monthly installments of $800 or more each, payable on the first day of each month, and that should default be made in the payment of any installment when due, the whole sum of principal and interest should become immediately due and payable at the option of the holder of the note; also, that appellant mortgage company had paid the sum of $7,974 in partial discharge of principal and interest upon a prior mortgage lien existing upon the property involved herein; also, that steps had been taken by the trustee to foreclose the deed of trust and expose the security to sale thereunder.

[6] Notwithstanding these several facts, the court, sitting as a court of equity at the instigation of plaintiffs, did not dispose of the issue tendered by the above-mentioned facts, but, as we have noted above, rendered only a partial decision in the matter. These several facts above noted, in our opinion, made it incumbent upon the court below, as such court of equity, to assume full and complete jurisdiction in the premises and make and state the account between the parties and make plenary disposition of all the issues involved in the action. 25 Cal. Jur. § 53, pp. 69, 70. While the provision for a special right of action in plaintiff for treble the amount of interest paid is in the nature of a penalty, the context of the act gives it more of the rating of an action for debt and therefore subject to offsets and counterclaims by defendants. Besides, were this not true, the plaintiffs waived the right to object to offsets and counterclaims by coming into a court of equity and praying for additional relief instead of the mere pronouncement of a judgment in forfeiture against the defendant mortgage company. Equity, having once acquired jurisdiction, as we have noted above, will administer the whole issue.

[7] We accord no merit to the contention of appellants, also of amici curiæ, that plaintiffs must first do equity by tendering the principal and such other items, excluding interest, as may be due under the obligation, before suit may be maintained for treble the interest paid. This contention is the general rule (27 R. C. L. p. 264, § 67, and cases cited), but this rule has no application to the special remedy allowed the borrower under this act when the action is commenced within one year after payment (27 R. C. L. pp. 274, 275, § 77; Second Nat. Bk. v. Fitzpatrick, 111 Ky. 228, 63 S. W. 459, 62 L. R. A. 599). This construction is plain from the language of the act itself.

[8] But we are yet met with another question in this case. The act further provides:

> "Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed." Section 2.

Does this provision affect the maturity date of the promissory note before us? A careful consideration of the provision convinces us that the intent is that the maturity date of the obligation cannot be accelerated, if the option to declare the whole of the principal debt due is dependent solely upon nonpayment of usurious interest. In other words, if the note provides for installment payments on the principal as well as the payment of interest and gives the right to the holder to declare the whole debt due for nonpayment of either principal or interest, the forfeiture of the right as to interest could not destroy or affect the remaining right as to principal. From a consideration of the note involved in this action it will be seen that it is an installment note without a definite date of maturity. It specifically provides for payments of $800 or more monthly. How soon such an obligation would be finally matured and paid cannot be definitely foretold, unless interest be excluded and the payments are confined to $800 per month and all applied on the principal.

Respondents seem to contend that such date of maturity should be determined as though the situation were the creation of a sinking fund by these monthly payments which would gradually and finally amortize the principal debt with interest, and that the point of time at which such debt would be finally absorbed should be considered the maturity date of the whole of such obligation. In other words, respondents seem to declare that the court must forbid the collection of any principal or the declaring of any portion of the principal due until by a process similar to the one above described, the debt would be finally paid in full with interest, were such partial payments provided for made. We can see no reason for any such holding. One thing is true and that is that the note provides that each month a payment to some extent must be made on account of the principal as distinguished from the interest and that such payments on account of principal will increase from month to month. Is it true that, on account of the usury in connection with this item of interest, this obligation to pay part of the principal is also voided? Our answer is, "No." A man guilty of usury does not forfeit his goods like a felon at common law. The usury law is to be used as a shield and not as a sword.

We have no hesitancy in holding that in an obligation such as we have before us the full payments called for in the promissory note must be paid in order to prevent default, as well as to prevent acceleration of the maturity date of the the remainder of the principal; that, inasmuch as the claim for interest is void, all payments will be referred to the principal and the obligation thus finally extinguished. If default has been or is hereafter made in the payment in full of these installments, the whole of the obligation (without interest) may, at the option of the holder of the note, be declared due and payable. Any other construction would be tantamount to the infliction of a further penalty upon defendants not provided for in the act.

So, also, in this case if the principal obligation is found to be due and on this account, when taken in connection with other charges, it exceeds the amount of the interest paid when trebled, it would be the duty of the court, as above noted, to state the account between the parties and to credit the offsets of the interest trebled and generally to dispose of the whole issue presented by the cause.

Judgment is reversed, with direction to the court below for such further proceedings herein as it may be advised not inconsistent with this opinion.

We concur: WASTE, C. J.; SHENK, J.; RICHARDS, J.; CURTIS, J.; SEAWELL, J.; LANGDON, J.

200 Cal. 688

FRATERS GLASS & PAINT CO. et al. v. SOUTHWESTERN CONST. CO. et al.

(L. A. 7732.)

(Supreme Court of California. March 16, 1927, as Modified on Rehearing April 15, 1927.)

1. Mechanics' liens 🔑315—Materialman may waive right to lien against building without impairing right to proceed against sureties on bond (Code Civ. Proc. § 1183).

Materialman may waive right to lien against building, for construction of which he furnished the material, without impairing his right to proceed against sureties on undertaking given, under Code Civ. Proc. § 1183.

2. Mechanics' liens 🔑315—Agreement by materialman to wait for payment, "waiving our lien rights," held not waiver of right to sue sureties on bond (Code Civ. Proc. § 1183).

Letter from materialman to sureties agreeing to furnish glass and to await payment till completion of building, "waiving our lien rights," *held* to waive only right to lien, under Code Civ. Proc. § 1183, leaving its right of action on surety bond in full force.

3. Appeal and error 🔑907(4)—Rule raising presumption that evidence sustains facts found held inapplicable, where unambiguous writing showed intention of parties.

Rule that, in absence of transcript or bill of exceptions containing all evidence, presumption is that evidence was competent, and supported facts found, has no application, where court found writing was executed, and intention of parties could be ascertained therefrom.

4. Evidence 🔑385—Writing, unless uncertain or ambiguous, is conclusively presumed to speak for itself.

A writing is conclusively presumed to speak for itself unless it is uncertain or ambiguous, and testimony is inadmissible to vary its express terms.

5. Evidence 🔑448—Circumstances under which instrument was made may be shown only when it is uncertain and needs construction (Code Civ. Proc. § 1860; Civ. Code, § 1647).

Circumstances under which written instrument was made may be shown under Code Civ. Proc. § 1860, and Civ. Code, § 1647, but only when the instrument is uncertain and needs construction.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Action to foreclose materialmen's and mechanics' liens by the Fraters Glass & Paint Company and others against the Southwestern Construction Company and others. From a judgment in favor of defendants Patten against the named plaintiff, it appeals. Reversed.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for appellant.

Jones & Weller, of Los Angeles, for respondents.

CURTIS, J. This action was instituted for the purpose of foreclosing certain materialmen's and mechanics' liens. The only cause of action with which we are concerned on this appeal is that on behalf of Fraters Glass & Paint Company, a corporation, the appellant herein. This company sought a judgment against the sureties on the bond given by the contractor to the owner in compliance with the provisions of section 1183 of the Code of Civil Procedure. E. B. Rivers, as the owner of the real property on which the building was constructed, entered into a contract with the Southwestern Construction Company, a corporation, for the construction of said building at an agreed price of $91,000. The contractor gave a bond as required by section 1183 of the Code of Civil Procedure, with the defendants Henry S. Patten and F. W. Patten as sureties, in the sum of $45,500, being 50 per cent. of the contract price of said building. There is no claim but that this bond met all the requirements of said section 1183. Under the contract for the construction of said building, the appellant, Fraters Glass & Paint Company, furnished glass which was actually used in the construction of said building, the reasonable market value of which was the sum of $5,135.34, no part of which has been paid. Appellant's complaint herein set forth the foregoing facts, and asked for judgment against respondents, the said sureties, for the sum of $5,135.34. The respondents in their answer make no denial of the allegations of the complaint, but, as a special defense, alleged that, as a part of the consideration for executing said undertaking, and as an inducement to them to execute the same, the appellant, prior to the signing of said bond by the sureties, executed and delivered to the sureties the following writing:

> "April 26, 1921, Mr. Henry Patten, Patten & Davies Lumber Co., Los Angeles, Cal.—Dear Sir: In connection with the contract between the Southwestern Construction Company and E. B. Rivers, for a building at Seventh and Central, we agree to furnish glass as arranged with Harry E. Martin, to cost approximately $4,000.00, and to wait thirty-five days after completion of said building for payment of same, waiving our lien rights. We are doing this, of course, to help Mr. Martin in this deal and are confident that it will be carried to a successful completion. Very truly yours, Fraters Glass & Paint Co., by J. A. Fraters, Pres."

Mr. Martin was the president of said construction company.

Respondents further allege in their answer that it was the intent and purpose of said plaintiff, the appellant herein, by the execution of said writing, to relieve said respondents of the burden of said undertaking to the extent of $4,000, and that, had it not been for the execution of said writing by the appellant, respondents would not have become sureties upon said undertaking. The trial court found the allegations of respondents' special defense to be true, and rendered judgment accordingly.

On this appeal the appellant attacks these findings as unsupported by any evidence. Appellant contends that by this writing it did nothing more than waive its right to a lien against the building for which it furnished said material, and that this waiver did not extend to, nor include, its right to proceed against said sureties on said bond for the amount unpaid on its claim. In this connection appellant contends that, as a materialman furnishing materials to be used, and which were actually used in the construction of said building, it was given under the statute the right to a lien against said building and the land upon which it was constructed, together with a convenient space about the same, and also a right in case of the nonpayment of its claim to proceed against the sureties on said bond for the amount unpaid on its claim; that these two rights are separate, distinct, and independent of each other; and that, by waiving its right to a lien against the real property, it in no manner impaired its right of action against the sureties on the bond to recover the amount remaining unpaid upon its claim. In support of this contention, appellant relies upon the case of General Elec. Co. v. American Bonding Co., 180 Cal. 675, 182 P. 444. That action was instituted by the plaintiff therein against the surety upon a bond given in compliance with section 1183 of the Code of Civil Procedure to recover for the value of materials furnished, and which were actually used in the construction of the building referred to in said bond. As a defense to said action, the surety set up in its answer the failure of plaintiff therein to file any claim of lien under the provisions of section 1187 of the Code of Civil Procedure, and that, during the time within which such a claim of lien might have been filed, a large sum of money was due from the owner to the contractor, and which should and would have been applied to plaintiff's claim if the lien had been formally asserted. To this defense the trial court sustained a demurrer, and granted a motion to strike it out. Upon appeal this court sustained the action of the trial court, and held:

> "Section 1197 of the same chapter clearly contemplates suits which may be maintained without the previous filing of liens, for it provides that: 'Nothing contained in this chapter shall be construed to impair or affect the right of any person to whom any debt may be due for work done or materials furnished to maintain a personal action to recover said debt against the person liable therefor; * * * but the judgment, if any, obtained by the plaintiff in such personal action shall not be construed to impair or merge any lien held by said plaintiff under this chapter; provided, only, that any money collected on said judgment shall be credited on the amount of such lien in any action brought to enforce the same, in accordance with the provisions of this chapter.' The bond by its terms creates a direct obligation on the part of the surety to pay for materials used in the construction of the building and the right of action on such bond is preserved by said section 1197 as well as by section 1183.
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> "It can no doubt be persuasively argued that the bond which must 'be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work' relates to claims of lien filed within time. But it seems to us that this is a strained interpretation. The mere use of the word 'claim,' which is as apt a description of the demand of the individual who has filed no claim of lien as it is of one who has filed such claim, is not persuasive.
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> "It is to be noted also that the portion of the section (and of the bond which follows its terms), by which the rights of materialmen are safeguarded, does not use the word 'claims' but the bond is made to 'inure to the benefit of any and all persons who * * * furnish materials to be used in the work described' in the contract.
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> "But there is another and a very strong reason for rejecting the theory that section 1187 of the Code of Civil Procedure restricts the terms of section 1183 of the Code of Civil Procedure, and makes them applicable only to those persons who have filed liens, and that reason is found in the history of the two sections and in the decisions of this court relating thereto."

The court then proceeds to review the history of the legislation affecting these two Code sections as well as the decisions of this court relating to such legislation, and concludes by reasserting its conclusion that:

"The phrase 'claiming the benefits of this chapter' [found in said section 1187] was thus given a meaning which confined its operation to the benefits of asserting a lien upon the property and did not extend it to include the benefits of any other remedy afforded by the chapter against the owner."

This court accordingly held in that case that the waiver of the plaintiff therein of its lien by its failure to file its claim of lien, as required by section 1187 of the Code of Civil Procedure, did not deprive it of its right of action against the surety on the bond given under the provisions of section 1183 of the Code of Civil Procedure. There can be little, if any, difference between a waiver of lien by a failure to file the claim of lien as required by section 1187 and a waiver by express agreement in so far as such waiver may affect the claimant's right to proceed against the sureties on the bond given under section 1183 of the Code of Civil Procedure. In either case the materialmen or laborers, as the case may be, simply forfeit their right to a lien against the property of the owner without in any way impairing their further and additional right given them under section 1183 to proceed against the sureties upon the bond. This conclusion is in perfect accord with the terms of said section 1183 and with the provisions of the bond in the present proceeding. In said section it is expressly provided that said bond "shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or *in a separate suit brought on said bond.* * * *" (Italics ours.) The bond in suit herein provides that:

"And the same is hereby expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract, or in any modification thereof, and any and all such persons shall have and are given a right of action to recover upon this bond against the said principal and sureties, or either of them, in any suit brought to foreclose mechanic's liens, which may be filed by such persons, or any of them, upon the property mentioned in said contract, *or in a separate suit brought upon this bond*, and may recover in such action or actions the value of such labor done or materials furnished, or both, not exceeding, however, in the aggregate of said recoveries, the amount of this bond, as above specified." (Italics ours.)

[1] It is apparent, therefore, that a materialman may waive, by agreement or otherwise, his right to a lien against the building, for the construction of which he has furnished material, without in any way impairing his right to proceed against the sureties upon the undertaking given in compliance with section 1183, Code of Civil Procedure.

[2] Referring now to the writing signed by the appellant, and which it is claimed by respondents is a waiver of appellant's right to recover in this action on said bond, we find that by its terms it is confined to an agreement to wait 35 days after the completion of the building for the payment of its claim and to a waiver of "our lien rights." No reference is made therein as to any waiver of the rights of appellant under said bond. It must be apparent, therefore, of the two rights which the statute gives appellant that by this writing it waived only its right to a lien against the property, leaving its right of action upon the bond in full force and effect, and capable of being enforced in a proper proceeding.

[3, 4] It is further insisted, however, that, even if it be conceded as true all that has been said herein, yet under the record before us the judgment must be affirmed. This record does not contain any evidence, but consists merely of a "Stipulation of Facts," with a further stipulation "that the foregoing may be settled as a bill of exceptions." To this was attached the certificate of the trial judge in the following form:

"The foregoing stipulation of facts is hereby settled and allowed as a bill of exceptions, and the clerk is hereby instructed to file the same, provided, however, that it is to be noted that the foregoing are not all of the material facts or evidence in the case."

Respondents claim that, as the certificate of the trial judge shows that the bill of exceptions does not contain all the evidence before the trial court, and as the attack on the foregoing findings is based upon the insufficiency of the evidence to support them, such attack must fail. Undoubtedly it is the rule that, in the absence of a transcript or bill of exceptions containing all the evidence, it will be presumed that the evidence adduced at the trial was competent and material, and was sufficient to sustain the facts found. But this rule can have no application in the present action, where the court found that the writing was duly executed by the appellant, and where the intention of the appellant in signing and delivering the writing can be ascertained from the clear and unambiguous language of the writing. Under what possible theory of the law could any evidence, aside from the writing itself, be received by the court for the purpose of determining the intent of the appellant in the execution and delivery thereof? The writing is conclusively presumed to speak for itself without it is uncertain or ambiguous. In what respect can it be said that there is any uncertainty or ambiguity in this writing? There is nothing uncertain about that part thereof whereby the appellant agrees to wait 35 days after the completion of the building for payment of its claim; neither is there any ambiguity in the further statement that appellant by so doing waived "our lien rights." The writing, therefore, upon its face is perfectly clear and plain. It is free from any uncertainty or ambiguity. In apt language it expresses the intention of the appellant, and any attempt to show by parol testimony a contrary intention would be to vary its express terms, and such testimony would be inadmissible and incompetent. To attempt to show by a writing whereby the appellant in express terms waived its right to a lien that it thereby intended to, and did, waive its right of action upon the bond, when no mention, either directly or indirectly, is made in the writing to the bond, would be to vary its plain and unambiguous terms by parol testimony. The rule against such a procedure is so well established that no citation of authority is necessary in support of it.

[5] It is true, under section 1860 of the Code of Civil Procedure and section 1647 of the Civil Code, for the purpose of construing an instrument, the circumstances under which it is made may be shown, but these sections apply only in aid of construction in the real sense. They have no application where it is sought, as here, to add to the language an additional term which is not contained therein. This court, in the case of Payne v. Commercial Nat. Bank, 177 Cal. 68, 71, 169 P. 1007, 1008 (L. R. A. 1918C, 328), has expressed the rule in apt and convincing language as follows:

> "The principal claim of appellant bank is that the trial court erred in refusing to receive parol evidence of the transaction between the plaintiff and the payee named in the check, culminating in the giving of the check, for the purpose of showing the intention of plaintiff to give a check for five hundred dollars to the payee. It seems to be the theory of learned counsel for defendant that under various sections of our Civil Code (1635, 1636, 1637, 1640, 1641, 1643, 1647, 1654), which simply lay down well-settled rules for the construction of the language used in a contract, the ambiguity may be removed and the check treated as one for five hundred dollars. This theory is without any support in the authorities. Rules provided for the construction of contracts are simply for the purpose of ascertaining the true intent and meaning of the language used therein. Under these rules parol evidence is admissible where it tends to show the correct interpretation of the language used, the purpose being to enable the court or jury to understand, in the light of the circumstances shown, what the words employed really mean, and to interpret those words, in so far as this can reasonably be done, in accord with the intention of the parties as the same may be shown by such circumstances. But no authority sustains the proposition that under the guise of construction or explanation a meaning can be given to the instrument which is not to be found in the instrument itself, but is based entirely upon direct evidence of intention independent of the instrument. It has been well said that in the admission of extrinsic evidence the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, and not what was intended to be written."

From the foregoing we conclude that the writing executed by appellant and given to the respondents was no more than a waiver by appellant of its right to file a lien; that it was not a waiver of its right of action upon the bond given by the contractor to the owner, on which respondents were sureties: that appellant's right to proceed against said sureties was not waived nor in any manner affected by its waiver of a lien; that said writing, in so far as it expresses the intention of the appellant in executing and delivering it to respondents, is clear and unambiguous, and any testimony offered or admitted for the purpose of showing that appellant's intention was different from that expressed in the writing would be inadmissible and incompetent as an attempt to vary the plain and explicit terms of a writing by parol evidence. It follows, therefore, that the finding of the court that appellant intended by said writing to relieve respondents from any of the burdens of said undertaking is unsupported by the evidence. For this reason the judgment must be reversed, and it is so ordered.

We concur: WASTE, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; LANGDON, J.

200 Cal. 743

DOWNS et al. v. KROEGER. (L. A. 8471.)★

(Supreme Court of California. March 30, 1927. Rehearing Denied April 28, 1927.)

1. Covenants 🔑72—Where property in neighborhood is no longer residence property, restrictions in deed will not be given effect, where change has resulted from causes other than their breach.

Where there has been a change in uses to which property in neighborhood is being put, so that such property is no longer residence property, covenants prohibiting construction of any structures but residences in restricted area will not be given effect, where such change has resulted from causes other than breach of restrictive covenants.

2. Injunction 🔑128—Evidence held to show change in character of locality to warrant refusal to enjoin violation of covenants restricting building to residences.

In suit to enjoin construction of store building contrary to covenants prohibiting construction of any structures but residences in restricted area, evidence *held* to show such change in character of locality as to warrant an equity court in refusing to enjoin violation of restrictive covenants.

3. Injunction 🔑62(3)—That property has become more valuable for business purposes is defense to action to enjoin construction of store building where property is useless for residence purposes.

That property has become more desirable or valuable for business than for residence purposes is defense to action to enjoin construction of store building in violation of restrictive covenants, where property is useless for residence purposes, and defendant will be irreparably damaged, if not allowed to construct business building.

4. Judgment 🔑526—In determining scope and effect of judgment, entire judgment roll may be looked to.

Entire judgment roll may be looked to for purpose of its interpretation in determining scope and effect of judgment.

Richards, J., Waste, C. J., and Curtis, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Ralph H. Clock, Judge.

Action by Luella E. Downs and others against J. L. Kroeger to enjoin construction of store building contrary to restrictive covenants. From a judgment for defendant, plaintiffs appeal. Affirmed.

Rehearing denied; WASTE, C. J., and RICHARDS and CURTIS, JJ., dissenting.

Jas. W. Bell and C. W. Hall, both of Los Angeles, for appellants.

Jones & Weller, Dana R. Weller, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

PRESTON, J. Plaintiffs instituted this action for a permanent injunction to restrain defendant from completing a store building upon lot 27, block 9, in tract 2072, commonly known as Wellington square, situate in the city of Los Angeles, said tract consisting of approximately eight contiguous blocks, forming a rectangular shaped area containing 397 lots. In the year 1912 it was subdivided and laid out for residential purposes, restrictive covenants running with the land being inserted in all deeds by which parts of said tract were conveyed, prohibiting until the year 1960 the construction of any structures but residences in the restricted area. Said lot 27 is a border lot which abuts West Adams street, and faces an unrestricted area. It was purchased by defendant in 1920, and he concedes the validity of the restrictive covenants, and that he took said lot subject thereto.

Plaintiffs, owners of certain lots in the tract, allege that the erection of a store building on said lot by defendant would be in violation of said restrictive covenants; would depreciate the value of plaintiffs' property; and lower the class of the neighborhood, all to their damage.

Defendant contends that the character of the surrounding neighborhood has so changed that the property was and is essentially business property, and, as a result, the covenants and restrictions relied upon by plaintiffs have become ineffective, and their enforcement would be inequitable, unjust, and oppressive.

The trial court, after hearing the evidence and inspecting the locality, denied the relief prayed for, and plaintiffs have taken this appeal from the judgment, urging that said restrictions are for the benefit of all owners in said tract and of substantial value to the dominating lots therein; that changed conditions in the neighborhood, or even the fact that defendant's property may have become more valuable for business purposes, are immaterial, and not a defense to an action for injunction; and, furthermore, that no such changed conditions are in fact shown by the evidence.

Respondent contends that the equitable remedy by injunction will not be granted where the condition of the property is so altered as to render it unfit for the purposes for which it was originally designed, and that the enforcement of the restrictions would result in slight, if any, benefit to plaintiffs, but would work great and irreparable hardship upon respondent.

The court, among other things, found: That, although the permitting of said structure for the purpose stated was contrary to said restrictions, it would not greatly or at all depreciate the value of plaintiffs' property or lower the general class and character of the neighborhood, nor would plaintiffs suffer damage of any character thereby. That in 1920, when said lot was purchased by defendant, no improvements of any character existed on Adams street for a distance of several blocks,

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★Rehearing denied.

but within the past three years that section of Adams street had become a business section, and many stores and business structures had been built, including three buildings occupied by building contractors and real estate brokers; a building for business occupied by a real estate broker, a shoemaker, and a restaurant; and other structures occupied by a grocery store, a meat market, and a hardware store. That by reason of the construction of business buildings defendants' lot is no longer suitable or desirable for residential purposes, and is essentially business property, and located in a section devoted exclusively to business purposes. That the construction and use of a business building on the lot of defendant will not injure or damage the property of plaintiffs or the owner of any other lot in said tract 2072, but, if defendant is restrained from using his property for the only purpose for which it is now suitable and available, he will be irreparably damaged and deprived of any use whatsoever of said property. That by reason of the changed conditions in the neighborhood occurring since said restrictions were imposed, it would be inequitable to enforce them against the use of said property as contemplated by defendant.

A careful review of the evidence, and an inspection of the several exhibits introduced at the trial, clearly indicate, in our opinion, that it is amply sufficient to support the findings, and the further fact may be noted that the trial court had previously inspected the locality for a better understanding of the testimony.

Respondent testified that at the time he purchased the lot there was a big Chinese vegetable garden on the south side of the street, and the whole tract did not have a building on it; that during the year preceding the trial some business buildings had been constructed in the unrestricted area; that it would not pay to put a residence on his lot; and that the lot would be better adapted for business.

Nathan Levin, a resident of the northeast corner of Adams and Buckingham streets, testified that three store buildings had been erected across the street, occupied by a laundry, silk store, cleaning and pressing place, real estate office, and church; also as to grocery and drug store in the adjoining blocks.

On cross-examination he testified that he paid $10,200 for his place, and on redirect that as business property, without restrictions, the lot alone would be worth $12,000; that on account of the street car line on Adams street and the traffic and rubbish it is unfit for residences, and no place to keep children.

E. S. Butterworth testified that the property was more adaptable and valuable for business purposes, and not reasonably fit for residential purposes; that he did not think lifting the restrictions on this block would depreciate the value of the rest of the tract.

Frank D. Tatum, a real estate broker, testified that Adams street had changed into a business street and that the remaining vacant property was only fit for business purposes, and absolutely useless for residences.

The only witnesses called in rebuttal by appellants, Charles E. Ott, the real estate broker who assisted in subdividing Wellington square, and John H. Albright, a builder and contractor residing therein, merely testified that in their opinion the lifting of the restrictions would depreciate the value of the property in the tract.

[1] The authorities unquestionably support the conclusion of the trial court in holding that, where there has been a change in the uses to which the property in the neighborhood is being put, so that such property is no longer residence property, it would be unjust, oppressive, and inequitable to give effect to the restrictions, if such change has resulted from causes other than their breach.

"It is evident that the purpose of the restrictions as a whole was to make the locality a suitable one for residences; and that, owing to the general growth of the city, and the present use of the whole neighborhood for business, this purpose can no longer be accomplished. If all the restrictions imposed in the deeds should be rigidly enforced, it would not restore to the locality its residential character, but would merely lessen the value of every lot for business purposes. It would be oppressive and inequitable to give effect to the restrictions; and, since the changed condition of the locality has resulted from other causes than their breach, to enforce them in this instance could have no other effect than to harass and injure the defendant, without effecting the purpose for which the restrictions were originally made [citing cases]." Jackson v. Stevenson, 156 Mass. 496, 502, 31 N. E. 691, 693, 32 Am. St. Rep. 476.

"It certainly is not the doctrine of courts of equity, to enforce, by its peculiar mandate, every contract, in all cases, even where specific execution is found to be its legal intention and effect. It gives or withholds such decree according to its discretion, in view of the circumstances of the case, and the plaintiff's prayer for relief is not answered, where, under those circumstances, the relief he seeks would be inequitable. Peters v. Delaplaine, 49 N. Y. 362; Margraf v. Muir, 57 N. Y. 155; Mathews v. Terwilliger, 3 Barb. [N. Y.] 51; Radcliffe v. Warrington, 12 Ves. 331. If for any reason, therefore, not referable to the defendant, an enforcement of the covenant would defeat either of the ends contemplated by the parties, a court of equity might well refuse to interfere, or if in fact the condition of the property by which the premises are surrounded has been so altered 'that the terms and restrictions' of the covenant are no longer applicable to the existing state of things. 1 Story's Eq. Jur. (10th Ed.) § 750. And so though the contract was fair and just when made, the interference of the court should be denied, if subsequent events have made performance by the defendant so onerous, that its enforcement would impose great hardship upon him, and cause little or no benefit to the plaintiff." Trustees of Columbia College v. Thacher, 87 N. Y. 311, 317, 41 Am. Rep. 365, 367.

> "Under the circumstances now existing the covenant is no longer effective for the purpose in view by the parties when they made it, and the enforcement thereof cannot restore the neighborhood to its former condition by making it desirable for private residences. If the building restriction were of substantial value to the dominant estate, a court of equity might enforce it even if the result would be a serious injury to the servient estate, but it will not extend its strong arm to harm one party without helping the other, for that would be unjust. An injunction that bears heavily on the defendant without benefiting the plaintiff will always be withheld as oppressive." McClure v. Leaycraft, 183 N. Y. 36, 44, 75 N. E. 961, 963 (5 Ann. Cas. 45).

[2] The evidence, in our opinion, is sufficient, within the rule as announced by the above authorities, to show such a change in the character of the locality as to warrant an equity court in refusing to enjoin a violation of the restrictive covenants, and supports the findings and judgment.

[3] There remains the further contention of appellants that the fact that defendant's property has become more desirable or valuable for business than for residence purposes is not a defense to an action for injunction, and that its value for business purposes is immaterial, in support of which they rely largely upon the case of Miles v. Clark, 44 Cal. App. 539, 549, 187 P. 167. That case is not in point as the evidence here shows, and the court found that defendant's property is essentially business property, and, if he is restrained from using it for the only purpose for which it is now suitable and available, he will be irreparably damaged and deprived of any use whatsoever thereof; in other words, that defendant's property is "absolutely useless for residence purposes." Testimony of Mr. Tatum.

It is stated in the case of Miles v. Clark, supra, that:

> "Where there has been a change in the uses to which property in the neighborhood is being put, so that such property is no longer residence property, it would be oppressive and inequitable to give effect to restrictions where the changed condition of the locality has resulted from other causes than their breach. Los Angeles Terminal Land Co. v. [Muir] Southern Pacific R. R., 136 Cal. 36, 68 P. 308; Trustees of Columbia College v. Thatcher, 87 N. Y. 311 [41 Am. Rep. 365]; Jackson v. Stevenson, 156 Mass. 496 [31 N. E. 691, 32 Am. St. Rep. 476]."

The evidence and the findings in that case, however, showed no unfavorable change in the tract or its vicinity, and the above doctrine was held inapplicable there.

The question of damage to appellants is disposed of by the cases above cited and in the finding, supported by the evidence, that appellants will not suffer any damage whatsoever from completion of defendant's building.

It is proper to note in disposing of the appeal in this case that we are by no means intending to establish a precedent in cases of this general character, where the facts and circumstances distinguish them from the case before us. Nor does it by any means follow that the integrity and validity of the restrictions obtaining as to other property in this subdivision will necessarily be affected in any manner or at all by the conclusion herein announced. The findings of the court below under the evidence are binding upon us, and we have simply adhered to the well-known rule of law governing us in such a situation.

[4] Appellants also make some objection to the form of the judgment, claiming that it exceeds the findings. It appears to be supported by the findings when examined and considered with the record as a whole, and it can only be construed to harmonize with them. "In determining the scope and effect of the judgment the entire judgment roll may be looked to for the purpose of its interpretation." Freeman v. Donohoe, 188 Cal. 172, 204 P. 593, 594.

Judgment affirmed.

We concur: SHENK, J.; SEAWELL, J.; LANGDON, J.

RICHARDS, J. I dissent. The tract known as "Wellington square," lying along the Wellington road about five miles from the heart of the city of Los Angeles, was laid out, subdivided, and sold about fourteen years ago as a restricted residence district, to be used for residence purposes only, as expressed in the deeds to purchasers of residence lots therein. These deeds contained the covenant "that no apartment house, flat, lodging house, store, hotel or any other than a first-class private residence, with or without the customary outbuildings, including a private stable or garage, shall be erected, placed or permitted on said land or any part thereof." There were further specific restrictions touching the minimum cost of residences to be erected therein, their distance from the front line of the premises, regulating the location of outbuildings, and the height of hedges, fences, copings, or walls, and prohibiting signboards, advertising boards, or banners within said restricted area. The lots and tracts of land therein were sold to many purchasers, subject to the foregoing restrictions in the deeds of each, including the defendant herein, and these purchasers or their transferees have during the intervening years proceeded to build their residences and homes thereon and therein until practically the entire area thereof has been built up residentially, and until, as a matter of common knowledge, and as the exhibits and photographs appended to the transcript herein disclose, Wellington square has become, and now is, one of the most beautiful and attractive exclusively residence areas within the city of Los Angeles. Heretofore and until this defendant conceived the idea that it would be more profitable to him to violate than to continue to comply with the covenants, conditions, and restrictions upon which he was permitted to purchase his lot within said area, no other attempted breach thereof has occurred. His sole excuse for his breach of the express conditions, covenants, and restrictions of his grant is that the lands and lots of an adjoining tract across the street from one side of this restricted area, and which constitutes an unrestricted area, are being devoted in part to business purposes. There is no evidence in the case showing that the other three sides of this restricted subdivision have been invaded by business or are other than residential in character, nor is there any evidence that the unrestricted tract on Adams street opposite the defendant's lot has been wholly devoted to business establishments. In fact, the evidence is to the contrary. We have the condition as shown by the practically undisputed evidence wherein the defendant, because some places of business have been erected in an unrestricted area across the street from him, claims the right to put a store upon his lot within the restricted area, in violation of the covenants and restrictions of his deed, the effect of which, if permitted, will inevitably be to open the way to such an invasion of Wellington square by stores, garages, service stations, apartment and lodging houses, and other forbidden structures and uses as would ere long entirely destroy the restrictive covenants upon which residential owners of property within this area purchased and have improved and enjoyed their restrictive holdings therein. No case that has been cited in the main opinion, and none that I have seen, has gone to this extent before in permitting a single owner within a restricted area to not only violate his own covenants, but to destroy the essential covenants, prohibitions, and securities of his co-owners simply because other persons have put stores and shops in an unrestricted area across the street from his lot, and thus made it more profitable to himself to put his lot to like uses in violation of the terms, covenants, and restrictions of his deed. It is just this to which the main opinion herein gives its sanction. The case of Jackson v. Stevenson, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, from which the main opinion quotes as sustaining its doctrine, does not support it. It refers to the "present use of the whole neighborhood for business" and to the loss by the "locality of its residential character." The term "locality" as employed in the quoted portion of said case evidently means "the restricted locality." This case has no semblance as to its facts to the case at bar. The case of Trustees, etc., v. Thacher is equally inapplicable to the instant situation, since the court found, not only that "the general current of business affairs had reached and covered the entire premises," but also found the construction and operation of an elevated railway alongside the restricted district, which had the effect of producing a large depreciation in rents and frequent vacancies. The case of Miles v. Clark, 44 Cal. App. 539, 549, 187 P. 167, 172, states, in my opinion, the correct rule as to the effect to be given to changes in the use of property in the neighborhood where no radical change in the restricted tract is shown. In that case, as in this, the tract in question had been subdivided and sold under similar restrictions contained in the conveyances to purchasers who had built upon and occupied their respective holdings as strictly residential properties. In that case, as in this, the defendants were found to be holding their property subject to such restrictions. In that case, as in this, the defendants were seeking to avoid the binding force of such restrictions, and to put their property to business uses, upon the claim that the character of other property in the vicinity of the tract had so changed through the erection of apartment houses and business establishments that it would be inequitable to enforce such restrictions against a like use of the defendants' property. The appellate court, dealing with that situation, said:

> "The fact that apart from and surrounding the tract some business has grown up, and that the land has become more valuable in consequence, in no manner entitles the defendants to be relieved from the restrictions they have created. This condition is but the natural result of the improvement of the various tracts, and the fact that the property may have become more valuable thereby for business purposes is immaterial. * * * [Citing cases.] Courts in such cases are not controlled exclusively by money value, but may protect a home."

The fundamental error of the trial court as to the rule applicable to cases of this character lies in its holding that, when the property of the individual owner has been so far affected by conditions existing in contiguous unrestricted territory as to be less valuable to him for residential than for business purposes, he is no longer bound by the conditions and restrictions of his deed. Such is not the rule under the practically unanimous current of authority which holds that it is only when the character of the restricted region as a whole so far changes as to render it no longer adaptable to restricted residential uses that the right to be relieved from such restrictions can arise. There is no finding in this case that such a condition exists within the restricted area as a whole, but only as to the eight lots therein fronting on Adams street. As to all the rest of the tract the finding is that "said eight lots are the only lots in said tract which are affected by the changed conditions on said Adams street." It follows that the remaining 389 lots in the Wellington square tract still retain their residential character, but have lost the restrictive protection. Such is the inevitable result of the decision of the trial court, to which the majority opinion herein lends its approval. The principles laid down in Martin v. Holm, 197 Cal. 733, 242 P. 718, touching the sacredness of the reciprocal covenants of owners in restricted areas, should be given application to the case at bar, and, so applied, would operate to prevent the single owner of a lot in this restricted area from doing that with his property which will eventuate in the destruction of the restrictive benefits and protection of all of his co-owners therein. That such will be the result if this judgment is to stand was aptly indicated by Mr. Justice Lennon, in the case of Miller v. Board of Public Works, 234 P. 381, wherein he points out that, once the restrictive covenants of the home owner are broken down, his only recourse is to move to another location, and by so doing be compelled to abandon the benefits emanating from a permanent home site. Such, in my opinion, would be the effect of the affirmance of the judgment herein.

The trial court fell into another fundamental error which the main opinion herein would perpetuate. It is the error that the plaintiffs, seeking to enforce a building restriction against the defendant equally bound to conform to its covenant, but refusing to do so, must allege and prove damage before they can obtain an injunctive remedy. The rule is just the contrary. The damage resulting to the plaintiffs and their co-owners in the restricted area from an unjustified breach of covenants such as these is of necessity both irremediable and impossible of ascertainment, since they relate to the comfortable enjoyment of homes secluded from business in the restricted region. The trial court was therefore in error in denying the plaintiffs injunctive relief upon the ground that no damage had been shown. Such a conclusion was contrary to its own finding upon the undisputed evidence herein that the residential character of this restricted area as a whole had not undergone a change. It follows necessarily that for the foregoing fundamental errors the judgment herein should be reversed.

We concur: WASTE, C. J.; CURTIS, J.

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200 Cal. 754

DE LA TORRE v. JOHNSON et al. ★

(S. F. 12228.)

Supreme Court of California. March 31, 1927.

Rehearing Denied April 28, 1927.

1. Abatement and revival 🔑58(1) — Action against tort-feasor for personal injuries abates on death of either party, in absence of statute.

In absence of statute, action against tort-feasor for damages arising from personal injuries abates on tort-feasor's death or on death of person injured.

2. Master and servant 🔑394½—Action by employee for injuries in employment against tort-feasor, not his employer, held to abate on tort-feasor's death (Workmen's Compensation, Insurance and Safety Act, § 26, as amended by St. 1919, p 920).

Action by employee for injuries in course of employment against tort-feasor, not his employer, *held* to abate on tort-feasor's death; Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831) § 26, as amended by St. 1919, p. 920, providing for nonabatement of actions under Compensation Act, not being applicable.

3. Master and servant 🔑394½—Provision of Workmen's Compensation Act for nonabatement of action held inapplicable to action for injuries by employee against tort-feasor (Workmen's Compensation, Insurance and Safety Act, § 26, as amended by St. 1919, p. 920; Const. art. 20, § 21).

Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831) § 26, as amended by St. 1919, p. 920, providing death of employee or any other person shall not abate any right of action established by section, *held* not to apply to action by employee injured in course of employment against tort-feasor, not his employer, as object of act is compensation, not recovery of damages, under Const. art. 20, § 21; right to recover damages for personal injury not being right established by act.

4. Statutes 🔑184—Section must be construed in connection with subject-matter and object of entire act.

Section of act must be construed in connection with and with reference to subject-matter of act and its manifest object.

5. Master and servant 🔑394½—Nonabatement of employer's right of action held not to prevent abatement of employee's action against tort-feasor (Workmen's Compensation, Insurance and Safety Act, § 26, as amended by St. 1919, p. 920).

Fact that employer under Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831) § 26, as amended by St. 1919, p. 920, has right of action against tort-feasor after payment of compensation, which does not abate on death, being created by act, *held* not to prevent abatement of action by employee against tort-feasor, not his employer.

In Bank.

Appeal from Superior Court, Monterey County; Fred A. Treat, Judge.

Action by Albert De La Torre against W. P. Johnson and George Smith. Judgment for defendants, and plaintiff appeals. On plaintiff's motion, after death of defendant first named pending appeal, to substitute his executor and to continue the appeal against him, and on motion of the executor to dismiss the appeal as to the defendant W. P. Johnson. Motion to continue appeal denied, and motion to dismiss appeal as to defendant Johnson granted.

E. B. Mering and W. H. Metson, both of San Francisco, for appellant.

★Rehearing denied.

Pillsbury, Madison & Sutro, of San Francisco (Edwin V. McKenzie, of San Francisco, of counsel), for executor of will of respondent Johnson.

Hudson, Martin & Jorgensen, of Monterey, for respondent Smith.

SEAWELL, J. The question presented by this motion to substitute in the place of defendant Johnson the executor of his estate, and to continue the action against said executor as a defendant, and the counter motion to dismiss the appeal herein, is whether or not a person who suffers a personal injury in the course of his employment at the hands of a tort-feasor who is not his employer may, after a judgment rendered against him in the court below, continue to prosecute an appeal pending in this court after the death of said tort-feasor in the absence of express statutory provisions authorizing the continuance of the proceeding.

[1] Both at common law and under the general provisions of the statutes of this state such an action abates, and unless there can be found some statute altering the rule in this particular case this appeal must be dismissed. It is the claim of appellant that authority to continue the appeal inheres in the power conferred by the constitutional amendment authorizing the enactment of the Workmen's Compensation, Insurance and Safety Act, and if the right to continue the prosecution is not expressly given it is, nevertheless, conferred by the provisions of the act adopted in obedience to the constitutional mandate.

The facts are that the plaintiff and appellant, Albert De La Torre, on the 27th day of October, 1926, filed a notice of a motion for an order substituting in the place and stead of defendant and respondent W. P. Johnson, who died subsequent to the entry of judgment in the court below, his executor, and allowing the action to be continued against said executor as a codefendant. The executor thereupon filed notice of a motion to dismiss the appeal as to said defendant Johnson upon the ground that the cause of action set forth in the complaint against said defendant abated upon his death. It appears from the affidavits filed by the parties in support of their respective motions that the action is one to recover damages in the sum of $75,000 for personal injuries sustained through the alleged negligent operation of an automobile; and that respondent Johnson was the owner and respondent Smith was his chauffeur and the driver in charge of the automobile at the time said injuries were inflicted upon appellant. The defendants filed separate answers. Defendant Johnson denied that the accident took place while defendant Smith was acting in the course of his employment, and alleged that Smith was engaged in an errand of his own at the time. Defendant Smith denied all allegations of negligence. At the close of the evidence defendant Johnson moved for a directed verdict on the ground that the evidence showed as a matter of law that Smith was not acting within the course of his employment when the accident occurred. The motion was granted. The issues in the case as to the defendant Smith were submitted to the jury, which returned a verdict in his favor. Judgment was accordingly entered on June 10, 1926. Plaintiff's motion for a new trial was denied. On July 19, 1926, he filed a notice of appeal to this court. Defendant Johnson died on August 24, 1926.

[2, 3] Plaintiff recognizes the general rule that a cause of action for personal injuries, in the absence of a statute expressly providing to the contrary, abates upon the death of either the person injured or the tort-feasor (1 Cal. Jur. 71; 1 C. J. 174 and 197; 3 Street, Foundations of Legal Liability, p. 60; Clark v. Goodwin, 170 Cal. 527, 150 P. 357, L. R. A. 1916A, 1142), and it is not contended that there is any statute of general application in California that keeps alive a cause of action for personal injuries after the death of the tort-feasor except in those certain classes of cases in which the statute creates a sort of privity or quasi contractual relation. The instant case does not come within any of said classes. It is the contention of appellant, however, that this case is taken out of the general rule by the circumstance that the injury occurred in the course of and arose out of the employment in which appellant was engaged, and that section 26, Workmen's Compensation, Insurance and Safety Act (Stats. 1917, p. 831, as amended St. 1919, p. 920), authorizes the continuance of an action to recover damages for personal injuries which are made compensable under the provisions of said act after the death of the negligent third party by the substitution of his personal representatives. We cannot accede to this contention.

The opening sentences of section 26 of said act are as follows:

> "The term 'employee,' as used in this section, shall include the person injured and any other person in whom a claim may arise by reason of the injury or death of such injured person. The death of the employee, or of any other person, shall not abate any right of action established by this section. The claim of an employee for compensation shall not affect his right of action for damages arising out of injury or death against any person other than the employer; and any employer having paid, or having become obligated to pay compensation, may likewise bring an action against such other person to recover said damages."

Subsequent portions of the section provide that if either the employee or employer brings an action for damages against such third person the other must be notified, and may join as a party plaintiff at any time before trial on the facts, and must consolidate his action if brought independently; that if suit be prosecuted by the employer alone evidence of expenditures which he has paid or become obligated to pay by reason of the injury or death is admissible and such expenditures are part of the damages; that the amount of the recovery by the employer over and above what he has paid or become obligated to pay as compensation shall be paid to the employee; that if the employee joins in or prosecutes the suit evidence of the amount of disability indemnity or death benefit paid by the employer shall not be admissible, but proof of all other expenditures on account of the injury shall be admissible and shall be deemed part of the damages; and that the court shall, on application, allow as a first lien against any judgment recovered by the employee the amount of the employer's expenditures for compensation.

The Workmen's Compensation, Insurance and Safety Act does not attempt or purport to grant any right against a tort-feasor to the person who, at the time of the injury, was an employee of a third person that is not accorded to every other member of society similarly situated with respect to casualties which have no relation to the status of employer and employee. In this respect, in the absence of statutory language conferring greater rights upon a class than are conferred upon citizens at large, keeping within constitutional limits, all members of society are placed upon equal terms. The primary purpose of the Workmen's Compensation Act is to afford protection to the employee against the hazards of employment by making the employer responsible.

[4] Appellant relies strongly upon that portion of section 26 of the act which reads:

> "The death of the employee, or any other person, shall not abate any right of action established by this section."

The section above cited must be construed in connection with and with reference to the subject-matter of the act and its manifest object. Its sole and primary object is to fasten a liability on "all employers to compensate their employees for any injury incurred by said employees in the course of their employment, irrespective of the fault of either party." Article 20, § 21, Const. The compensation provided for in said act is not damages in the sense that the latter term is used in ordinary tort actions. The right to recover damages for personal injury is not a right of action established by the Workmen's Compensation, Insurance and Safety Act, but a common right established long before the adoption of the Workmen's Compensation Act. The clause providing that the "death of the employee, or of any other person, shall not abate any right of action established by this section," read in the light of the purpose of the act, must be construed to apply to those persons whose right or liability is established by the act. It was the new rights and liabilities created by the Compensation Act which before were nonexistent that were the concern of the lawmakers in framing the act. The rights of the employee, when he steps outside of the Compensation Act and elects to sue a tort-feasor who is not his employer, are not enlarged beyond those given to citizens generally.

[5] The right of the employer to prosecute a suit against the tort-feasor to recover any compensation which he has paid or has become obligated to pay is a new right created by the act. The extent of this right is not a question directly involved in this proceeding. In no way is the common-law rule as to the particular question presented changed or affected by the new right conferred upon the employer by the Workmen's Compensation Act. In addition to the common-law right of action to recover for personal injuries wrongfully inflicted, an employee, as such, is entitled to the protection provided by the act, and, while he has a twofold remedy, his common-law right is not enlarged by the provisions of the Workmen's Compensation Act. Appellant complains that it is illogical to hold that the employer may maintain an action against a tort-feasor's representative to recover compensation paid by him on account of the employee's injuries and to deny to the employee the right to maintain an action for damages against said representative. The maintenance of the action by the employer has the support of statutory authority, which does not exist as to the employee. The right of an injured person to maintain an action after the death of the tort-feasor has not the sanction of the common law and stands unsupported by any act or statute of this state. The justification for following appellant in so wide a departure from the long-approved rules of law should rest upon express statutory language or upon inferences arising out of the language of the act under construction which are so convincing as to leave no doubt as to legislative intent.

The cause of action against defendant Johnson having abated by reason of his death, the motion to continue the appeal is denied, and the motion to dismiss the appeal as to him is granted. It is so ordered.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; RICHARDS, J.; SHENK, J.

200 Cal. 776

MEYER et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 12270.)

(Supreme Court of California. March 31, 1927.)

1. Trusts 🔑147(1)—Devisee of share of cestui in income of trust, which cestui was permitted to devise, held tenant in common with trust estate, not cestui thereunder.

Right of cestui que trust under will to share in income arising from operations of trust property, which cestui under will could transfer and distribute as she might by will direct, when transferred to devisee, made devisee merely tenant in common with trust and trustees to extent of undivided share.

2. Trusts 🔑147(1)—Interest of trustee held to cease on death, not passing under will.

None of rights or interests of trustee in trust property could pass to devisee under will, as trusteeship ceased on death.

3. Tenancy in common 🔑3—Devise of share of testatrix in her mother's community interest held to give devisee tenancy in common.

Sole devisee of daughter, who on mother's death received share of her community estate, *held* to receive interest as tenant in common.

4. Wills 🔑634(9)—Provision in will that heirs should succeed to rights of coheirs in case of death without issue or without testamentary disposition held to create contingent remainder.

Will creating trust and giving heirs right to succeed to shares of coheirs made cestuis thereunder, in event of death without issue or without testamentary disposition, *held* to give heirs merely contingent remainder, subject to be defeated, and vesting only on termination of precedent estate.

5. Trusts 🔑147(1)—Devise by cestui que trust of contingent interest under father's will creating trust held such as could convey devisee only tenancy in common with testatrix's cobeneficiaries under trust.

Devise by cestui que trust of contingent interest under father's will creating trust, dependent on death without issue of cobeneficiaries under trust, could give devisee only tenancy in common with testatrix's cobeneficiaries.

6. Trusts 🔑169(3)—Tenant in common of property, remaining undivided interest in which was held in trust, held not entitled to participate in proceedings to fill vacant trusteeships.

Tenant in common of property, remaining undivided interest in which was held in trust, *held* not entitled as matter of right to participate in proceedings in court having jurisdiction instituted for purpose of filling vacancies in trusteeships.

7. Trusts 🔑169(3)—Court could fill vacant trusteeships without notice to tenant in common holding undivided interest in property balance of which was held in trust.

Notice to tenant in common of property, of which remaining undivided interest was held in trust, *held* not required as prerequisite to court's jurisdiction to proceed to fill vacant trusteeships.

8. Tenancy in common 🔑1—Possession is only unity of tenants in common in property held by them under distinct titles.

Only unity of tenants in common in property held by them as such by several and distinct titles is that of possession.

9. Trusts 🔑169(3)—Tenant in common of property, remainder of which was held in trust, had no right to maintain action against cestuis to fill vacant trusteeships.

Tenant in common holding property, balance of which was held in trust estate, *held* not entitled as matter of right to maintain proceeding against cestuis que trustent for appointment of successor to vacant trusteeships therein.

10. Prohibition 🔑28—Sustaining demurrer to amended complaint of tenant in common, holding undivided interest with trust estate seeking to have vacant trusteeships filled, held not matter of jurisdiction, reviewable in prohibition proceedings.

Whether court should have sustained demurrer to petition by tenant in common for appointment of trustees to fill vacant trusteeships to trust property constituting remaining portion of property of which tenant in common held share *held* not matter of jurisdiction reviewable in proceedings for prohibition.

11. Prohibition 🔑28—Prohibition proceeding raises only jurisdictional questions.

Proceedings for prohibition to be directed to lower court raise only questions of jurisdiction.

12. Trusts 🔑169(3)—Participation of, and notice to, creditor of trust estate held not essential to court's jurisdiction to fill vacant trusteeships.

Court had jurisdiction in proceeding by cestuis to appoint new trustees to fill vacant trusteeships without notice to creditor of estate and without his participation in proceedings.

13. Receivers 🔑31—Court had jurisdiction to appoint receiver of trust properties in proceeding wherein all necessary and proper parties were represented and concurred in request.

Where all necessary and proper parties were before court in proceeding to fill vacant trusteeships and concurred in request for appointment of receiver, court had jurisdiction to decree receivership of properties of trust estate.

In Bank.

Application by X. Rodwell Meyer, individually and as executor of the last will of Jennie C. D. Meyer, deceased, and another, for writ of prohibition to be directed to the Superior Court in and for the City of San Francisco and Thomas F. Graham, Judge, to prevent further proceedings upon a judgment and order in an action wherein James Clay Dunphy and others were plaintiffs and William Wesley Burnett, Jr., was defendant, to require its annulment, and to permit petitioners to intervene. Application denied.

Sullivan & Sullivan, Theo J. Roche and Geo. A. Clough, all of San Francisco, for petitioners.

Tobin & Tobin, of San Francisco, for Hibernia Savings & Loan Society.

C. F. Hanlon, Louis S. Beedy, J. W. Dorsey, and Thomas, Beedy & Presley, all of San Francisco, for defendants.

RICHARDS, J. This is an application for a writ of prohibition to be directed against respondents herein, the superior court of the state of California in and for the city and county of San Francisco, and the Hon. Thomas F. Graham, one of the judges of said court, prohibiting said court and the judge thereof from further proceeding upon a certain judgment made and entered by said court and from taking any further steps for the enforcement thereof and of an order made by said court appointing one Louis S. Beedy general receiver of the real and personal property belonging to that certain trust estate to which said judgment relates, and further directing that said judgment and all proceedings had or taken thereunder, including said order appointing said receiver, be vacated and annulled, and that said superior court and the judge thereof be directed to permit the petitioners herein to file their respective complaints in intervention in said action and to be heard upon the merits thereon.

The action in which the foregoing proceedings were had and taken by said court was one wherein James Clay Dunphy, Mary Dunphy Flood, and Viola C. C. P. Burnett are plaintiffs, and one William Wesley Burnett, Jr., is the sole defendant, and which action was commenced in said court for the purpose of having the said plaintiffs therein appointed trustees of certain real and personal properties lying and being within the state of California and Nevada, and which properties were subject to a certain trust created and existing under the terms of the last will and testament of one William Dunphy, deceased; the trusteeships over said trust having become vacant by the death of those persons who had been originally appointed the trustees thereof under the terms of said will.

The undisputed facts upon which the merits of this proceeding are to be considered and determined may be summarized as follows:

On September 17, 1892, William Dunphy died testate in San Francisco, Cal., being at the time of his death a resident therein, and leaving a large estate, both real and personal, in the states of California and Nevada. A considerable portion of his said holdings consisted of the so-called Dunphy ranch in the state of Nevada, containing approximately 160,000 acres of land, together with a large amount of personal property located thereon, consisting of cattle, horses, farming implements and utensils of great value. At the time of his death said decedent left surviving him as his sole heirs at law his wife, Carmen U. Dunphy, his three children, James Clay Dunphy, Mary Dunphy Flood, and Jennie C. Dunphy, and also a grandchild, daughter of a deceased daughter, Viola C. C. P. Burnett. By his will, the decedent, after making certain specific bequests, devised and bequeathed the entire residue of his estate to his wife, Carmen U. Dunphy, and his daughter, Jennie C. Dunphy, in trust for the following purposes, and with the following powers: The said trustees were to take full control and possession of all of the properties, real and personal, of said decedent and were to manage and conduct the same. They were to sell and convert into cash the personal property of said decedent in the county of Monterey, Cal., and also the real and personal property in the state of Nevada as soon as practicable, and for the best price obtainable, and were to invest the proceeds of such sales in real estate in the city and county of San Francisco, Cal., improved and unimproved; and, if unimproved, sufficient money was to be retained to improve such investments so that the property would be made to produce a steady and reasonable income. The net income of the decedent's entire estate, in whatever form the latter was or continued to be or take, was to be divided into five equal shares. One-fifth of said income was to be paid quarterly to the decedent's said widow during her life, and upon her death one-fifth of the said principal of his estate was to be transferred and distributed as his said widow should by will direct, or, in case she should make no such direction, said one-fifth thereof was to go to the decedent's heirs at law. One-fifth of said income was to be paid quarterly to his daughter Mary Dunphy Flood during her life. Upon her death one-fifth of the said principal of his estate was to go to her children, or, if she should leave no child, said one-fifth was to go to the decedent's heirs at law. One-fifth of said income was to be paid quarterly to his son James C. Dunphy during his life, and at his death one-fifth of the said principal of his estate was to be paid as his said son might by will direct, and, if he should make no such direction, the same was to go to his children, and, if he should leave no child, said one-fifth was to go to the decedent's heirs at law. One-fifth of said income was to be paid quarterly during her life to his daughter Jennie C. Dunphy and at her death one-fifth of said principal of his said estate was to be transferred and distributed as she might by will direct, and if she should make no such direction it was to go to her children, or if she should leave no children then to the decedent's heirs at law. The remaining fifth of said income was to be paid to his said daughter Jennie C. Dunphy, to be by her applied to the support and maintenance of his said granddaughter, Viola, while she should remain in the custody of the Dunphy family during her minority, and thereafter one-fifth of said income, less certain deductions, were to be paid to her quarterly during her life, and upon her death one-fifth of the principal of decedent's estate was to go to her children, or, if she should leave no children, then to the decedent's heirs at law. The will further provided that, in case the widow of said decedent should elect not to take under said will, but to claim her share of the community property of said estate, then and in that event the balance of the decedent's said estate should go to the trustees and be divided into four equal parts among his said children and grandchild upon the same terms, conditions, provisions, and limitations as are above set forth.

By the terms of said will his trustees were given full power and authority to make any and all sales, investments, and outlays in respect to said trust property, without applying to any court or judge for leave so to do, and without being required to offer or produce in any court vouchers for said outlays or for any acts and deeds performed or expenditures made by them, and that such outlays, acts, deeds, and expenditures were to be deemed proper and necessary, and the propriety and necessity thereof were never to be questioned. In the event of the death, absence, or inability of either of said trustees to act, the other of them was to act and serve alone with all the powers given to both. The trustees were also by the terms of said will made the executrices thereof without bonds. Said will was admitted to probate, shortly after decedent's death, in the superior court of the city and county of San Francisco. The widow elected not to take under the will, but to take one-half of the residue of said estate, all of which was community property. The principal administration of said estate was conducted in the state of California, but ancillary administration thereon was also had in the state of Nevada, covering the property, both real and personal, situate therein. At the conclusion of the administration in Nevada a final distribution was therein made and entered, distributing one-half of the residue of the decedent's estate therein located to Carmen U. Dunphy, surviving widow of said deceased, and the remaining one-half to Carmen U. Dunphy and Jennie C. Dunphy as trustees, in accordance with the trust provisions contained in said will. Thereafter Carmen U. Dunphy died, leaving her property to be succeeded to by her said three children and grandchild in equal shares. An administration of her estate was had in the state of California and an ancillary administration thereon in the state of Nevada, as a result of which the distribution of her estate was made to her surviving children and grandchild as above stated. Final distribution in the estate of William Dunphy, deceased, in California was not decreed until after the death of Carmen U. Dunphy, and in consequence thereof the decree of distribution therein made distributed the remaining undivided one-half of the estate to Jennie C. Dunphy as surviving trustee thereof in accordance with the terms of the trust created by the will of William Dunphy, deceased.

After the death of Carmen U. Dunphy partition proceedings were instituted in the state of Nevada affecting the aforesaid properties located in said state, and these resulted in the partition of said properties, by the terms of the decree in which proceedings one-half of the said Dunphy ranch, consisting approximately of 80,000 acres, was set apart in severalty to said Jennie C. Dunphy as the surviving trustee of said trust, and the remaining one-half of said ranch property was divided into four parcels, each containing 20,000 acres, each of said children and grandchild receiving one of said parcels. The personal property upon said real estate was also partitioned, as a result of which Mary Dunphy Flood and Viola C. C. Piercy, who had by marriage become Viola C. C. P. Burnett, each received their proportionate share of said personal property. As to James Clay Dunphy, his interest in said personal property had theretofore been acquired by the trustees, and, in consequence thereof, the trust estate was awarded an undivided five-sixths interest in said personal property. The individual interest of Jennie C. Dunphy therein was not partitioned, although she was declared entitled to an undivided one-sixth interest therein. In the meantime Jennie C. Dunphy had married X. Rodwell Meyer, who is one of the petitioners herein, and under said name continued to conduct the operations of said trust, in the course of which, through leases of the portions of the said ranch which had been set off in severalty as above set forth, she succeeded in keeping intact the said ranch properties in the state of Nevada, and in operating and conducting the same, involving the employment of many persons and the expenditure of large sums of money, to the extent that during the administration of her said trust it became necessary to borrow the sum of $200,000. Accordingly, in proceedings instituted in the courts of Nevada by her acting as such trustee, she was given permission as such to make said loans and to execute a mortgage or mortgages upon the Dunphy ranch properties belonging to said trust; whereupon the said sum of $200,000 was borrowed from the Hibernia Savings & Loan Society of San Francisco in two loans of $100,000 each, and mortgages upon said properties as security therefor were duly executed and delivered to said mortgagee by said surviving trustee.

Jennie C. Dunphy Meyer died on January 25, 1926, having up to the time of her death continued to act and serve as the surviving trustee of said trust. She left a last will and testament, by the terms of which, having left no issue, she devised and bequeathed the entire residue of her estate, after making certain specific bequests, both real and personal, to her surviving husband, X. Rodwell Meyer, who was also made the sole executor of her said will, and who, after due proceedings had in the matter of the probate thereof, was by the superior court of California in and for the city and county of San Francisco duly appointed such executor and duly qualified and continued thereafter to act as such. After the death of Jennie C. D. Meyer and the creation thereby of a vacancy in the trusteeship created by the will of William Dunphy, deceased, and after the appointment and qualification of X. Rodwell Meyer as executor of the will of Jennie C. D. Meyer, deceased, X. Rodwell Meyer commenced an action in the superior court of the state of California in and for the city and county of San Francisco, on March 12, 1926, wherein he named himself as the plaintiff, both individually and as executor of the last will of his said wife, and wherein he named as the defendants James Clay Dunphy, Mary Dunphy Flood, Viola C. C. Piercy Burnett, William Wesley Burnett, Jr., and the Hibernia Savings & Loan Society, for the purpose of procuring a judgment of said court appointing a trustee of said trust to fill the vacancy therein caused by the death of Jennie C. D. Meyer. The defendants in said action, after due service of process therein, with the exception of the defendant corporation, appeared in said action and filed their demurrer to said complaint. The complaint was thereupon amended, and it was thereupon agreed and stipulated by the aforesaid parties to said action, other than said defendant corporation, that the demurrer of said defendants presented to the original complaint should stand as their demurrer to the amended complaint.

In the meantime and on April 15, 1926, James Clay Dunphy, Mary Dunphy Flood, and Viola C. C. P. Burnett, as plaintiffs, commenced an action in the same superior court, naming as the sole defendant therein William Wesley Burnett, Jr., in which action said plaintiffs also sought to have entered a judgment of said court appointing a trustee or trustees of said trust estate in the place and stead of Jennie C. D. Meyer, deceased, each of said plaintiffs nominating and appointing each of their said coplaintiffs to be and act as such trustee or trustees. Neither the said X. Rodwell Meyer nor the said Hibernia Savings & Loan Society was made a party to said action or was served with any process therein. Thereafter and on or about May 6, 1926, X. Rodwell Meyer, individually and as executor of the will of Jennie C. Meyer, deceased, gave notice to the plaintiffs in said action, both as plaintiffs therein and as defendants in the action theretofore instituted by him, of a motion for an order to be made therein consolidating said last-named action with that theretofore commenced by him, which said motion came on regularly for hearing before said superior court in department No. 10 thereof, Hon. Thomas F. Graham, judge therein, presiding, which said motion was argued and submitted for decision, and on September 1, 1926, denied. On said 6th day of May, 1926, the Hibernia Savings & Loan Society also served upon the attorneys for the plaintiffs in said last-named action a notice of motion for leave to become and be made a party to said action, to wit, a defendant therein, and to be permitted to appear in whatever proceedings were thereafter to be taken therein for the appointment of a trustee or trustees and for such other purposes as were embraced in said action; said motion being made upon the ground that said corporation was the owner and holder of the aforesaid promissory notes and mortgages upon said trust estate, and was for that reason interested in the matter of the appointment of a trustee or trustees therein. Said motion came on for hearing in due course in said court before Hon. Thomas F. Graham, judge thereof, and having been argued and submitted was on the 1st day of September, 1926, denied by said court.

On May 17, 1926, X. Rodwell Meyer, individually and as executor of the last will of Jennie C. D. Meyer, deceased, served upon the plaintiffs in said last-named action a notice of motion for leave to intervene in said action, and filed therein a complaint in intervention, a copy of which accompanied said notice of motion. A hearing thereon was regularly had before said court upon said motion, which was on September 1, 1926, denied. On August 27, 1926, the said superior court in the first above-named action instituted by the petitioner herein X. Rodwell Meyer, individually and as executor of the will of Jennie C. D. Meyer, deceased, entered its order sustaining the demurrer interposed by the defendants therein to the amended complaint, with leave to the plaintiff within ten days thereafter to further amend the complaint. The plaintiff, however, neglected and declined to further amend the complaint. On September 1, 1926, by consent of the plaintiffs and defendant in the action of James C. Dunphy et al. v. William Wesley Burnett, Jr., the trial of said action was brought on for hearing before said court over the protest of X. Rodwell Meyer and of the Hibernia Savings & Loan Society, each of which parties had theretofore vainly sought to become parties to said action, and who attempted to appear therein for the purpose of objecting to the jurisdiction of said court to further proceed therein or to appoint a trustee or trustees therein until the said protesting parties should be permitted to appear therein and afforded the opportunity to examine the applicants for appointment as such trustees. The trial court overruled their objections and protests upon the ground that they were not interested parties in said action, and, having done so, proceeded with the trial thereof, as a result of which a judgment was made and entered therein appointing James C. Dunphy, Mary Dunphy Flood, and Viola C. C. P. Burnett trustees of said trust, and conferring upon them and each of them full authority and power to manage and control said trust properties in conformity with the terms and provisions of said will of William C. Dunphy, deceased, creating said trust. The trial court also in said action and upon the application and consent of the plaintiffs and defendants therein, and over the protest of the petitioners herein, proceeded to appoint one Louis S. Beedy as a receiver of the trust properties involved in said action. Said Louis S. Beedy, having qualified as such receiver under said appointment, is proceeding to exercise the powers and functions of such receiver over the properties of said trust both in the state of California and in the state of Nevada.

In the meantime and on September 2, 1926, X. Rodwell Meyer, individually and as executor of the will of his deceased wife, commenced an action in the district court of the Fourth judicial district of the state of Nevada, having jurisdiction over the properties involved in said trust, in which action Mary Dunphy Flood, James Clay Dunphy, Viola C. C. P. Burnett, William Wesley Burnett, Jr., and the Hibernia Savings & Loan Society are named as defendants, which action has for its purpose the appointment of a trustee of said trust and of the trust property thereof located in the state of Nevada, and has procured an order of said court appointing one George Russell, Jr., temporary trustee of said trust, with power to take possession and administer said trust property in said state, and who has qualified as such trustee and is undertaking to exercise said trust. Proceedings have been commenced by the trustees appointed by the respondent court herein in the Supreme Court of the state of Nevada, whereby they are seeking to avoid, vacate, and have set aside the appointment of said Russell as such temporary trustee, and they have secured in such proceeding a temporary restraining order preventing said Russell from further exercising the powers and functions of a trustee with respect to said trust property in said state.

The present proceeding was instituted in this court on October 18, 1926, by the filing of the application for a writ of prohibition herein and in which application the foregoing facts and proceedings are fully set forth. The respondents herein have filed both a demurrer and an answer, but as to the latter it presents no issues essential to the determination of the questions of law presented by the demurrer or necessary to the determination of this entire proceeding upon the merits thereof.

The primary inquiry herein, in so far as the right of the petitioner Meyer, both in his personal and representative capacity, exists, relates to the nature of the several rights and interests which his deceased wife, Jennie C. Dunphy Meyer, had in the properties which were owned by her father, William Dunphy, and which were referred to and sought to be disposed of by his last will. The rights and interests of Jennie C. Dunphy therein which she held or occupied after the death of her said father were of a fourfold character: First, there was her right and interest therein as a cestui que trust under the terms of said will, and which under the terms thereof she was entitled to dispose of by will; second, there was her right and interest therein, or in so much thereof as became subject to the trusts created by said will in her capacity of trustee of such trusts under the terms of said will; third, there was her right and interest in so much of the community property of her deceased father as became the property of his widow, her mother, under the latter's election not to take under her husband's will, but to claim her undivided one-half of her said community property as his wife and surviving widow, and which property so claimed and taken she left upon her death in equal shares to her said children, of whom Jennie C. Dunphy was one; fourth, the right and interest which Jennie C. Dunphy, as one of the heirs of William Dunphy, would succeed to in the event that certain of her coheirs should die without issue or without direction by will as to the disposition of their respective shares in the properties of the Dunphy estate on the part of those of their number who were entitled to make such testamentary disposition under the terms of their father's will. It is conceded that the petitioner herein, X. Rodwell Meyer, either personally or in his representative capacity, has no other right in the remaining properties of William Dunphy, deceased, than those which he has derived from his deceased wife, Jennie C. Dunphy Meyer, as the sole devisee under her last will and as the executor of said will, and that whatever right he may have or assert to participate in any proceedings having for their purpose the selection of a trustee or trustees to fill the vacant trusteeships over the still existing trust, and the properties covered thereby, created by the will of William Dunphy, deceased, must have been derived from the foregoing source or sources alone, viz. those rights and interests to which he has succeeded as the sole devisee of his said wife under her last will or as the executor thereof. This being so, let us proceed to consider each in turn the nature, extent, and determination of the foregoing fourfold interests which Jennie C. Dunphy had during her lifetime in the properties of her father's estate.

[1] First, as to her right and interest as one of the cestui que trustents under her father's will, it may here be said that, whatever the nature and extent of those rights, interests, and estates may have been while she was living, these have been changed by her death into rights, interests, and estates of an entirely different character. This change has been effected by and under the express terms of her father's will, which provided in substance that she was to receive as a cestui que trust under the provisions of said will her allotted share of the income to be derived from the operation of such of his properties as came within the terms and control of said trusteeship, but that upon her death her allotted share of the principal of his estate "should be transferred and distributed as she may by will direct." There would seem to be no room for doubt that the above provision in the will of William Dunphy, deceased, would upon the death of his said daughter become effectual to terminate her relation as a cestui que trust under the aforesaid trust provisions of his said will and to work an immediate elimination of her allotted share in the principal of his estate from the control of said trust and to transfer the same and all right, title, and interest theretofore held, owned, and exercised by the trustees of said trust to those who were to be the beneficiaries under her will. It follows necessarily that, as to the undivided one-fourth interest which Jennie C. Dunphy had as a cestui que trust in the income arising from the operations of said trust, her right and relation thereto ended with her death, and in place and stead thereof there arose and existed in her devisee the right to and ownership of an undivided one-fourth interest in the properties of said estate which had theretofore been subject to said trust, but which were released therefrom by the demise of the former cestui que trust of the income thereof. Her devisee thus became, not a cestui que trust under said will, but a tenant in common with said trust and with the trustees thereof to the extent of an undivided one-fourth interest in the properties, real and personal, which prior to the death of his testatrix, had been controlled by and subject to said trust.

[2] Second, as to the rights and interests which Jennie C. Dunphy owned, held, and controlled in her capacity as one of the trustees, and later as a sole trustee under the will of her deceased father and under the terms of the trust created thereby, it must be conceded that these have fully ceased and come to an end by her demise and that none of her aforesaid rights and interests as trustee under said will have in any degree descended to or been succeeded to by her said devisee.

[3] Third, as to those rights and interests in the properties and estate of William Dunphy, deceased, to which his widow claimed and had been allowed an undivided one-half as her community share thereof, and to an undivided one-fourth of which Jennie C. Dunphy succeeded as one of the heirs of her mother upon the latter's decease, Jennie C. Dunphy became to the extent of her inherited interest therein, as her mother before her had been, a tenant in common with the trustees in their ownership of that remaining portion of the properties of William Dunphy, deceased, which had come within the provisions of their trust; and she remained such tenant in common to the extent of her said undivided interest until her death, whereupon her said sole devisee succeeded to her said interest in the same capacity and not otherwise.

[4, 5] Fourth, as to those rights and interests to which Jennie C. Dunphy as one of the heirs of William Dunphy, deceased, would succeed in the event of one or more of her coheirs dying without issue or without such testamentary disposition as certain of them were entitled to make under the terms of their father's will, there would seem to be no doubt that these were remainders, existing in Jennie C. Dunphy at the time of her death, and to which her sole devisee would become entitled by the terms of her will; but, though remainders, these and each of them were and are at most merely contingent remainders, and as such subject to be defeated by the death of certain of the coheirs leaving issue and by the making of testamentary dispositions by others of them entitled to so dispose of their interest in their father's estate. With respect to contingent remainders somewhat similar to these, this court has held that a devise of a contingent estate to come into being only in the event of the devisee of the fee dying without leaving heirs, while termed a contingent remainder under our Code, was rather in the nature of an executory devise at common law which did not require any precedent estate to support it, but which could not of necessity arise at the death of the testator, but only at the termination of the precedent interest, and when the contingency ceased to exist. Jewell v. Pierce, 120 Cal. 79, 52 P. 132. In the later case of Estate of Wilson, 184 Cal. 63, 193 P. 581, wherein a like devise of an estate contingent upon a prior devisee dying without heirs was interpreted, it was held that such estate and who were the owners thereof were to be determined as of the date of the death of the life tenant and termination thereby of the precedent estate. The rule laid down in these cases applies with even stronger force to the peculiar facts of the instant case, since the precedent interest

of each of the children of William Dunphy, as we have seen, was not, during the lifetime of each, a direct interest in the corpus of the ancestor's estate but only in the income thereof, and with respect to which corpus of the estate the remainder to which said Jennie C. Dunphy could only contingently succeed was one which for the first time would come into being when her coheir died without leaving issue, or, if entitled so to do, making a testamentary disposition of the share in the corpus of the estate, to the income of which only such coheir was entitled during his or her lifetime in the capacity of a cestui que trust of the trust estate. In the event that any one or more of these contingent interests had ripened during the lifetime of Jennie C. Dunphy through the death of any one or more of her coheirs, under circumstances which would have called such contingent remainder or remainders into being, she would not have, as to these, become a cestui que trust under the trust estate according to the terms of her father's will, but only a tenant in common as to such remainder with the trust estate. Her devisee could not in the nature of things become more than this, even though (which is not the case) such estate or estates in remainder had become vested through the termination of the precedent interest under circumstances which would have called them into being.

It follows of necessity that the only interest which the petitioner herein, X. Rodwell Meyer, has either individually as sole devisee, or officially as executor under the last will of his deceased wife, is at best none other than that of a tenant in common with the trust estate of those properties of William Dunphy and of his wife and widow Carmen Dunphy, with relation to which Jennie C. Dunphy Meyer was during her own lifetime such tenant in common or with relation to such portion of which as said Jennie C. Dunphy Meyer, by her will, made in conformity with her father's bequest, created her husband a tenant in common therein. X. Rodwell Meyer in his portion of the petition herein expressly alleges that he has succeeded to "an undivided one-fourth interest in and to the 80,000 acres of said ranch owned and operated by said trust at the time of the death of said Jennie Carmen Dunphy Meyer." It is true that he also alleges that he is the owner of the contingent interests above referred to, but, as to these, as we have seen, they have not yet ripened and may never ripen into a present estate, and when, if ever, they do so ripen, such estate or interest as would then arise would amount to no more than merely the interest of a tenant in common with such trust in the corpus of the remaining properties subjected to such trust. We are not therefore called upon to pass upon the respondents' contention that the said petitioner is seeking remedies in this proceeding upon a statement of other matters than those considered by the superior court in making its several rulings which said petitioner is herein assailing, since at most said petitioner is none other than a tenant in common with said trust in the properties which are subject to its provisions.

[6-8] We are thus brought to the inquiry as to whether a tenant in common of property, the remaining undivided interest in which is held in a trust estate, the trusteeship of which has become vacant, is either entitled of right to participate in proceedings in the superior court having jurisdiction over such trust instituted for the purpose of filling such vacancy, or is entitled to notice of such proceedings before such court or the judge thereof can acquire jurisdiction to proceed to fill such vacant trusteeships. We are satisfied that both upon reason and authority these questions must both be answered in the negative. A tenant in common has as such no interest in the title of his cotenant to property held by them and each of them in that relation. It is hornbook law that the only unity of tenants in common in the property held by them as such by several and distinct titles is that of possession. 2 Blackstone Com. 191. We are cited by the petitioners herein to no authority which goes to the extent of holding that a tenant in common in property, the other undivided interest wherein is held and owned in trust for the benefit of other persons than said tenant in common, has such an interest therein as would entitle him as a matter of right to dominate, dictate, or participate in proceedings for the appointment of trustees to be charged with the administration of such trust. On the other hand, we are cited by the respondents herein to cases arising in jurisdictions having laws relating to the creation and administration of trusts similar to our own, which hold that a tenant in common with a trust in the ownership of property has no right as such to participate in or even to have notice of proceedings in a proper court for the appointment of trustees to fill existing vacancies in the trusteeship of such trust.

The leading case upon this subject is that of Greene v. Borland, 4 Metc. (45 Mass.) 330. In that case a testatrix created a trust over an undivided one-half of her property and estate, naming certain trustees thereof in her will. The other one-half of her said property and estate she devised in fee to her son, whom she also named as the executor of her estate. The trustees named in the will declined to act, whereupon the court appointed one Quincy as succeeding trustee and the latter brought suit against the son as tenant in common in possession of the whole property for an accounting. The son undertook to defend said suit upon the ground that the court had no jurisdiction to appoint such trustee without notice to him as such tenant in common. Under the public statutes of the state of Massachusetts the court having jurisdiction over trusts "shall after notice to all persons interested appoint a new trustee" (Pub. St. Mass. 1882, C. 141, § 5). The court with this provision in mind held that the appointment of the trustee was valid as having been made with the consent of all parties interested in the trust, and that the defendant, either as a tenant in common in the property or as executor of the estate, was not a person in interest legally entitled to notice in order to give validity to the appointment of the trustee.

In the case of Dexter v. Cotting, 149 Mass. 92–95, 21 N. E. 230, the Supreme Court of that state held that the phrase, "persons beneficially interested in the trust," referred only to such parties as had a present vested interest in the trust fund, and was not intended to include contingent remaindermen who might possibly become interested in the future. In the case of Matter of Earnshaw, 196 N. Y. 330, 89 N. E. 825, the court of appeal of that state held that, under a statute empowering the court to appoint trustees of a vacant trust upon such notice to the beneficiaries of the trust as the court may direct, only those persons who were entitled to the income of the trust during their lives were entitled to such notice, and that remaindermen were not entitled to notice of the appointment of trustees.

In the case of Offutt v. Jones, 110 Md. 233, 73 A. 629, it was held by the Court of Appeals of that state that, under a statute providing for the appointment of trustees of a trust estate upon the petition of any person interested in the trust property the court had jurisdiction upon the petition of a cestui que trust to appoint a trustee, but that the executor of the will or the remaindermen were not such necessary parties that their absence from the proceedings rendered the appointment void. In each of the jurisdictions from which the foregoing cases are cited there are express statutory provisions requiring notice to persons interested in the trust.

Section 1702 of the Code of Civil Procedure of this state contains a like provision relating to the filling of vacancies in a trust created by will during the period when administration of an estate is pending; the provision therein being that such appointment may be made by the probate judge "upon the written application of any person interested in the trust filed in the probate proceedings and shall only be made after notice to all persons interested in the trust." It is to be noted, however, that the statutes of this state contain no similar express requirement as to notice in other cases and that the only language therein out of which an implication would arise that notice of some sort would be requisite in order to entitle the court having jurisdiction over a trust in an estate, wherein administration is not pending, to appoint trustees to a vacant trusteeship therein is that provision in section 2287 of the Civil Code permitting cestuis que trustent over the age of 14 years to make nominations to the court having statutory jurisdiction to appoint such trustees. We do not feel called upon herein to interpret such implication since we are of the opinion that even if notice is required in this as in other states having express statutes to that effect, such notice would only be necessary to be given to the cestuis que trustent under the interpretation given to such statutes in the foregoing cases.

[9-12] We therefore reach the conclusion in this case, in disposing of the petition of X. Rodwell Meyer herein, that he occupies no such relation to the trust or to the trust property involved in this proceeding as would have entitled him as a matter of right to maintain the action or proceeding instituted by him as plaintiff and against the cestuis que trustent of said trust for the appointment of a successor to the vacant trusteeship therein, and that as to whether or not the superior court should have sustained the demurrer of the defendants to his amended complaint in that proceeding is not a matter of jurisdiction which is reviewable in the instant proceeding, and that, as to the right of said X. Rodwell Meyer, either individually or as the executor of his deceased wife's estate, to receive notice of the proceedings instituted by the cestuis que trustent themselves and among themselves for the appointment of a trustee to such vacant trusteeship, he had no right to such notice as a prerequisite to the jurisdiction of the superior court, the respondent herein, to make such appointment, and hence has no right in either his individual or representative capacity to maintain this proceeding. With respect to the right of the Hibernia Savings & Loan Society, a corporation, and the corporation herein to be made a party to the proceedings for the appointment of a trustee over the trust estate upon the properties of which it holds several mortgages for the security of certain indebtedness to it incurred under the sanction of the court procedure by the former trustee, it would seem that but little remains to be said. The sole question presented in the instant proceeding is one of jurisdiction, and however advisable it might be for the court having jurisdiction over a trust estate to consider the interests of a large creditor of such estate in the matter of the appointment of a successor to a vacant trusteeship therein, we are cited to no authority which renders it incumbent upon such court as a matter of jurisdiction to either notify such a creditor of or admit it to its counsels in making such appointment. We are cited to no authority, either statutory or otherwise, which confers upon a mere creditor or lienholder of a trust estate the right to call

into question the jurisdiction of the court having power so to do to appoint trustees or to fill vacancies in the trusteeship of a trust or over the properties wherein the only interest of the party objecting to such jurisdiction is that above stated. As before stated, the questions involved in this proceeding are those of jurisdiction only and not of policy, and, with the wisdom or prudence of the action of the respondents herein in the matter of the selection of trustees who are under its direction to administer this trust, this court in the instant proceeding has nothing to do.

[13] The only remaining question involved in this proceeding is as to the jurisdiction of the respondent court to appoint a receiver over the properties of the trust estate in a proceeding before it wherein all of the necessary and proper parties to such proceeding concur in the request for the appointment of such receiver. We are advised of no provision in the statute relating to the appointment of receivers which imposes a jurisdictional requirement that other parties than the necessary and proper parties to the action or proceeding in question must be brought in as parties thereto or must receive notice of the consent application for the appointment of the receiver therein. If the receiver thus appointed is given larger powers than he should possess in his capacity as such, or is attempting to exercise powers beyond the proper scope of his appointment, parties who are injuriously affected thereby have ample remedies in the ordinary course of law. We find no merit, therefore, in the petitioners' contention that this court in this limited proceeding should interfere to restrain any threatened act in excess of his authority on the part of such receiver.

The application is denied.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

82 Cal. App. 123

AMBASSADOR HOTEL CORPORATION v. LEE. (Civ. 4161.)

(District Court of Appeal, Second District, Division 2, California. March 31, 1927.)

1. Landlord and tenant 🔑231(8)—Finding that lessee did not rely on lessor's representations as to use of premises held sustained by evidence, in action for rent.

In lessor's action to recover rent, evidence *held* to sustain finding that lessee did not rely upon alleged false representations of lessor regarding use of premises, thereby precluding cancellation of lease and return of rent paid.

2. Fraud 🔑20—Reliance on representations is essential.

In order that action may lie on account of fraudulent misrepresentation, such misrepresentation must be relied on by persons to whom it is made.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by the Ambassador Hotel Corporation against Don Lee, in which defendant counterclaimed and interposed a cross-complaint. Judgment for plaintiff, and defendant appeals. Affirmed.

Clark, Law & Clay, of Los Angeles, for appellant.

O'Melveny, Millikin, Tuller & Macniel and Walter K. Tuller, all of Los Angeles, for respondent.

WORKS, P. J. The complaint in this action was for the recovery of unpaid rent. Defendant interposed an answer and counterclaim, in which it was alleged that, at the time the lease mentioned in the complaint was entered into, "the plaintiff represented to defendant and agreed as part of the consideration for the defendant entering into" the lease "the plaintiff would not lease any of the premises" in which the demised quarters were located "to any other person * * * in the business of exhibiting or selling automobiles, but would at all times during the life of said lease give unto the defendant the exclusive right and privilege of exhibiting and selling automobiles on said * * * premises"; that defendant believed the representations and relied upon them, and would not have entered into the lease but for them; that when plaintiff made the representations it had no intention of performing them and made them solely to induce defendant to enter into the lease and to deceive and defraud him; that soon after the lease was entered into plaintiff leased a part of its premises to another person engaged in the automobile business; that thereupon defendant, in writing, notified plaintiff that he rescinded the lease; and that defendant had expended certain specified sums in preparing for his occupancy of the demised quarters. Defendant demanded in his prayer in the answer and counterclaim that the lease be canceled, and that he have judgment for the sums of money alleged to have been expended by him. He also filed a cross-complaint averring that the matters alleged in the answer and counterclaim as representations were agreed to by him and plaintiff; that by mutual mistake they were omitted from the lease as executed, although intended to be inserted therein; that plaintiff breached the promise not to lease to another, and that defendant then gave notice of rescission, all as alleged in the answer and counterclaim; and praying that the lease be reformed to express the true intent of the parties, and that it then be canceled and rescinded. After answer to the cross-complaint, the action was tried and judgment went for plaintiff. Defendant appeals.

Appellant asks for a reversal of the judgment upon the ground that four certain findings of the trial court were not supported by the evidence.

It will be observed that in his pleadings appellant took two inconsistent positions concerning the matters of fact, which, in the answer and counterclaim, are termed representations. First, from that pleading the representations appear to be representations pure and simple, for it is there alleged that they were made solely for the purpose of inducing appellant to enter into the lease, without an intention to perform them, and for the purpose of deceiving and defrauding appellant. Second, in the cross-complaint the "representations" cease to be such, but become matters agreed to between the parties and omitted from the lease by a mutual mistake. While one of the findings, stated in appellant's brief to be unsupported by the evidence, relates to the question of mutual mistake, the entire argument in the brief proceeds upon the theory that the representations were made merely for the purpose of inducing appellant to enter into the lease. Indeed, some of the points advanced are utterly inconsistent with a view that appellant relies upon the alleged mutual mistake. As an instance of the truth of this statement, appellant contends that the representations were collateral to the engagements inserted in the lease, that they need not have been incorporated in the instrument, and, in truth, that they need not have been in writing at all. Under these circumstances, we shall pay no further attention to the claim that the representations were omitted from the lease through the inadvertence of the parties, except to say that the finding of the trial court that there was no mutual mistake is amply supported by the evidence. This is so plain that we shall not pause to state the evidence that furnishes the support.

[1] The trial court found that appellant did not rely upon the representations, and this is one of the findings that is said to be without support. There was some conflict in the evidence upon the question, it is true, but it was shown without dispute that after the representations were made a lease was prepared by respondent which contained no reference to the matters represented; that the instrument was then delivered to appellant for approval as to form; that appellant then delivered it to his counsel for inspection and approval; that several changes in the instrument were then suggested to respondent, the paper being returned to it for the purpose of making them; that the changes were then made and the lease was returned to appellant for further inspection, and that it was afterward executed as changed. Appellant made no suggestion that the represented matters be covered in the lease. It was stipulated at the trial that the projected lease was in the hands of appellant's counsel, at the time when the changes in its form were suggested, for a period of three or four days. This evidence was ample to support the finding that appellant did not rely upon the representations. Nounnan v. Sutter County Land Co., 81 Cal. 1, 22 P. 515, 6 L. R. A. 219.

[2] The view that we entertain upon this question disposes of the appeal and renders it unnecessary to consider the many other questions argued by both parties.

"In order that an action may lie, at law or in equity, on account of fraudulent misrepresentation, such misrepresentation must be relied upon by the party to whom it is made." 12 Cal. Jur. 750.

Judgment affirmed.

We concur: CRAIG, J.; THOMPSON, J.

MEMORANDUM DECISIONS

201 Cal. 15

Ida May SMITH, Plaintiff and Respondent, v. Milton SMITH, Defendant and Appellant. (S. F. 11129.)★ (Supreme Court of California. April 5, 1927. Rehearing Denied May 2, 1927.) In Bank. Appeal from Superior Court, City and County of San Francisco, Thomas F. Graham, Judge. Jos. L. Taaffe, of San Francisco, for appellant. Sawyer & Sawyer and F. W. Sawyer, all of San Francisco, for respondent.

RICHARDS, J. This is an appeal by the defendant from a judgment of the superior court of the state of California in and for the county of San Francisco, made and entered in favor of the plaintiff herein. The action was one to quiet title to real property, consisting of two parcels of land situate in the city of San Francisco, the asserted claim of the plaintiff to have her title so quieted being predicated upon an unrecorded deed of gift alleged to have been made, executed, and delivered to her by her husband, James J. Smith, shortly before his death. The claim of the defendant in resisting this assertion was based upon the alleged nondelivery of said deed. The sole issue upon this appeal relates to the sufficiency of the evidence presented to the trial court with respect to the delivery of said deed of gift. The appellant's brief herein is devoted almost wholly to a discussion of the evidence in the case, with some occasional citation of authority with respect to what in point of law constitutes a sufficient delivery of such instruments. The brief of the respondent sets forth that the case upon its merits depends upon the weight and verity of the evidence presented to the trial court. We are satisfied, from an inspection of such briefs and from an examination of the record before us, that the evidence in the case was sufficient to justify the action of the trial court in denying defendant's motion for a nonsuit and in rendering and entering its judgment in the plaintiff's favor. It would serve no useful purpose to review the evidence here-

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★Rehearing denied.

in in detail, since we are satisfied that, if the trial court believed, as it evidently did, the statements of the plaintiff's witnesses herein, such evidence would suffice as a matter of law to uphold its conclusion as to the delivery and sufficiency of said conveyance, and hence to sustain its judgment in her favor herein. The judgment is therefore affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.

82 Cal. App. 201

PEOPLE of the State of California, Plaintiff and Respondent, v. G. D. JOHNSON, Defendant and Appellant. (Cr. 962.) (District Court of Appeal, Third District, California. April 5, 1927.) Appeal by defendant from a judgment of the Superior Court of San Joaquin County, C. W. Miller, Judge, of conviction of practicing medicine without a license and from an order denying motion for new trial. Appeal dismissed. Eicke & Warren and Berry & Watson, all of Stockton, for appellant. U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the offense of practicing medicine without a license. He duly gave notice of appeal from the judgment of conviction and the order denying a new trial. He failed, however, within five days, or at all, to file with the clerk or present to the trial court an application for a transcript of any part of the phonographic reporter's notes or to state the grounds of the appeal or the points upon which he relies. By reason of such failure, under the express provisions of section 1247 of the Penal Code, "the appeal is wholly ineffectual and shall be deemed dismissed." The appeal is dismissed.

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